156

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 116

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY, AND BETHLEHEM STEEL CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

FILED JULY 8, 1947

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Russell F. Handwerk (deposition)	475	280
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3. Registration statement of Holding Company filed with SEC [not printed].		
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5. Consolidated income statement of Holding Company from above registration statement [not printed].		
6. Consolidated statement of surplus of Holding Company from above registration statement [not printed].		
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10. Schedule of accounts of Holding Company from above registration statement [not printed].		
11. Further schedule of accounts of Holding Company from above registration statement [not printed].		
12. Booklet—List of Sidings—South Buffalo [not printed].		
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 198

THE UNITED STATES OF AMERICA, APPELLANT

vs.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY, AND BETHLEHEM STEEL CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

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1 In United States District Court, Western District of New York

Civil 1464

UNITED STATES OF AMERICA

vs.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY & BETHLEHEM STEEL CORPORATION

Docket entries

1943

June 4—Filed complaint.
4—Issued summons & 3 copies.
4—Initial docket report made up.
5—Filed summons—served Bethlehem Steel Corp. & So. Bflo. Ry. June 4/43.
12—Filed Marshal's return on certified summons—served. Bethlehem Steel Co. June 9/43.
23—Filed notice of appearance for So. Bflo. Ry.
23—Filed notice of appearance for Bethlehem Steel Co.
23—Filed notice of appearance for Bethlehem Steel Corp.
23—Filed stipulation & order extending time to answer of So. Bflo. Ry—20 days, entered order (copy sent Mr. Grobe).
23—Filed stipulation & order extending time to answer of Bethlehem Steel Co.—20 days, entered order (copy sent Mr. Grobe).
23—Filed stipulation & order extending time to answer of Bethlehem Steel Corp.—20 days, ntered order (copy sent Mr. Grobe).
July 7—Filed answer of So. Buffalo Ry.
7—Filed answer of Bethlehem Steel Co.
7—Filed answer of Bethlehem Steel Corp.

1944

July 24—Filed stipulation & order to adjourn examination of certain parties, entered order—Knight, J.
Aug. 14—Filed consent & order for filing of first amended complaint & extending time to answer same—40 days, entered order. Knight, J.
16—Filed first amended complaint.
Sept. 21—Filed stipulation & order extending time to answer to Sept. 29, entered order (copy sent Mr. Grobe).
2 Sept. 29—Filed answer of So. Buffalo Ry Co. to amended complaint.

1944

Sept. 29—Filed answer of Bethlehem Steel Co. to amended complaint.

29—Filed answer of Bethlehem Steel Corp. to amended complaint.

Oct. 14—Filed note of issue of plff. Nov. 1944 term.

Dec. 29—Filed Depositions of R. McGrath, J. Gross, H. Crawford, P. Tragesser, D. Patty, R. Handwerk, C. Fatzinger, R. McGuire. (Notice sent Attys.) (corrected notice sent Attys. 1/15/45).

1945

Feb. 17—Filed deposition of W. R. McLean. (Notice sent Attys.) 10 vol.

27—Filed notice of filing deposition.

27—Filed note of issue of plff. Mar. 1945 term.

Apr. 21—Filed notice of filing deposition.

Oct. 15—Filed note of issue of plff. Nov. 1945 term.

Nov. 8—Pretrial conference before Judge Knight—Trial Jan. 8/46.

Dec. 14—Filed amended answer of Bethlehem Steel Co. to first amended complaint.

14—Filed amended answer of Bethlehem Steel Corp. to first amended complaint.

14—Filed amended answer of So. Buffalo Ry. Co. to first amended complaint.

1946

Jan. 11—Filed 10 subpoenas.

22—Filed stipulation re records.

25—Filed Depositions of Ed. F. Entwisle, John E. Jacobs, J. D. DeWitt & Rob. J. Van Duzen. (Notice sent Attys.)

25—Filed subpoena.

22-25—Trial before Judge Knight—Adjourned until next Tues.

29-31—Trial continued—adjourned.

Feb. 1—Trial continued—Decision reserved.

Mar. 14—Filed proof of service of copies of brief.

Sept. 24—Filed findings of fact & conclusions of law requested by Gov't.

24—Filed acknowledgment of service of above.

Nov. 7—Filed Opinion, Knight, J.

3 1947

Jan. 29—Filed findings of fact & conclusions of law.

Mar. 28—Filed & entered judgment of dismissal—Knight, J. (copy sent Mr. Grobe).

28—Final docket report made up.

May 26—Filed petition for appeal to Supreme Court.

26—Filed & entered order allowing appeal—Knight, J.

1947
May 26—Filed assignment of errors & prayer for reversal.
26—Filed statement as to jurisdiction & Opinion of Court.
26—Filed statement re provisions of Supreme Court Rule 12 (3).
26—Filed praecipe for transcript of record.
26—Filed proof of service of above papers & citation.
26—Filed citation.
June 4—Filed counter praecipe.
July 2—Filed 8 vol. minutes.

4 In United States District Court for the Western District of New York

Civil Action File No. 1464

UNITED STATES OF AMERICA, PLAINTIFF

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY, AND BETHLEHEM STEEL CORPORATION, DEFENDANTS

First amended complaint

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission of the United States, under authority of the Act of Congress known as the Interstate Commerce Act, approved February 4, 1887, 24 Stat. 379, as amended by Section 3 of the Act of Congress, approved March 2, 1889, 25 Stat. 855, United States Code, Title 49, Section 12, paragraph (1), brings this civil action against the defendants and complains as follows:

I

DESIGNATION OF PARTIES

1. The defendant South Buffalo Railway Company is a corporation of the State of New York and is hereinafter called the "South Buffalo."

The defendant Bethlehem Steel Company is a corporation of the State of Pennsylvania and is hereinafter called the "Steel Company."

The defendant Bethlehem Steel Corporation is a corporation of the State of Delaware and is hereinafter called the "Holding Company."

4-A II

JURISDICTION AND VENUE

2. This first amended complaint is filed and the jurisdiction of this Court is invoked for the purpose of restraining the South Buffalo, a common carrier by railroad, from transporting in interstate commerce any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or by the Steel Company or by the Holding Company or by an other wholly owned subsidiary of the Holding Company, or any article or commodity manufactured, mined or produced under its authority or the authority of any of these designated companies, or in which it or any of these designated companies may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for the use of the South Buffalo in the conduct of its business as a common carrier, any and all such transportation being in violation of Section 1 (5) of the Act of Congress approved June 29, 1906, 34 Stat. 584, as amended, U. S. C., Title 49, Section 1, paragraph 8, commonly called the Commodities Clause.

3. The South Buffalo is a railroad corporation duly organized and existing under the laws of the State of New York and an inhabitant of the State of New York, having its principal place of business in the Western District of New York where, among other places, the operations and business of the South Buffalo are conducted and engaged in. The Steel Company, a corporation duly organized and existing under the laws of the State of Pennsylvania, is an inhabitant of the State of New York for the purposes of this suit. The Holding Company, a corporation duly organized and existing under the laws of the State of Delaware, is in truth and in substance conducting business in the State of New York and elsewhere through the means and instrumentality of the Steel Company and the South Buffalo which act as the agents and the representatives of the Holding Company.

4. The unlawful acts, transactions and operations of the South Buffalo, hereinafter set forth, have been performed and accomplished as acts, transactions and operations as a common carrier by railroad in the course of interstate commerce and in violation of the Interstate Commerce Act, U. S. C., Title 49, Section 1, paragraph 8, within the Western District of the State of New York and within the jurisdiction of this Court.

5. The unlawful acts, transactions and operations of the Steel Company and the Holding Company hereinafter set forth have been accomplished and performed within the Western District

of the State of New York and within the jurisdiction of this Court.

III

Description of Parties

6. South Buffalo is an incorporated railway company which was incorporated under the Railroad Laws of the State of New York, on April 25, 1899, and obtained a certificate of convenience and necessity on June 21, 1899, from the Board of Railroad Commissioners of the State of New York.

7. South Buffalo, when incorporated, has an authorized capital stock of 5,000 shares of the par value of $100 per share. 4,991 of these shares were originally issued to Lackawanna Iron and Steel Company. On July 3, 1902, these 4,991 shares aforesaid of the stock of the South Buffalo were transferred to Lackawanna Steel Company.

8. On October 10, 1922, the Lackawanna Steel Company contracted to sell the 4,991 shares aforesaid of the stock of the South Buffalo to the Bethlehem Steel Company of New York, Inc., and on the same date, October 10, 1922, Lackawanna Steel Company also sold and actually conveyed its steel manufacturing plant and other properties at Lackawanna, New York, to the Bethlehem Steel Company of New York, Inc. The name of the Bethlehem Steel Company of New York, Inc., was changed shortly thereafter,
5-A and on or about October 21, 1922, to Bethlehem Iron and Steel Corporation and the 4,991 shares aforesaid of the stock of the South Buffalo were transferred of record to that company on June 4, 1923.

9. On November 30, 1922, the Bethlehem Iron and Steel Corporation, by a bill of sale, assigned the 4,991 shares aforesaid of the stock of the South Buffalo to the Bethlehem Steel Corporation, a New Jersey corporation, but the transfer of the ownership of these shares was not entered on the stock, transfer records of South Buffalo.

10. The steel manufacturing plant and other properties at Lackawanna, New York, conveyed as aforesaid on October 10, 1922, to the Bethlehem Steel Company of New York, Inc., were on July 12, 1935, in their then existing condition duly conveyed by it under the name of Bethlehem Iron and Steel Corporation to the Steel Company.

11. On December 31, 1936, the 4,991 shares aforesaid of the stock of the South Buffalo were transferred on the stock transfer records of South Buffalo to the Holding Company. These shares at all times since June 4, 1923, have been owned and voted by the Holding Company or by the Bethlehem Iron and Steel Cor-

poration. On January 3, 1940, the 9 shares of the stock of the South Buffalo theretofore used as qualifying shares for the directors of the South Buffalo were also transferred to the Holding Company.

12. The South Buffalo has its executive offices at Bethlehem, Pennsylvania, and has offices at Lackawanna, New York, within the jurisdiction of this Court.

13. The South Buffalo is operated as a common carrier by railroad in interstate commerce and has direct physical connections with five railway systems, namely, Lehigh Valley Railroad, New York Central Railroad, Pennsylvania Railroad, Delaware, Lackawanna & Western Railroad, and Baltimore & Ohio Railroad, each of which is a common carrier by railroad engaged in interstate commerce. South Buffalo also has direct physical connections with Buffalo Creek Railroad, a switching carrier, and has
6 direct connections with the Erie Railroad and New York, Chicago and St. Louis Railroad, all three of the carriers last named being also common carriers by railroad engaged in interstate commerce. South Buffalo has indirect connections with Canadian National Railway, Grand Trunk Railway, Michigan Central Railway, Pere Marquette Railroad and Wabash Railroad, each of which is a common carrier by railroad engaged in interstate commerce.

14. The South Buffalo's services include the transportation in interstate commerce of products of the several manufacturing plants of the Steel Company in Buffalo, Lackawanna, and Hamburg, all of which are cities or towns in the State of New York, to points in other States on through shipments involving continuous transportation in interstate commerce by the South Buffalo and other common carrier railroads engaged in interstate commerce with which the South Buffalo has direct or indirect connections, including the several railroads above-mentioned. The South Buffalo's common carrier services include likewise the transportation in interstate commerce of products of the manufacturing plants of various independent corporations and other independent business enterprises in Buffalo, Lackawanna, and Hamburg, all of which are cities or towns in the State of New York, to points in other States on through shipments involving continuous transportation in interstate commerce by the South Buffalo and other common carrier railroads engaged in interstate commerce with which the South Buffalo has direct or indirect connections, including the several railroads above mentioned. The South Buffalo's common carrier services include likewise the transportation in interstate commerce of raw materials, ingredients, and fuels to these aforesaid industrial plants of the Steel Company in the State of New York on through consignments from shipping points in other

States, and similar consignments to other industrial plants owned by independent companies.

15. The South Buffalo owns about 90 miles of track, more than 58 miles of which are located within the enclosure of the
6-A Steel Company's main plant at Lackawanna. The main line of the South Buffalo extends from a northern terminus in the City of Buffalo immediately south of the Buffalo River southwardly and westwardly into the City of Lackawanna where it enters and extends through the said main plant; thence into the Town of Hamburg, a total distance of approximately six miles, and returning once more into the City of Lackawanna, where it terminates at the point of interconnection with the Lehigh Valley Railroad. South Buffalo has several branches and serve about 27 industrial plants located on its right-of-way other than those of the Steel Company and the Holding Company.

16. The Steel Company is a corporation duly organized and existing under the laws of the State of Pennsylvania and owns and operates manufacturing plants located on the lines of the South Buffalo and served by it, including a large steel manufacturing plant, at Lackawanna, New York, which is served by a system of intra-plant trackage, 58 miles of which is owned by the South Buffalo Railway Company, while approximately 49 miles is owned by the Steel Company. Said Steel Manufacturing plant is served for interstate railway purposes by the South Buffalo as its sole connection with the trunk-line railroad systems hertofore mentioned.

17. The Holding Company is a corporation duly organized and existing under the laws of the State of Delaware which owns full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of the Steel Company, except directors' qualifying shares, and which owns full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of the South Buffalo. It owns all or substantially all of the stock of approximately 55 other corporations, all of which, together with South Buffalo and the Steel Company, are operated as one cohesive organization for the manufacture of steel and products made of steel in whole or part. Said organization is dominated and controlled by the holding Company.

7

IV

Domination of the South Buffalo by the Holding Company and the Steel Company

18. The ownership by the Holding Company of the stock of the South Buffalo and of the stock of the Steel Company has been and is so used and exercised by the Holding Company both on its own

behalf and also through the agency of the Steel Company in a manner not normal and usual with ordinary stockholders but has been and is so used and exercised as to dominate and control the business operations and affairs of the South Buffalo and to destroy its independence and freedom of action in the management of its affairs as a common carrier and to bring it under and within the control, management and direction of the Holding Company and the Steel Company, which said control, management and direction have been and now are effectuated and consummated and manifested and exhibited by the following described, and numerous and various other methods, acts and means:

18. (a) South Buffalo is a unit in the organization operated by the Holding Company, largely through the Steel Company, for the manufacture of steel and of products made of steel in whole or in part. The Holding Company and the Steel Company are not interested in the operations of the South Buffalo as an independent railroad corporation but are interested in it only as a unit in the larger organization.

18. (b) The Holding Company by reason of the fact that it owns all of the issued and outstanding capital stock of the South Buffalo except directors' qualifying shares as hereinbefore alleged is enabled to and does control and direct the election of the South Buffalo's directors and through them the appointment or election of its officers and the subsequent executive acts of said officers, including the organization, management, operation and direction of the common carrier business and affairs of the South Buffalo.

7-A During a long period of years prior to July 19, 1938, the the majority of the members of the Board of Directors of the South Buffalo were elected from among the employees of the Steel Company. Since July 1938 the directors of the South Buffalo have been persons named to act for the interests of the Holding Company, although not employees of the Holding Company or of the Steel Company. The present directors of the South Buffalo, the majority of whom are not employees of the Holding Company or its subsidiaries, do not have any interest in the stock of the company but are appointed merely as agents to act on behalf of the interests of the Holding Company, which owns the entire equitable interest in all the outstanding stock of the South Buffalo.

The Holding Company controls and dominates, by reason of stock ownership and otherwise, seven short line railroads located respectively in the vicinity of and operated in connection with the several plants of manufacturing companies likewise controlled and dominated by the Holding Company. These railroads are: Conemaugh & Black Lick Railroad Company at Johnstown, Pennsylvania; Cornwall Railroad Company at Lebanon, Pennsylvania; Fore River Railroad Corporation at Quincy, Massachusetts;

Patapsco and Back Rivers Railroad Company at Sparrows Point, Maryland; Philadelphia, Bethlehem & New England Railroad Company at Bethlehem, Pennsylvania; Steelton & Highspire Railroad Company at Steelton, Pennsylvania; and South Buffalo Railway Company (South Buffalo) at Buffalo, New York. The principal offices of all the said short line railroads are maintained in a single building at Bethlehem, Pennsylvania. The principal offices of each of the said short line railroad companies are filled by the same individuals so that the dominating executives of each of the seven short line railroads constitute together a single identical group. D. M. Petty is President of the South Buffalo and also President of the six other railroad subsidiaries above-named; Paul A. Trageser is Vice President of the South Buffalo and also Vice President of the six other railroad subsidiaries above-named;

C. J. Fatzinger is Auditor of the South Buffalo and also
8 Auditor of the six other railroad subsidiaries above-named;

A. F. Brooke is Purchasing Agent of the South Buffalo and also Purchasing Agent of the six other railroad subsidiaries above-named; C. E. Sellers is Secretary and Treasurer of the South Buffalo and also Secretary and Treasurer of the six other railroad subsidiaries named. These officers are each and all appointed to act for the interests of the Holding Company as the dominant owner in each and all of the subsidiary railways and not for the separate corporate interests of the South Buffalo.

18. (c) No important step has been or is taken or change of policy made by South Buffalo without the sanction or approval of the Steel Company's General Manager. South Buffalo has subbordinated and is subordinating its railroad policy to the industrial policy of the Steel Company. The cash funds of the South Buffalo have been and now are constantly and effectively supervised by the Steel Company. Officials of the South Buffalo have inquired and do inquire from the General Manager of the Steel Company as to what the South Buffalo's policy shall be with regard to common carrier services relating to the shipments of industrial plants on the line of the South Buffalo, some of which are or at the time of inquiry were competitors of the Steel Company in the production and sale of steel products, and follow his instructions therein.

18. (d) Within the plants of the Steel Company served by the South Buffalo, the movements of cars made by South Buffalo over the tracks of the Steel Company and of South Buffalo are subject to the convenience of the Steel Company and not that of South Buffalo. The operations of South Buffalo within the plants of the Steel Company are conducted as a part of the Steel Company's business and not as those of an independently operated railroad.

18. (e) The South Buffalo has performed and now performs connection terminal switching services and intra-plant

8-A switching services, and spotting of cars in the said plants of the Steel Company on a large scale. The South Buffalo handles and has regularly for many years handled by far the greater part of the intraplant switching that has been requisite in the Steel Company's plants in the Buffalo area, that is, switching to accomplish movements merely between different operating units wholly within one of the Steel Company's said plants. Almost all of the total intraplant switching services performed by the South Buffalo for all industries which it serves are performed solely for the Steel Company and within its plants.

South Buffalo has performed and does perform intraplant and interplant switching services for the benefit of the Steel Company without lawful compensation. The South Buffalo has moved and does move empty cars in intraplant movements within the Steel Company's respectives plants for the benefit of the Steel Company without making any charge therefor.

18. (f) On or about October 31, 1936, the Holding Company transmitted to the South Buffalo a check for $211,616 which was paid to the South Buffalo as a contribution without legal consideration. No shares of stock or other corporate securities or legal obligations were ever delivered or issued by the South Buffalo to the Holding Company as the equivalent or consideration for this contribution of $211,616 nor was this contribution ever noted, recorded or audited as a loan, nor was any interest ever paid by the South Buffalo to the Holding Company with respect to this amount.

18. (g) On or about December 30, 1936, the Holding Company transmitted to the South Buffalo a check for $1,900,000 which was paid to the South Buffalo as a contribution without legal consideration. No shares of stock or other corporate securities or legal obligations were ever delivered or issued by the South Buffalo to the Holding Company as the equivalent or consideration for this contribution of $1,900,000, nor was this contribution ever
9 noted, recorded or audited as a loan, nor was any interest ever paid by the South Buffalo to the Holding Company with respect to this amount.

18. (h) The South Buffalo and connecting lines have participated and do participate in making false records of the time at which cars are interchanged between them and thereby full payment of per diem charges is avoided by the South Buffalo and the differential caused by the underpayment is assumed by the connecting railroads over which the Steel Company routes the shipments of its products in interstate commerce.

South Buffalo has failed and does fail to maintain accurate car detention records to determine the basis of demurrage and thereby has unlawfully deviated and does unlawfully deviate from

its published tariff rules in computing detention time of cars handled for the Steel Company.

The South Buffalo has unlawfully failed and neglected and does unlawfully fail and neglect to apply established demurrage rules and charges to cars handled in intraplant switching in the Steel Company's plants and has entered and does enter them with cars handled in other services in the Steel Company's average demurrage account. This practice has resulted and results in unlawful fixing, for detention of cars in other services by the Steel Company for its use and benefit, of charges lower than provided in the published tariffs.

18. (i) The South Buffalo and the Holding Company offer to the employees of South Buffalo the benefits and burdens of a relief plan maintained by the Holding Company for its employees and the employees of its subsidiary companies, including South Buffalo. Each month the South Buffalo deducts the amount of the contribution requisite under this plan from the compensation due to each of its own employees participating in the plan and the total of these deductions is transferred by checks to South Buffalo to the relief fund maintained by the Holding Company pursuant to such relief plan.

9-A

V

VIOLATION OF THE COMMODITIES CLAUSE

19. South Buffalo as a common carrier by railroad now transports and for many years last past has transported in the course of interstate commerce from the plants of the Steel Company in Buffalo, Lackawanna, and Hamburg in the State of New York by means of connecting railroads and other common carriers to points in other States great quantities of articles and commodities, other than timber and the manufactured product thereof, which have been manufactured, mined or produced by the Steel Company, including, among others, structural steel for buildings and bridges, steel rails, steel bars, and steel specialties for use in the construction of highways other than such articles or commodities as may be necessary or intended for its use in the conduct of its business as a common carrier. In all of the foregoing articles and commodities, the South Buffalo has an interest, direct or indirect, within the meaning of the aforesaid Act of Congress. Likewise, the South Buffalo as a common carrier by railroad transports and for many years past has transported in interstate commerce by its own operations and through its connections with connecting railroads and other common carriers from points in other States to the plants of the Steel Company in Buffalo,

Lackawanna, and Hamburg in the State of New York, bituminous coal, gravel, sand, iron and steel scrap, and other raw materials and ingredients to be used in the fabrication of steel.

20. The South Buffalo being completely owned, dominated and controlled by the Holding Company and the Steel Company being likewise owned, dominated and controlled by the Holding Company, the South Buffalo as a common carrier by railroad is transporting and for many years last past has transported in interstate commerce vast quantities of articles and commodities other than timber and the manufactured products thereof in which South Buffalo has an interest, direct or indirect, at the time of transportation within the meaning of and in violation of the prohibitions of Section 1, paragraph 8, of the Interstate Commerce Act (Title 49, Section 1, paragraph 8, U. S. Code).

21. By virtue of the complete control and domination of South Buffalo by the Holding Company and the Steel Company and by virtue of the domination of the Steel Company by the Holding Company the affairs of said three companies have been and are in fact so commingled and the identity and community of interest between them is such that in substance and reality they are one and the same organization at Buffalo, Lackawanna, and Hamburg, New York, consisting on the one hand of a steel producing branch and on the other of a transporting railroad common carrier branch, both wholly owned and completely dominated by the same financial interest, the Holding Company. The resulting commingling of the respective business and affairs of the said three companies is so complete and the community of interest among said companies is so perfect that the articles and commodities hereinbefore described and transported by the railroad company are in reality manufactured, produced, and transported by and under control and direction of one and the same authority. By virtue of the facts hereinbefore alleged, the South Buffalo has been unlawfully transporting for many years last past and is now unlawfully transporting a vast quantity of articles and commodities manufactured or produced by it under its authority within the meaning of and in violation of Section 1, paragraph 8, of the Interstate Commerce Act (Title 49, Section 1, paragraph 8, U. S. Code).

22. By reason of the facts hereinbefore alleged and otherwise, plaintiff alleges:

1. That the South Buffalo, not being in substance a corporation separate, distinct, and independent from the Steel Company, but both the South Buffalo and the Steel Company being mere adjuncts, branches, or departments of the same enterprise or business, the South Buffalo at the times it has transported and

10-A will transport the steel products and other articles and commodities manufactured and produced by the Steel Company and the raw materials, ingredients, and fuels consigned to the Steel Company as alleged above, had, has, and will have with respect to all such manufactured products so produced and transported and all such raw materials, ingredients and fuels so transported, an interest, direct or indirect, within the meaning of and in violation of the Act of Congress, Section 1, paragraph 8 of the Interstate Commerce Act (Title 49, Section 1, paragraph 8, U. S. Code).

2. That said steel products and other articles and commodities so manufactured and produced by the Steel Company and transported as aforesaid by the South Buffalo were and are in reality in truth and fact manufactured, produced, and transported by and under the direction of the same authority; and the South Buffalo in transporting such steel products and other articles and commodities as aforesaid is transporting articles or commodities manufactured and produced under its authority within the meaning of and in violation of the aforesaid Commodities Clause Statute (Title 49, Section 1, paragraph 8, U. S. Code).

3. That the transportation of said steel products and other articles and commodities and of said raw materials, ingredients, and fuels by the South Buffalo under the circumstances hereinbefore alleged has been, now is, and will be unlawful and in violation of the Act of Congress aforesaid;

4. That the South Buffalo has for many years engaged in said unlawful transportation as hereinbefore alleged, and unless enjoined, restrained, and prevented by order of this Court, will continue so to do in violation of said Act of Congress.

VI

Prayer

Wherefore plaintiff prays:

1. That the defendant South Buffalo be perpetually en-
11 joined and restrained from transporting in interstate commerce any article or commodity other than timber and the manufactured products thereof, manufactured, mined, or produced by it or by the Steel Company or by the Holding Company, or by any wholly-owned subsidiary of the Holding Company, or an article or commodity manufactured, mined, or produced by or under the authority of the South Buffalo or the Steel Company or the Holding Company, or by any such subsidiary, or any article or commodity which the South Buffalo or the Steel Company or the Holding Company or any such subsidiary may own in whole or in part, or in which the South Buffalo or the Steel Company

or the Holding Company, or any such subsidiary may own in whole or in part, or in which the South Buffalo or the Steel Company or the Holding Company, or any such subsidiary has an interest, direct or indirect, except such articles or commodities as may be necessary and intended for the use of the South Buffalo in the conduct of its business as a common carrier, and that the South Buffalo and the Steel Company and the Holding Company and any such subsidiary be further perpetually enjoined and restrained from continuing to do said acts or any of them in violation of said Act of Congress.

2. That plaintiff recover its costs and disbursements incurred in this action.

3. That plaintiff have such other and further and general relief as may be equitable and proper.

UNITED STATES OF AMERICA.
ARNE C. WIPRUD,
DAVID S. CRAIG,
Special Assistants to the Attorney General.
FRANK F. VESPER,
Special Attorney.

FRANCIS BIDDLE,
Attorney General.
WENDELL BERGE,
Assistant Attorney General.
GEORGE L. GROBE,
United States Attorney for the Western District of New York.
R. NORMAN KIRCHGRABER,
Assistant United States Attorney.

Sir: Take notice of First Amended Complaint, of which the within is a copy, duly granted in the within-entitled action, on the — day of —, 19—, and duly entered in the office of the Clerk of the United States Court, Western District of New York, on the 16th day of August 1944. Dated Buffalo, N. Y., August 16, 1944.

12 In United States District Court

[Title omitted.]

Answer of South Buffalo Railway Company to first amended complaint

The defendant South Buffalo Railway Company, for its answer to the first amended complaint of the plaintiff herein, respectfully shows to the Court, as follows:

1. This defendant admits the allegations contained in paragraph 1 of said complaint and in the two unnumbered paragraphs that immediately follow said paragraph 1.

2. Answering paragraph 2 of said complaint, this defendant admits that it is a common carrier by railroad. It denies that it transports or has transported in interstate commerce any article or commodity manufactured, mined, or produced by it or under its authority or any article or commodity in which it has or had any interest, direct or indirect, except such articles or commodities as are or were necessary and intended for the use of this defendant in the conduct of its business as a common carrier, and further denies that it transports or has transported any article or commodity in violation of the provisions of the Interstate Commerce Act, commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph (8). This defendant alleges that it is without knowledge or information sufficient to form a belief as to whether it transports or has transported in interstate commerce any article or commodity manufactured, mined, or produced by or under the authority of defendant Bethlehem Steel Corporation (hereinafter, as in said complaint, called the Holding Company), or by or under the authority of any subsidiary of the Holding Company other than Bethlehem Steel Company (hereinafter, as in said complaint, called the Steel Company) or in which the Holding Company or any such other subsidiary has or had any interest, direct or indirect.

13 3. Answering paragraph 3 of said complaint, this defendant admits that it is a railroad corporation duly organized and existing under the laws of the State of New York and is an inhabitant of that State; that the Steel Company is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania; that the Holding Company is a corporation duly organized and existing under the laws of the State of Delaware; that this defendant has its principal place of business in the Western District of New York; and that its operations and business are conducted and engaged in in said District. This defendant denies that its operations are conducted or engaged in elsewhere than in said District. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations (a) that the Steel Company is an inhabitant of the State of New York for the purposes of this suit or for any other purpose; (b) that the Holding Company is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality of the Steel Company; and (c) that the steel company acts as the agent and representative or as either the agent or the representative of the Holding Company. This defendant denies that the Holding Company is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality or the means or the instrumentality of this defendant and denies that

this defendant acts as the agent and representative of the Holding Company or as either its agent or representative.

4. Answering paragraph 4 of said complaint, this defendant denies that any of the acts or transactions or operations of this defendant which are set forth in said complaint are or have been unlawful acts, transactions or operations of this defendant as a common carrier by railroad in the course of interstate commerce, and further denies that any such acts, transactions, or operations have been performed or accomplished by this defendant in violation of paragraph (8) of Section 1 of the Interstate Commerce Act.

5. Answering paragraph 5 of said complaint, this defendant denies that any of the acts, transactions, or operations of the Steel Company or of the Holding Company which are set forth in said complaint are or have been unlawful.

6. This defendant admits the allegations contained in paragraphs 6, 7, 8, 9, 10, 11, and 13 of said complaint.

7. This defendant denies each and every allegation con-
14 tained in paragraph 12 of said complaint, except that it admits that it has offices at Bethlehem, Pennsylvania, and at Lackawanna, New York, and that its offices at Lackawanna, New York, are within the jurisdiction of this Court.

8. This defendant admits the allegations contained in paragraph 14 of said complaint, but avers that the railroad operations of this defendant in the transportation of products, articles, and commodities, whether in interstate commerce or otherwise, are and have been carried on solely and entirely within the limits of Erie County in the State of New York.

9. Answering paragraph 15 of said complaint, this defendant admits that this defendant owns approximately 87 miles of track and that approximately 58 miles thereof are located on rights-of-way held by this defendant under a lease from the Steel Company's predecessor in title thereto, the term of which extends to October 9 in the year 2021, and within the area which is situated west of the highway known at the Hamburg Turnpike, in the City of Lackawanna, and is owned by the Steel Company and used by it as the location of various manufacturing plants owned by it. This defendant denies that any of its said tracks is located within the enclosure of any plant of the Steel Company, and that its main line enters or extends through any such plant. Except as so specifically answered, this defendant admits the allegations of said paragraph 15.

10. Answering paragraph 16 of said complaint, this defendant admits that the Steel Company is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and that it owns and operates manufacturing plants which are

located on the lines of this defendant, including large steel manufacturing plants at Lackawanna, New York, and which are served in railroad transportation by this defendant; and that such manufacturing plants are served for common carrier railway purposes, whether interstate or intrastate, by this defendant as the sole terminal connection of said plants with trunk-line railroad systems. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 16.

11. Answering paragraph 17 of said complaint, this defendant admits that the Holding Company is a corporation duly organized and existing under the laws of the State of Delaware and that, in so far as the records of this defendant show, the Holding Company owns full and unrestricted legal and equitable title to all the issued and outstanding capital stock of this defendant. This defendant denies the allegation of said paragraph 17, in so far as it has reference to this defendant, that this defendant and other corporations are operated as one cohesive organization either for the manufacture of steel and products made of steel in whole or in part or for any other purpose. Except as herein specifically answered, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph 17.

12. This defendant denies each and every allegation contained in paragraph 18 of said complaint and particularly denies that any control, management, or direction of this defendant has been or now is effectuated or consummated or manifested or exhibited by the methods, acts and means described in subsequent paragraphs of said complaint or by any of them or otherwise.

13. This defendant denies each and every allegation contained in paragraph 18 (a) of said complaint.

14. Answering paragraph 18 (b) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits that the Holding Company, through its ownership of the capital stock of this defendant, at meetings of the stockholders of this defendant is enabled to and does control and direct the election of the members of the Board of Directors of this defendant; that during a period of years prior to July 19, 1938, a majority of the members of the Board of Directors of this defendant were employees of the Steel Company; that since July 1938 none of the members of the Board of Directors of this defendant has been an employee of the Steel Company or of the Holding Company; that the present directors of this defendant do not have any interest in any of the capital stock of this defendant; that D. M. Petty is President of this defendant and of the six other railroad companies which are named in said unnumbered paragraph; that Paul A. Trageser is Vice President thereof; that

C. J. Fatzinger is Auditor thereof; and that G. E. Sellers is Secretary and Treasurer thereof. This defendant avers, however, that each of said officers holds his office in said seven railroad companies, respectively, pursuant to authorization granted by an order of the Interstate Commerce Commission. This defendant admits for the purposes of this suit that the Holding Company
16 owns the entire equitable interest in all the outstanding stock of this defendant. Except as herein specifically admitted or otherwise answered, this defendant denies each and every allegation contained in said paragraph 18 (b) and in said unnumbered paragraph.

15. This defendant denies each and every allegation contained in paragraph 18 (c) of said complaint, except that it admits that some of the industrial plants which are located on the line of this defendant have been or are competitors of the Steel Company in the production and sale of steel products.

16. This defendant denies each and every allegation contained in paragraph 18 (d) of said complaint.

17. This defendant admits that this defendant has performed and now performs connection terminal switching services to and from, and intraplant switching services at, the above-mentioned plants of the Steel Company, and the spotting of cars at or in said plants. This defendant denies each and every other allegation contained in paragraph 18 (e) of said complaint and in the unnumbered paragraph that immediately follows said paragraph 18 (e).

18. This defendant admits the allegations contained in paragraphs 18 (f) and 18 (g) of said complaint, except that this defendant denies that either of the contributions therein referred to was made without legal consideration.

19. Answering paragraph 18 (h) of said complaint and the two unnumbered paragraphs that immediately follow said paragraph, this defendant admits that prior to July 1, 1942, pursuant to and in accordance with the provisions of duly filed tariffs of car demurrage rules and charges then in effect and to which this defendant was a participating party, this defendant entered the detention of railroad cars handled by it in intraplant switching service for the Steel Company with interstate cars in the average demurrage account of this defendant with the Steel Company which this defendant maintained under and pursuant to an average demurrage agreement entered into between this defendant and the Steel Company in accordance with the provisions of said tariffs. This defendant denies that on or after July 1, 1942, on which date changes in the provisions of the filed tariffs applicable thereto became effective, this defendant so entered the detention of any railroad cars handled by it in intraplant switching service for

the Steel Company, and denies that its so entering the detention of any railroad cars so handled by it in intraplant switching service for the Steel Company at any time has resulted in the fixing for the detention of cars by the Steel Company of any charges lower than the charges provided in the published tariffs in effect at the respective times of the detention thereof. This defendant denies that it has knowingly or intentionally failed or neglected to apply established demurrage rules or charges to cars handled in any plant of the Steel Company either
17 in intraplant switching or otherwise; and, except as so answered, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that this defendant has failed and neglected and does fail and neglect so to do. Except as herein specifically admitted or otherwise answered, this defendant denies each and every allegation contained in said paragraph 18 (h) and in said two unnumbered paragraphs.

20. This defendant admits the allegations contained in paragraph 18 (i) of said complaint and avers that the relief plan referred to in said paragraph is a voluntary plan insofar as the employees participating therein, including employees of this defendant, are concerned, and that benefits in accordance with the provisions of said plan are paid to the participants therein out of the relief fund maintained pursuant to said plan.

21. Answering paragraph 19 of said complaint, this defendant admits that this defendant as a common carrier by railroad now transports, and for many years last past has transported, but only within the limits of Erie County of the State of New York, in the course interstate commerce accomplished by means of other railroad carriers that connect with the lines of this defendant from plants of the Steel Company located in Buffalo, Lackawanna, and the Town of Hamburg, in the State of New York, great quantities of articles and commodities, other than timber and the manufactured products thereof, which have been manufactured, mined, or produced by the Steel Company at and shipped from said plants, including all such commodities as are enumerated in the first sentence of said paragraph 19, and that such articles and commodities so transported were not intended for the use of this defendant in the conduct of its business. This defendant further admits that, in operating within the limits of Erie County of the State of New York, it, as a common carrier by railroad, transports, and for many years past has transported, bituminous coal, gravel, sand, iron and steel scrap and other raw materials and ingredients for use in the production and fabrication of steel which have been shipped over the lines of other railroad carriers having connections with this defendant from

points in other States to said plants of the Steel Company. Except as herein specifically admitted this defendant denies each and every allegation contained in said paragraph 19.

22. Answering paragraph 20 of said complaint, this defendant denies that it is completely or otherwise dominated or controlled by the Holding Company, and this defendant also denies that it is completely owned by the Holding Company otherwise than through the ownership of its capital stock. This defendant denies each and every other allegation contained in said
18 paragraph, except that it alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said paragraph that the Steel Company is completely owned, dominated, and controlled by the Holding Company.

23. This defendant denies each and every allegation contained in paragraph 21 of said complaint and in the subparagraphs numbered 1, 2, 3, and 4 of paragraph 22 of said complaint.

WHEREFORE, this defendant demands judgment dismissing the complaint of the plaintiff herein.

KENEFICK, COOKE, MITCHELL,
BASS & LETCHWORTH,
Attorneys for defendant South Buffalo Railway Company, Marine Trust Building, Buffalo, N. Y.
By [S] Lyman M. Bass,
LYMAN M. BASS.

CRAVATH, SWAINE & MOORE,
15 Broad Street, New York, N. Y.
Of Counsel.

19 In the United States District Court

[Title omitted]

Answer of Bethlehem Steel Company to First Amended Complaint

The defendant Bethlehem Steel Company, for its answer to the first amended complaint of the plaintiff herein, respectfully shows to the Court as follows:

1. This defendant admits the allegations contained in paragraph 1 of said complaint and in the two unnumbered paragraphs that immediately follow said paragraph 1.

2. Answering paragraph 2 of said complaint, this defendant admits that the defendant South Buffalo Railway Company (hereinafter, as in said complaint, called South Buffalo) is a common carrier by railroad. This defendant denies that South Buffalo transports or has transported in interstate commerce any article or

commodity manufactured, mined or produced by it or under its authority. This defendant alleges that it is without knowledge or information sufficient to form a belief as to whether South Buffalo transports or has transported in interstate commerce any article or commodity in which it has or had any interest, direct or indirect, except such articles or commodities as are or were necessary and intended for the use of South Buffalo in the conduct of its business as a common carrier. This defendant further denies that South Buffalo transports or has transported in interstate commerce any article or commodity manufactured, mined or produced by or under the authority of Bethlehem Steel Corporation (hereinafter, as in said complaint, called the Holding Company) or by or under the authority of any subsidiary of the Holding Company other than this defendant or in which the Holding Company or any such other subsidiary has or had any interest, direct of indirect. This defendant further denies that South Buffalo transports or has transported any article or commodity in violation of the provisions of the Interstate Commerce Act, commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph (8).

3. Answering paragraph 3 of said complaint, this defendant admits that South Buffalo is a railroad corporation duly organized and existing under the laws of the State of New York and is an inhabitant of said State; that South Buffalo has its principal place of business in the Western District of New York; and that the operations and business of South Buffalo are conducted and engaged in in said District. But this defendant denies that the operations of South Buffalo as a common carrier or otherwise are conducted or engaged in elsewhere than in said District. This defendant admits that this defendant is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and is an inhabitant of the State of New York for the purposes of this suit; and the Holding Company is a corporation duly organized and existing under the laws of the State of Delaware. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations (a) that the Holding Company is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality of South Buffalo and (b) that South Buffalo acts as the agent and the representative of the Holding Company. This defendant denies that the Holding Company is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality or the means or the instrumentality of this defendant and denies that this defendant acts as the agent and representative of the Holding Company or as either its agent or representative.

4. Answering paragraph 4 of said complaint, this defendant

denies that any of the acts or transactions or operations of South Buffalo which are set forth in said complaint are or have been unlawful acts, transactions or operations of South Buffalo as a common carrier by railroad in the course of interstate commerce, and further denies that any such acts, transactions or operations have been performed or accomplished by South Buffalo in violation of paragraph (8) of Section 1 of the Interstate Commerce Act.

5. Answering paragraph 5 of said complaint, this defendant denies that any of the acts, transactions or operations of this defendant or of the Holding Company which are set forth in said complaint are or have been unlawful.

6. This defendant admits for the purposes of this suit the allegations contained in paragraphs 6, 7, 8, 9, 10, 11, and 13 of said complaint.

7. This defendant denies each and every allegation contained in paragraph 12 of said complaint, except that it admits that South Buffalo has offices at Bethlehem, Pennsylvania, and at Lackawanna, New York, and that its offices at Lackawanna, New York, are within the jurisdiction of this Court.

8. This defendant admits the allegations contained in paragraph 14 of said complaint, but avers that the railroad operations of South Buffalo in the transportation of products, articles and commodities, whether in interstate commerce or otherwise, are and have been carried on solely and entirely within the limits of
21. Erie County, in the State of New York.

9. Answering paragraph 15 of said complaint, this defendant admits that South Buffalo owns approximately 87 miles of track and that approximately 58 miles thereof are located on rights-of-way held by South Buffalo under a lease from this defendant's predecessor in title thereto, the term of which extends to October 9 in the year 2021, and within the area which is situated west of the highway known as the Hamburg Turnpike, in the City of Lackawanna, and is owned by this defendant and used by it as the location of various manufacturing plants owned by it. This defendant denies that any of said tracks is located within the enclosure of any plant of this defendant, and that the main line of South Buffalo enters or extends through any such plant. Except as so specifically answered, this defendant admits the allegations of said paragraph 15.

10. Answering paragraph 16 of said complaint, this defendant admits that it is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and that it owns and operates manufacturing plants which are located on the lines of South Buffalo, including large steel manufacturing plants at Lackawanna, New York, and which are served by South Buffalo in railroad transportation; and that such manufacturing plants

are served for common carrier railroad purposes, whether interstate or intrastate, by South Buffalo as the sole terminal connection of said plants with trunk-line railroad systems. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 16.

11. Answering paragraph 17 of said complaint, this defendant admits that the Holding Company is a corporation duly organized and existing under the laws of the State of Delaware and also admits for the purposes of this suit that the Holding Company owns full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of this defendant, except directors' qualifying shares, and full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of South Buffalo. This defendant also admits for the purposes of this suit that the Holding Company owns all or substantially all of the stock of approximately 55 corporations other than South Buffalo and this defendant. This defendant denies each and every other allegation contained in said paragraph 17.

12. This defendant denies each and every allegation contained in paragraph 18 of said complaint and particularly denies that any control, management or direction of South Buffalo has been or now is effectuated or consummated or manifested or exhibited by the methods, acts and means described in subsequent paragraphs of said complaint or by any of them or otherwise.

22 13. This defendant denies each and every allegation contained in paragraph 18 (a) of said complaint.

14. Answering paragraph 18 (b) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits for the purposes of this suit that the Holding Company, through its ownership of the capital stock of South Buffalo, at meetings of the stockholders of South Buffalo is enabled to and does control and direct the election of members of the Board of Directors of South Buffalo; that during a period of years prior to July 19, 1938, a majority of the members of the Board of Directors of South Buffalo were employees of this defendant; that since July 1938, none of the members of the Board of Directors of South Buffalo has been an employee of this defendant or of the Holding Company; that the present directors of South Buffalo do not have any interest in any of its capital stock; that the Holding Company owns the entire equitable interest in all the outstanding stock of South Buffalo; that D. M. Petty is President of South Buffalo and of the six other railroad companies named in said unnumbered paragraph; that Paul A. Trageser is Vice President thereof; that C. J. Fatzinger is Auditor thereof; and that G. E. Sellers is Secretary and Treasurer

thereof. This defendant avers, however, that each of said officers holds his office in said seven railroad companies, respectively, pursuant to authorization granted by an order of the Interstate Commerce Commission. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 18 (b) and in said unnumbered paragraph.

15. This defendant denies each and every allegation contained in paragraph 18 (c) of said complaint, except that it admits that some of the industrial plants which are located on the line of South Buffalo have been or are competitors of this defendant in the production and sale of steel products.

16. This defendant denies each and every allegation contained in paragraph 18 (d) of said complaint.

17. Answering paragraph 18 (e) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits that South Buffalo has performed and now performs connection terminal switching services to and from, and intraplant switching services at, the above-mentioned plants of the Steel Company, and the spotting of cars at or in said plants. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said paragraph 18 (e) that almost all of the total intraplant switching services performed by South Buffalo for all industries which it serves are performed solely for this defendant and within its plant. This defendant denies each and every other allegation contained in said paragraph 18 (e) and in said
23 unnumbered paragraph.

18. This defendant admits the allegations contained in paragraphs 18 (f) and 18 (g) of said complaint, except that this defendant denies that either of the contributions therein referred to was made without legal consideration.

19. Answering paragraph 18 (h) of said complaint and the two unnumbered paragraphs that immediately follow said paragraph, this defendant admits that prior to July 1, 1942, pursuant to and in accordance with the provisions of duly filed tariffs of car demurrage rules and charges then in effect and to which South Buffalo was a participating party, South Buffalo entered the detention of railroad cars handled by it in intraplant switching service for this defendant with interstate cars in the average demurrage account of South Buffalo with this defendant which South Buffalo maintained under and pursuant to an average demurrage agreement entered into between South Buffalo and this defendant in accordance with the provisions of said tariffs. This defendant denies that on or after July 1, 1942, on which date changes in the provisions of the filed tariffs applicable thereto became effective, South Buffalo has so entered the detention of

railroad cars handled in intraplant switching service for this defendant, and denies that its so entering the detention of any railroad cars so handled by it in intraplant switching service for this defendant at any time has resulted in the fixing for the detention of cars by this defendant of any charges lower than the charges provided in the published tariffs in effect at the respective times of the detention thereof. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph 18 (h) and in said two unnumbered paragraphs.

20. This defendant admits the allegation contained in paragraph 18 (i) of said complaint, and avers that the relief plan referred to in said paragraph is a voluntary plan in so far as the employees participating therein, including employees of South Buffalo, are concerned, and that benefits in accordance with the provisions of said plan are paid to the participants therein out of the relief fund maintained pursuant to said plan.

21. Answering paragraph 19 of said complaint, this defendant admits that South Buffalo, as a common carrier by railroad, now transports and for many years last past has transported, but only within the limits of Erie County of the State of New York, in the course of interstate commerce accomplished by means of other railroad carriers that connect with the lines of South Buffalo from the plants of this defendant located in Buffalo, Lackawanna, and the Town of Hamburg, in the State of New York, great quantities of articles and commodities, other than timber and the manufactured products thereof, which have been manufactured, mined, or produced by this defendant at and shipped from said
24 plants, including all such commodities as are enumerated in the first sentence of said paragraph 19, and that such articles and commodities so transported were not intended for the use of South Buffalo in the conduct of its business. This defendant further admits that, in operating within the limits of Erie County of the State of New York, South Buffalo, as a common carrier by railroad, transports, and for many years past has transported bituminous coal, gravel, sand, iron and steel scrap, and other raw materials and ingredients for use in the production and fabrication of steel which commodities have been shipped over the lines of other railroad carriers having connections with South Buffalo from points in other states to said plants of this defendant. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 19.

22. Answering paragraph 20 of said complaint, this defendant denies that either South Buffalo or this defendant is completely or otherwise dominated or controlled by the Holding Company, and this defendant also denies that either South Buffalo or this

defendant is completely owned by the Holding Company otherwise than through the ownership of its capital stock. This defendant denies each and every other allegation contained in said paragraph.

23. This defendant denies each and every allegation contained in paragraph 21 of said complaint and in subparagraphs numbered 1, 2, 3, and 4 of paragraph 22 of said complaint.

Wherefore, this defendant demands judgment dismissing the complaint of the plaintiff herein.

KENEFICK, COOKE, MITCHELL,
BASS & LETCHWORTH,
Attorneys for defendant Bethlehem Steel Company,
Marine Trust Building, Buffalo, N. Y.
By [S] Lyman M. Bass.
LYMAN M. BASS.

CRAVATH, SWAINE & MOORE,
15 Broad Street, New York, N. Y.
Of Counsel.

25 In United States District Court

[Title omitted.]

Answer of Bethlehem Steel Corporation to first amended complaint

The defendant Bethlehem Steel Corporation, for its answer to the first amended complaint of the plaintiff herein, respectfully shows to the Court as follows:

1. This defendant admits the allegations contained in paragraph 1 of said complaint and in the two unnumbered paragraphs that immediately follow said paragraph 1.

2. Answering paragraph 2 of said complaint, this defendant admits that the defendant South Buffalo Railroad Company (hereinafter, as in said complaint, called South Buffalo) is a common carrier by railroad. This defendant denies that South Buffalo transports or has transported in interstate commerce any article or commodity manufactured, mined or produced by it or under its authority. This defendant alleges that it is without knowledge or information sufficient to form a belief as to whether South Buffalo transports or has transported in interstate commerce any article or commodity in which it has or had any interest, direct or indirect, except such articles or commodities as are or were necessary and intended for the use of South Buffalo in the conduct of its business as a common carrier. This defendant further denies that South Buffalo transports or has transported in interstate commerce any article or commodity manufactured, mined, or produced

by or under the authority of this defendant or by or under the authority of any subsidiary of this defendant other than Bethlehem Steel Company (hereinafter, as in said complaint, called the Steel Company) or in which this defendant or any such other subsidiary has or had any interest, direct or indirect. This defendant further denies that South Buffalo transports or has transported any article or commodity in violation of the provisions of the Interstate Commerce Act, commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph 8.

3. Answering paragraph 3 of said complaint, this defendant admits that South Buffalo is a railroad corporation duly organized and existing under the laws of the State of New York and is an inhabitant of said State; that South Buffalo has its principal place of business in the Western District of New York; and that the
26 operations and business of South Buffalo are conducted and engaged in in said District. But this defendant denies that the operations of South Buffalo as a common carrier or otherwise are conducted or engaged in elsewhere than in said District. This defendant admits that the Steel Company is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and is an inhabitant of the State of New York for the purposes of this suit; and that this defendant is a corporation duly organized and existing under the laws of the State of Delaware. This defendant denies that it is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality or the means or the instrumentality of the Steel Company and South Buffalo, or of either of them, and denies that they act as the agents and representatives of this defendant, and that either of them acts as such agent and representative or as either such agent or representatives.

4. Answering paragraph 4 of said complaint, this defendant denies that any of the acts or transactions or operations of South Buffalo which are set forth in said complaint are or have been unlawful acts, transactions or operations of South Buffalo as a common carrier by railroad in the course of interstate commerce, and further denies that any such acts, transactions or operations have been performed or accomplished by South Buffalo in violation of paragraph (8) of Section 1 of the Interstate Commerce Act.

5. Answering paragraph 5 of said complaint, this defendant denies that any of the acts, transactions or operations of this defendant or of the Steel Company which are set forth in said complaint are or have been unlawful.

6. This defendant admits the allegations contained in paragraphs 6, 7, 8, 9, 10, 11, and 13 of said complaint.

7. This defendant denies each and every allegation contained in paragraph 12 of said complaint, except that it admits that South Buffalo has offices at Bethlehem, Pennsylvania, and at Lackawanna, New York, and that its offices at Lackawanna, New York, are within the jurisdiction of this Court.

8. This defendant admits the allegations contained in paragraph 14 of said complaint, but avers that the railroad operations of South Buffalo in the transportation of products, articles and commodities, whether in interstate commerce or otherwise, are and have been carried on solely and entirely within the limits of Erie County in the State of New York.

9. Answering paragraph 15 of said complaint, this defendant admits that South Buffalo owns approximately 87 miles of track and that approximately 58 miles thereof are located on rights-of-way held by South Buffalo under a lease from the Steel Company's predecessor in title thereto, the term of which extends to October 9 in the year 2021, and within the area which is situated west of the highway known as the Hamburg Turnpike, in the
27 City of Lackawanna, and is owned by the Steel Company and used by it as the location of various manufacturing plants owned by it. This defendant denies that any of said tracks is located within the enclosure of any plant of the Steel Company, and that the main line of South Buffalo enters or extends through any such plant. Except as so specifically answered, this defendant admits the allegations of said paragraph 15.

10. Answering paragraph 16 of said complaint, this defendant admits that the Steel Company is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and that it owns and operates manufacturing plants which are located on the lines of South Buffalo, including large steel manufacturing plants at Lackawanna, New York, and which are served by South Buffalo in railroad transportation; and that such manufacturing plants are served for common carrier railroad purposes, whether interstate or intrastate, by South Buffalo as the sole terminal connection of said plants with trunk-line railroad systems. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 16.

11. Answering paragraph 17 of said complaint, this defendant admits that it is a corporation duly organized and existing under the laws of the State of Delaware and also admits for the purposes of this suit that it owns full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of of the Steel Company, except directo[illegible] qualifying shares, and full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of South Buffalo. This defendant

also admits for the purpose of this suit that it owns all or substantially all of the stock of approximately 55 corporations other that South Buffalo and the Steel Company. This defendant denies each and every other allegation contained in paragraph 17 of said complaint.

12. This defendant denies each and every allegation contained in paragraph 18 of said complaint and particularly denies that any control, management or direction of South Buffalo has been or now is effectuated or consummated or manifested or exhibited by the methods, acts and means described in subsequent paragraphs of said complaint or by any of them or otherwise.

13. This defendant denies each and every allegation contained in paragraph 18 (a) of said complaint.

14. Answering paragraph 18 (b) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits that this defendant, through its ownership of the capital stock of South Buffalo, at meetings of the stockholders of South Buffalo is enabled to and does control and direct the election of the members of the Board of Directors of South Buffalo; that during a period of years prior to July 19,
28 1938, a majority of the members of the Board of Directors of South Buffalo were employees of the Steel Company; that since July, 1938, none of the members of the Board of Directors of South Buffalo has been an employee of this defendant or of the Steel Company; that the present directors of South Buffalo do not have any interest in any of its capital stock; that this defendant owns the entire equitable interest in all the outstanding stock of South Buffalo; that D. M. Petty is President of South Buffalo and of the six other railroad companies which are named in said unnumbered paragraph; that Paul A. Trageser is Vice-President thereof; that C. J. Fatzinger is Auditor thereof; and that G. E. Sellers is Secretary and Treasurer thereof. This defendant avers, however, that each of said officers holds his office in said seven railroad companies, respectively, pursuant to authorization granted by an order of the Interstate Commerce Commission. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 18 (b) and in said unnumbered paragraph.

15. This defendant denies each and every allegation contained in paragraph 18 (c) of said complaint, except that it admits that some of the industrial plants which are located on the line of South Buffalo have been or are competitors of the Steel Company in the production and sale of steel products.

16. This defendant denies each and every allegation contained in paragraph 18 (d) of said complaint.

17. Answering paragraph 18 (e) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits that South Buffalo has performed and now performs connection terminal switching services to and from, and intraplant switching services at, the above-mentioned plants of the Steel Company, and the spotting of cars at or in said plants. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph 18 (e) that almost all of the total intraplant switching services performed by South Buffalo for all industries which it serves are performed solely for the Steel Company and within its plants. This defendant denies each and every other allegation contained in said paragraph 18 (e) and in said unnumbered paragraph.

18. This defendant admits the allegations contained in paragraphs 18 (f) and 18 (g) of said complaint, except that this defendant denies that either of the contributions therein referred to was made without legal consideration.

19. Answering paragraph 18 (h) of said complaint and the two unnumbered paragraphs that immediately follow said paragraph, this defendant admits that prior to July 1, 1942, pursuant to and in accordance with the provisions of duly filed tariffs of car demurrage rules and charges then in effect and to which South Buffalo was a participating party, South Buffalo entered the detention
29 of railroad cars handled by it in intraplant switching service for the Steel Company with interstate cars in the average demurrage account of South Buffalo with the Steel Company which South Buffalo maintained under and pursuant to an average demurrage agreement entered into between South Buffalo and the Steel Company in accordance with the provisions of said tariffs. This defendant denies that on or after July 1, 1942, on which date changes in the provisions of the filed tariffs applicable thereto became effective, South Buffalo has so entered the detention of any railroad cars handled by it in intraplant switching service for the Steel Company, and denies that its so entering the detention of any railroad cars so handled by it in intraplant switching service for the Steel Company at any time has resulted in the fixing for the detention of cars by the Steel Company of any charges lower than the charges provided in the published tariffs in effect at the respective times of the detention thereof. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph 18 (h) and in said two unnumbered paragraphs.

20. This defendant admits the allegations contained in paragraph 18 (i) of said complaint and avers that the relief plan referred to in said paragraph is a voluntary plan insofar as the employees participating therein, including employees of South Buffalo, are concerned, and that benefits in accordance with the provisions of said plan are paid to the participants therein out of the relief fund maintained pursuant to said plan.

21. Answering paragraph 19 of said complaint, this defendant admits that South Buffalo, as a common carrier by railroad, now transports, and for many years last past has transported, but only within the limits of Erie County of the State of New York, in the course of interstate commerce accomplished by means of other railroad carriers that connect with the lines of South Buffalo, from plants of the Steel Company located in Buffalo, Lackawanna, and the town of Hamburg, in the State of New York, great quantities of articles and commodities, other than timber and the manufactured products thereof, which have been manufactured, mined or produced by the Steel Company at and shipped from said plants, including all such commodities as are enumerated in the first sentence of said paragraph 19, and that such articles and commodities so transported were not intended for the use of South Buffalo in the conduct of its business. This defendant further admits that, in operating within the limits of Erie County of the State of New York, South Buffalo, as a common carrier by railroad, transports, and for many years past has transported, bituminous coal, gravel, sand, iron and steel scrap and other raw materials and ingredients for use in the production and fabrication of steel which commodities have been shipped over the lines of other railroad carriers having connections with South Buffalo from points in other States to said plants of the Steel Company. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 19.

22. Answering paragraph 20 of said complaint, this defendant denies that either South Buffalo or the Steel Company is completely or otherwise dominated or controled by this defendant, and this defendant also denies that either South Buffalo or the Steel Company is completely owned by this defendant otherwise than through the ownership of its capital stock. This defendant denies each and every other allegation contained in said paragraph.

23. This defendant denies each and every allegation contained in paragraph 21 of said complaint and in subparagraphs numbered 1, 2, 3, and 4 of paragraph 22 of said complaint.

Wherefore, this defendant demands judgment dismissing the complaint of the plaintiff herein.

KENEFICK, COOKE, MITCHELL,
BASS & LETCHWORTH,
Attorneys for Defendant Bethlehem Steel Corporation,
Marine Trust Building, Buffalo, N. Y.
By [S] Lyman M. Bass.
LYMAN M. BASS.

CRAVATH, SWAINE & MOORE,
15 Broad Street, New York, N. Y.
Of Counsel.

31 In United States District Court

[Title omitted.]

Amended answer of South Buffalo Railway Company to First Amended Complaint

The defendant South Buffalo Railway Company, for its amended answer to the first amended complaint of the plaintiff herein, respectively shows to the Court as follows:

1. This defendant admits the allegations contained in paragraph 1 of said complaint and in the two unnumbered paragraphs that immediately follow said paragraph 1.

2. Answering paragraph 2 of said complaint, this defendant admits that it is a common carrier by railroad. It denies that it transports or has transported in interstate commerce any article or commodity manufactured, mined, or produced by it or under its authority or any article or commodity in which it has or had any interest, direct or indirect, except such articles or commodities as are or were necessary and intended for the use of this defendant in the conduct of its business as a common carrier. This defend-

32 ant denies that it is a railroad company which transports or has transported and denies that it now transports or has transported any article or commodity from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, within the meaning or contemplation of the provisions of the Interstate Commerce Act commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph (8), and avers that it is a switching carrier, operating wholly within the Buffalo Switching District, in the County of Erie, State of New York. This defendant further denies that it transports or has transported any article or commodity in violation of the provisions of the Interstate

Commerce Act, commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph (8). This defendant alleges that it is without knowledge or information sufficient to form a belief as to whether it transports or has transported in interstate commerce any article or commodity manufactured, mined, or produced by or under the authority of defendant Bethlehem Steel Corporation (hereinafter, as in said complaint, called the Holding Company) or by or under the authority of any subsidiary of the Holding Company other than Bethlehem Steel Company (hereinafter, as in said complaint, called the Steel Company) or in which the Holding Company or any such other subsidiary has or had any interest, direct or indirect.

3. Answering paragraph 3 of said complaint, this defendant admits that it is a railroad corporation duly organized and existing under the laws of the State of New York and is an inhabitant of that State; that the Steel Company is a corporation duly organized
33 and existing under the laws of the Commonwealth of Pennsylvania; that the Holding Company is a corporation duly organized and existing under the laws of the State of Delaware; that this defendant has its principal place of business in the Western District of New York; and that its operations and business are conducted and engaged in in said District. This defendant denies that its operations are conducted or engaged in elsewhere than in said District. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations (a) that the Steel Company is an inhabitant of the State of New York for the purposes of this suit or for any other purpose; (b) that the Holding Company is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality of the Steel Company; and (c) that the Steel Company acts as the agent and representative or as either the agent or the representative of the Holding Company. This defendant denies that the Holding Company is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality or the means or the instrumentality of this defendant and denies that this defendant acts as the agent and representative of the Holding Company or as either its agent or representative.

4. Answering paragraph 4 of said complaint, this defendant denies that any of the acts or transactions or operations of this defendant which are set forth in said complaint are or have been unlawful acts, transactions, or operations of this defendant as a common carrier by railroad in the course of interstate commerce, and further denies that any such acts, transactions, or opera-
34 tions have been performed or accomplished by this defend-

ant in violation of paragraph (8) of Section 1 of the Interstate Commerce Act.

5. Answering paragraph 5 of said complaint, this defendant denies that any of the acts, transactions, or operation of the Steel Company or of the Holding Company which are set forth in said complaint are or have been unlawful.

6. This defendant admits the allegations contained in paragraphs 6, 7, 8, 9, 10, and 11 of said complaint.

7. This defendant denies each and every allegation contained in paragraph 12 of said complaint, except that it admits that it has offices at Bethlehem, Pennsylvania, and at Lackawanna, New York, and that its offices at Lackawanna, New York, are within the jurisdiction of this Court.

8. This defendant admits for purposes of this suit the allegations of paragraph 13 of said complaint except it denies that it is a railroad company engaged in interstate transportation within the meaning or contemplation of the Commodities Clause and avers that it is a switching carrier and that all its operations are performed within the Buffalo Switching District, in the County of Erie, State of New York.

9. This defendant admits the allegations contained in paragraph 14 of said complaint except that it denies that the services rendered by this defendant include the transportation by it from any state, territory, or the District of Columbia to any other state, territory,
or the District of Columbia, or to any foreign country of
35 products of the several manufacturing plants of the Steel Company in Buffalo, Lackawanna, and Hamburg or any of them and further denies that the common-carrier services rendered by this defendant include the transportation by it from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country of the products of the manufacturing plants of the independent corporations and other independent business enterprises or any of them, or of the raw materials, ingredients, and fuels of the industrial plant of the Steel Company, in said paragraph 14 of the complaint referred to, but avers that the services of this defendant, to whomsoever rendered, and whether in connection with interstate commerce or otherwise, constitute services as a switching carrier in connection with such transportation and further avers that the operations of this defendant in connection with the transportation of articles and commodities, whether in interstate commerce or otherwise, are and have been carried on solely and entirely within the limits of the Buffalo Switching District in Erie County, in the State of New York.

10. Answering paragraph 15 of said complaint, this defendant admits that this defendant owns approximately 87 miles of track

and that approximately 58 miles thereof are located on rights-of-way held by this defendant under a lease from the Steel Company's predecessor in title thereto, the term of which extends to October 9 in the year 2021, and within the area which is situated west of the highway known as the Hamburg Turnpike, in the City of Lackawanna, and is owned by the Steel Company and used by it as
36 the location of various manufacturing plants owned by it. This defendant denies that any of its said tracks is located within the enclosure of any plant of the Steel Company, and that its main line enters or extends through any such plant. Except as so specifically answered, this defendant admits the allegations of said paragraph 15.

11. Answering paragraph 16 of said complaint, this defendant admits that the Steel Company is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and that it owns and operates manufacturing plants which are located on the lines of this defendant, including large steel manufacturing plants at Lackawanna, New York, and which are served as switching carrier in connection with railroad transportation by this defendant; and that such manufacturing plants are served by this defendant as the sole terminal connection of said plants with trunk-line railroad systems. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 16.

12. Answering paragraph 17 of said complaint, this defendant admits that the Holding Company is a corporation duly organized and existing under the laws of the State of Delaware and that, in so far as the records of this defendant show, the Holding Company owns full and unrestricted legal and equitable title to all the issued and outstanding capital stock of this defendant. This defendant denies the allegation of said paragraph 17, in so far as it has reference to this defendant, that this defendant and other corporations are operated as one cohesive organization either for the manufacture of steel and products made of
37 steel in whole or in part or for any other purpose. Except as herein specifically answered, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph 17.

13. This defendant denies each and every allegation contained in paragraph 18 of said complaint and particularly denies that any control, management, or direction of this defendant has been or now is effectuated or consummated or manifested or exhibited by the methods, acts, and means described in subsequent paragraphs of said complaint or by any of them or otherwise.

14. This defendant denies each and every allegation contained in paragraph 18 (a) of said complaint.

15. Answering paragraph 18 (b) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits that the Holding Company, through its ownership of the capital stock of this defendant, at meetings of the stockholders of this defendant is enabled to and does control and direct the election of the members of the Board of Directors of this defendant; that during a period of years prior to July 19, 1938, a majority of the members of the Board of Directors of this defendant were employees of the Steel Company; that since July 1938 none of the members of the Board of Directors of this defendant has been an employee of the Steel Company or of the Holding Company; that the present directors of this defendant do not have any interest in any of the capital stock of this defendant; that D. M. Petty is President of this defendant and of the six other railroad companies which are named in
38 said unnumbered paragraph; that Paul A. Trageser is Vice President thereof; that C. J. Fatzinger is Auditor thereof; and that G. E. Sellers is Secretary and Treasurer thereof. This defendant avers, however, that each of said officers holds his office in said seven railroad companies, respectively, pursuant to authorization granted by an order of the Interstate Commerce Commission. This defendant admits for the purposes of this suit that the Holding Company owns the entire equitable interest in all the outstanding stock of this defendant. Except as herein specifically admitted or otherwise answered, this defendant denies each and every allegation contained in said paragraph 18 (b) and in said unnumbered paragraph.

16. This defendant denies each and every allegation contained in paragraph 18 (c) of said complaint, except that it admits that some of the industrial plants which are located on the line of this defendant have been or are competitors of the Steel Company in the production and sale of steel products.

17. This defendant denies each and every allegation contained in paragraph 18 (d) of said complaint.

18. This defendant admits that this defendant has performed and now performs connection terminal switching services to and from, and intraplant switching services at, the above-mentioned plants of the Steel Company, and the spotting of cars at or in said plants. This defendant denies each and every other allegation contained in paragraph 18 (e) of said complaint and in the unnumbered paragraph that immediately follows said paragraph 18 (e).

19. This defendant admits the allegations contained in paragraphs 18 (f) and 18 (g) of said complaint, except that

this defendant denies that either of the contributions therein referred to was made without legal consideration.

20. Answering paragraph 18 (h) of said complaint and the two unnumbered paragraphs that immediately follow said paragraph, this defendant admits that prior to July 1, 1942, pursuant to and in accordance with the provisions of duly filed tariffs of car demurrage rules and charges then in effect and to which this defendant was a participating party, this defendant entered the detention of railroad cars handled by it in intraplant switching service for the Steel Company with interstate cars in the average demurrage account of this defendant with the Steel Company which this defendant maintained under and pursuant to an average demurrage agreement entered into between this defendant and the Steel Company in accordance with the provisions of said tariffs. This defendant denies that on or after July 1, 1942, on which date changes in the provision of the filed tariffs applicable thereto became effective, this defendant so entered the detention of any railroad cars handled by it in intraplant switching service for the Steel Company, and denies that its so entering the detention of any railroad cars so handled by it in intraplant switching service for the Steel Company at any time has resulted in the fixing for the detention of cars by the Steel Company of any charges lower than the charges provided in the published tariffs in effect at the respective times of the detention thereof. This defendant denies that it has knowingly or intentionally failed or neglected to apply established demurrage rules or charges to cars handled in any plant of the Steel Company either in intraplant switching or otherwise; and, except as so answered, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that this defendant has failed and neglected and does fail and neglect so to do. Except as herein specifically admitted or otherwise answered, this defendant denies each and every allegation contained in said paragraph 18 (h) and in said two unnumbered paragraphs.

21. This defendant admits the allegations contained in paragraph 18 (i) of said complaint and avers that the relief plan referred to in said paragraph is a voluntary plan in so far as the employees participating therein, including employees of this defendant, are concerned, and that benefits in accordance with the provisions of said plan are paid to the participants therein out of the relief fund maintained pursuant to said plan.

22. Answering paragraph 19 of said complaint, this defendant admits that this defendant as a switching carrier engaged in common carrier service by railroad, now transports, and for many years last past has transported, in the course of interstate com-

merce accomplished by means of railroad carriers that connect with the lines of this defendant, but only within the limits of Erie County of the State of New York, from plants of the Steel Company located in Buffalo, Lackawanna, and the Town of Hamburg, in the State of New York, great quantities of articles and commodities, other than timber and the manufactured products thereof, which have been manufactured, mined, or produced by the Steel Company at and shipped from said plants, in-
41 cluding all such commodities as are enumerated in the first sentence of said paragraph 19, and that such articles and commodities so transported were not intended for the use of this defendant in the conduct of its business. This defendant further admits that, in operating within the limits of Erie County of the State of New York, it, as a switching carrier engaged in common carrier service by railroad, transports, and for many years past has transported, bituminous coal, gravel, sand, iron and steel scrap, and other raw materials and ingredients for use in the production and fabrication of steel which have been shipped over the lines of railroad carriers having connections with this defendant from points in other States to said plants of the Steel Company. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 19.

23. Answering paragraph 20 of said complaint, this defendant denies that it is completely or otherwise dominated or controlled by the Holding Company, and this defendant also denies that it is completely owned by the Holding Company otherwise than through the ownership of its capital stock. This defendant denies each and every other allegation contained in said paragraph, except that it alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said paragraph that the Steel Company is completely owned, dominated, and controlled by the Holding Company.

24. This defendant denies each and every allegation con-
42 tained in paragraph 21 of said complaint and in the sub-paragraphs numbered 1, 2, 3, and 4 of paragraph 22 of said complaint.

Wherefore, this defendant demands judgment dismissing the amended complaint of the plaintiff herein.

KENEFICK, COOKE, MITCHELL,
BASS & LETCHWORTH,
Attorneys for defendant South Buffalo Railway Company,
Marine Trust Building, Buffalo, N. Y.
By LYMAN M. BASS.

CRAVATH, SWAINE & MOORE,
15 Broad Street, New York, N. Y.
Of Counsel.

43 In the United States District Court

[Title omitted.]

Amended answer of Bethlehem Steel Company to first amended complaint

The defendant Bethlehem Steel Company, for its amended answer to the first amended complaint of the plaintiff herein, respectfully shows to the Court as follows:

1. This defendant admits the allegations contained in paragraph I of said complaint and in the two unnumbered paragraphs that immediately follow said paragraph 1.

2. Answering paragraph 2 of said complaint, this defendant admits that the defendant South Buffalo Railway Company (hereinafter, as in said complaint, called South Buffalo) is a common carrier by railroad. This defendant denies that South Buffalo transports or has transported in interstate commerce any article or commodity manufactured, mined or produced by it or under its authority. This defendant alleges that it is without knowledge or information sufficient to form a belief as to whether South Buffalo transports or has transported in interstate commerce

44 any article or commodity in which it has or had any interest, direct or indirect, except such articles or commodities as are or were necessary and intended for the use of South Buffalo in the conduct of its business as a common carrier. This defendant further denies that South Buffalo transports or has transported in interstate commerce any article or commodity manufactured, mined or produced by or under the authority of Bethlehem Steel Corporation (hereinafter, as in said complaint, called the Holding Company) or by or under the authority of any subsidiary of the Holding Company other than this defendant or in which the Holding Company or any such other subsidiary has or had any interest, direct or indirect. This defendant denies that South Buffalo is a railroad company which transports or has transported, and denies that South Buffalo now transports or has transported, any article or commodity from any state, territory, or the District of Columbia, to any other state, territory, or the District of Columbia, or to any foreign country, within the meaning or contemplation of the provisions of the Interstate Commerce Act commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph (8), and avers that it is a switching carrier, operating wholly within the Buffalo Switching District, in the County of Erie, State of New York. This defendant further denies that South Buffalo transports or has transported any article or commodity in violation of the provisions of the Interstate

Commerce Act, commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph (8).

3. Answering paragraph 3 of said complaint, this defendant admits that South Buffalo is a railroad corporation duly
45 organized and existing under the laws of the State of New York and is an inhabitant of said State; that South Buffalo has its principal place of business in the Western District of New York; and that the operations and business of South Buffalo are conducted and engaged in in said District. But this defendant denies that the operations of South Buffalo as a common carrier or otherwise are conducted or engaged in elsewhere than in said District. This defendant admits that this defendant is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and is an inhabitant of the State of New York for the purposes of this suit; and that the Holding Company is a corporation duly organized and existing under the laws of the State of Delaware. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations (a) that the Holding Company is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality of South Buffalo and (b) that South Buffalo acts as the agent and the representative of the Holding Company. This defendant denies that the Holding Company is either in truth or in substance conducting business in the States of New York or elsewhere through the means and instrumentality or the means or the instrumentality of this defendant and denies that this defendant acts as agent and representative of the Holding Company or as either its agent or representative.

4. Answering paragraph 4 of said complaint, this defendant denies that any of the acts or transactions or operations of South Buffalo which are set forth in said complaint are or have been unlawful acts, transactions or operations of South Buffalo
46 as a common carrier by railroad in the course of interstate commerce, and further denies that any such acts, transactions or operations have been performed or accomplished by South Buffalo in violation of paragraph (8) of Section 1 of the Interstate Commerce Act.

5. Answering paragraph 5 of said complaint, this defendant denies that any of the acts, transactions or operations of this defendant or of the Holding Company which are set forth in said complaint are or have been unlawful.

6. This defendant admits for the purposes of this suit the allegations contained in paragraphs 6, 7, 8, 9, 10 and 11 of said complaint.

7. This defendant denies each and every allegation contained in paragraph 12 of said complaint, except that it admits that

South Buffalo has offices at Bethlehem, Pennsylvania, and at Lackawanna, New York, and that its offices at Lackawanna, New York, are within the jurisdiction of this Court.

8. This defendant admits for purposes of this suit the allegations of paragraph 13 of said complaint except that it denies that South Buffalo is a railroad company engaged in interstate transportation within the meaning or contemplation of the Commodities Clause, and avers that South Buffalo is a switching carrier and that all its operations are performed within the Buffalo Switching District, in the County of Erie, State of New York.

9. This defendant admits the allegations contained in paragraph 14 of said complaint except that it denies that the services rendered by South Buffalo include the transportation by it from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign
47 country of products of the several manufacturing plants of the Steel Company in Buffalo, Lackawanna and Hamburg or any of them and further denies that the common carrier services rendered by South Buffalo include the transportation by it from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country of the products of the manufacturing plants of the independent corporations and other independent business enterprises or any of them, or of the raw materials, ingredients and fuels of the industrial plants of the Steel Company, in said paragraph 14 of the complaint referred to, but avers that the services of South Buffalo, to whomsoever rendered, and whether in connection with interstate commerce or otherwise, constitute services as a switching carrier in connection with such transportation and further avers that the operations of South Buffalo in connection with the transportation of articles and commodities, whether in interstate commerce or otherwise, are and have been carried on solely and entirely within the limits of the Buffalo Switching District in Erie County, in the State of New York.

10. Answering paragraph 15 of said complaint, this defendant admits that South Buffalo owns approximately 87 miles of track and that approximately 58 miles thereof are located on rights-of-way held by South Buffalo under a lease from this defendant's predecessor in title thereto, the term of which extends to October 9 in the year 2021, and within the area which is situated west of the highway known as the Hamburg Turnpike, in the City of Lackawanna, and is owned by this defendant and used by it as the location of various manufacturing plants owned by it. This
48 defendant denies that any of said tracks is located within the enclosure of any plant of this defendant, and that the main line of South Buffalo enters or extends through any

such plant. Except as so specifically answered, this defendant admits the allegations of said paragraph 15.

11. Answering paragraph 16 of said complaint, this defendant admits that it is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and that it owns and operates manufacturing plants which are located on the lines of South Buffalo, including large steel manufacturing plants at Lackawanna, New York, and which are served by South Buffalo as switching carrier in connection with railroad transportation; and that such manufacturing plants are served by South Buffalo as the sole terminal connection of said plants with trunk-line railroad systems. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 16.

12. Answering paragraph 17 of said complaint, this defendant admits that the Holding Company is a corporation duly organized and existing under the laws of the State of Delaware and also admits for the purposes of this suit that the Holding Company owns full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of this defendant, except director's qualifying shares, and full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of South Buffalo. This defendant also admits for the purposes of this suit that the Holding Company owns all or substantially all of the stock of approximately 55 corporations other than South Buffalo and this defendant. This defendant denies each and every other allegation contained in said paragraph 17.

49 13. This defendant denies each and every allegation contained in paragraph 18 of said complaint and particularly denies that any control, management or direction of South Buffalo has been or now is effectuated or consummated or manifested or exhibited by the methods, acts and means described in subsequent paragraphs of said complaint or by any of them or otherwise.

14. This defendant denies each and every allegation contained in paragraph 18 (a) of said complaint.

15. Answering paragraph 18 (b) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits for the purposes of this suit that the Holding Company, through its ownership of the capital stock of South Buffalo, at meetings of the stockholders of South Buffalo is enabled to and does control and direct the election of members of the Board of Directors of South Buffalo; that during a period of years prior to July 19, 1938, a majority of the members of the Board of Directors of South Buffalo were employees of this defendant; that since July 1938, none of the members of the Board of Directors of South Buffalo has been an employee of this defendant or of the Holding Company; that the present directors of South Buffalo do not have

any interest in any of its capital stock; that the Holding Company owns the entire equitable interest in all the outstanding stock of South Buffalo; that D. M. Petty is President of South Buffalo and of the six other railroad companies named in said unnumbered paragraph; that Paul A. Trageser is Vice-President thereof; that C. J. Fatzinger is Auditor thereof; and that G. E. Sellers is Secretary and Treasurer thereof. This defendant avers, however,
50 that each of said officers holds his office in said seven railroad companies, respectively, pursuant to authorization granted by an order of the Interstate Commerce Commission. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 18 (b) and in said unnumbered paragraph.

16. This defendant denies each and every allegation contained in paragraph 18 (c) of said complaint, except that it admits that some of the industrial plants which are located on the line of South Buffalo have been or are competitors of this defendant in the production and sale of steel products.

17. This defendant denies each and every allegation contained in paragraph 18 (d) of said complaint.

18. Answering paragraph 18 (e) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits that South Buffalo has performed and now performs connection terminal switching services to and from, and intraplant switching services at, the above-mentioned plants of the Steel Company, and the spotting of cars at or in said plants. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said paragraph 18 (e) that almost all of the total intraplant switching services performed by South Buffalo for all industries which it serves are performed solely for this defendant and within its plants. This defendant denies each and every other allegation contained in said paragraph 18 (e) and in said unnumbered paragraph.

19. This defendant admits the allegations contained in
51 paragraphs 18 (f) and 18 (g) of said complaint, except that this defendant denies that either of the contributions therein referred to was made without legal consideration.

20. Answering paragraph 18 (h) of said complaint and the two unnumbered paragraphs that immediately follow said paragraph, this defendant admits that prior to July 1, 1942, pursuant to and in accordance with the provisions of duly filed tariffs of car demurrage rules and charges then in effect and to which South Buffalo was a participating party, South Buffalo entered the detention of railroad cars handled by it in intraplant switching

service for this defendant with interstate cars in the average demurrage account of South Buffalo with this defendant which South Buffalo maintained under and pursuant to an average demurrage agreement entered into between South Buffalo and this defendant in accordance with the provisions of said tariffs. This defendant denies that on or after July 1, 1942, on which date changes in the provisions of the filed tariffs applicable thereto became effective, South Buffalo has so entered the detention of railroad cars handled in intraplant switching service for this defendant, and denies that its so entering the detention of any railroad cars so handled by it in intraplant switching service for this defendant at any time has resulted in the fixing for the detention of cars by this defendant of any charges lower than the charges provided in the published tariffs in effect at the respective times of the detention thereof. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph 18 (h) and in said two unnumbered paragraphs.

21. This defendant admits the allegation contained in paragraph 18 (i) of said complaint, and avers that the relief plan referred to in said paragraph is a voluntary plan in so far as the employees participating therein, including employees of South Buffalo, are concerned, and that benefits in accordance with the provisions of said plan are paid to the participants therein out of the relief fund maintained pursuant to said plan.

22. Answering paragraph 19 of said complaint, this defendant admits that South Buffalo, as a switching carrier engaged in common carrier service by railroad, now transports, and for many years last past has transported, in the course of interstate commerce accomplished by means of railroad carriers that connect with the lines of South Buffalo, but only within the limits of Erie County of the State of New York, from the plants of this defendant located in Buffalo, Lackawanna, and the Town of Hamburg, in the State of New York, great quantities of articles and commodities, other than timber and the manufactured products thereof, which have been manufactured, mined, or produced by this defendant at and shipped from said plants, including all such commodities as are enumerated in the first sentence of said paragraph 19, and that such articles and commodities so transported were not intended for the use of South Buffalo in the conduct of its business. This defendant further admits that, in operating within the limits of Erie County of the State of New York, South Buffalo, as a switching carrier engaged in common carrier service by railroad, transports, and for many years past has transported, bituminous coal, gravel, sand, iron and steel scrap, and other raw

materials and ingredients for use in the production and
53 fabrication of steel which commodities have been shipped over the lines of railroad carriers having connections with South Buffalo from points in other states to said plants of this defendant. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 19.

23. Answering paragraph 20 of said complaint, this defendant denies that either South Buffalo or this defendant is completely or otherwise dominated or controlled by the Holding Company, and this defendant also denies that either South Buffalo or this defendant is completely owned by the Holding Company otherwise than through the ownership of its capital stock. This defendant denies each and every other allegation contained in said paragraph.

24. This defendant denies each and every allegation contained in paragraph 21 of said complaint and in subparagraphs numbered 1, 2, 3, and 4 of paragraph 22 of said complaint.

Wherefore, this defendant demands judgment dismissing the amended complaint of the plaintiff herein.

KENEFICK, COOKE, MITCHELL,
BASS & LETCHWORTH,
Attorneys for defendant Bethlehem Steel Company,
Marine Trust Building, Buffalo, N. Y.
By LYMAN M. BASS.

CRAVATH, SWAINE & MOORE,
15 Broad Street, New York, N. Y.
Of Counsel.

54 In United States District Court

[Title omitted.]

Amended answer of Bethlehem Steel Corporation to first amended complaint

The defendant Bethlehem Steel Corporation, for its amended answer to the first amended complaint of the plaintiff herein, respectfully shows to the Court as follows:

1. This defendant admits the allegations contained in paragraph 1 of said complaint and in the two unnumbered paragraphs that immediately follow said paragraph 1.

2. Answering paragraph 2 of said complaint, this defendant admits that the defendant South Buffalo Railway Company (here-

inafter, as in said complaint, called South Buffalo) is a common carrier by railroad. This defendant denies that South Buffalo transports or has transported in interstate commerce any article or commodity manufactured, mined or produced by it or under its authority. This defendant alleges that it is without knowledge or information sufficient to form a belief as to whether South Buffalo transports or has transported in interstate commerce any article or commodity in which it has or had any interest, direct or indirect, except such articles or commodities as are or were necessary and intended for the use of South Buffalo in the conduct of its business as a common carrier. This defendant further denies that South Buffalo transports or has transported in interstate commerce any article or commodity manufactured, mined or produced by or under the authority of this defendant or by or under the authority of any subsidiary of this defendant other than Bethlehem Steel Company (hereinafter, as in said complaint, called the Steel Company) or in which this defendant or any such other subsidiary has or had any interest, direct or indirect. This defendant denies that South Buffalo is a railroad company
55 which transports or has transported, and denies that South Buffalo now transports or has transported, any article or commodity from any State, Territory, or the District of Columbia to any other State, territory, or the District of Columbia, or to any foreign country, within the meaning or contemplation of the provisions of the Interstate Commerce Act commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph (8), and avers that it is a switching carrier, operating wholly within the Buffalo Switching District, in the County of Erie, State of New York. This defendant further denies that South Buffalo transports or has transported any articles or commodity in violation of the provisions of the Interstate Commerce Act, commonly called the Commodities Clause, United States Code, Title 49, Section 1, paragraph (8).

3. Answering paragraph 3 of said complaint, this defendant admits that South Buffalo is a railroad corporation duly organized and existing under the laws of the State of New York and is an inhabitant of said State; that South Buffalo has it principal place of business in the Western District of New York; and that the operations and business of South Buffalo are conducted and engaged in said District. But this defendant denies that the operations of South Buffalo as a common carrier or otherwise are conducted or engaged in elsewhere than in said District. This defendant admits that the Steel Company is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and is an inhabitant of the State of New York for the purposes of this suit; and that this defendant is a cor-

poration duly organized and existing under the laws of the State of Delaware. This defendant denies that it is either in truth or in substance conducting business in the State of New York or elsewhere through the means and instrumentality or the means or the instrumentality of the Steel Company and the South Buffalo; or of either of them, and denies that they act as the agents and representatives of this defendant, and that either of them acts as such agent and representative or as either such agent or representative.

4. Answering paragraph 4 of said complaint, this defendant denies that any of the acts of transactions or operations of South Buffalo which are set forth in said complaint are or have been unlawful acts, transactions or operations of South Buffalo as a common carrier by railroad in the course of interstate commerce, and further denies that any such acts, transactions or operations have been performed or accomplished by South Buffalo in violation of paragraph (8) of Section 1 of the Interstate Commerce Act.

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5. Answering paragraph 5 of said complaint, this defendant denies that any of the acts, transactions, or operations of this defendant or of the Steel Company which are set forth in said complaint are or have been unlawful.

6. This defendant admits the allegations contained in paragraphs 6, 7, 8, 9, 10, and 11 of said complaint.

7. This defendant denies each and every allegation contained in paragraph 12 of said complaint, except that it admits that South Buffalo has offices at Bethlehem, Pennsylvania, and at Lackawanna, New York, and that its offices at Lackawanna, New York, are within the jurisdiction of this Court.

8. This defendant admits for purposes of this suit the allegations of paragraph 13 of said complaint except that it denies that South Buffalo is a railroad company engaged in interstate transportation within the meaning or contemplation of the Commodities Clause, and avers that South Buffalo is a switching carrier and that all its operations are performed within the Buffalo Switching District, in the County of Erie, State of New York.

9. This defendant admits the allegations contained in paragraph 14 of said complaint except that it denies that the services rendered by South Buffalo include the transportation by it from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country of products of the several manufacturing plants of the Steel Company in Buffalo, Lackawanna, and Hamburg or any of them and further denies that the common carrier services rendered by South Buffalo include the transportation by it from any state,

territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country of the products of the manufacturing plants of the independent corporations and other independent business enterprises or any of them, or of the raw materials, ingredients, and fuels of the industrial plants of the Steel Company, in said paragraph 14 of the complaint referred to, but avers that the services of South Buffalo, to whomsoever rendered, and whether in connection with interstate commerce or otherwise, constitute services as a switching carrier in connection with such transportation and further avers
57 that the operations of South Buffalo in connection with the transportation of articles and commodities, whether in interstate commerce or otherwise, are and have been carried on solely and entirely within the limits of the Buffalo Switching District in Erie County, in the State of New York.

10. Answering paragraph 15 of said complaint, this defendant admits that South Buffalo owns approximately 87 miles of track and that approximately 58 miles thereof are located on rights-of-way held by South Buffalo under a lease from the Steel Company's predecessor in title thereto, the term of which extends to October 9 in the year 2021, and within the area which is situated west of the highway known as the Hamburg Turnpike, in the City of Lackawanna, and is owned by the Steel Company and used by it as the location of various manufacturing plants owned by it. This defendant denies that any of said tracks is located within the enclosures of any plant of the Steel Company, and that the main line of South Buffalo enters or extends through any such plant. Except as so specifically answered, this defendant admits the allegations of said paragraph 15.

11. Answering paragraph 16 of said complaint, this defendant admits that the Steel Company is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania and that it owns and operates manufacturing plants which are located on the lines of South Buffalo, including large steel manufacturing plants at Lackawanna, New York, and which are served by South Buffalo as a switching carrier in connection with railroad transportation; and that such manufacturing plants are served for common carrier railroad purposes by South Buffalo as the sole terminal connection of said plants with trunk-line railroad systems. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 16.

12. Answering paragraph 17 of said complaint, this defendant admits that it is a corporation duly organized and existing under the laws of the State of Delaware and also admits for the purposes

of this suit that it owns full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of the Steel Company, except directors' qualifying shares, and full and unrestricted legal and equitable title to all of the issued and outstanding capital stock of South Buffalo. This defendant also admits for the purposes of this suit that it owns all or substantially all of the stock of approximately 55 corporations other than South Buffalo and the Steel Company. This defendant denies each and every other allegation contained in paragraph 17 of said complaint.

13. This defendant denies each and every allegation contained in paragraph 18 of said complaint and particularly denies that any control, management or direction of south Buffalo has been or now is effectuated or consummated or manifested or exhibited by the methods, acts and means described in subsequent paragraphs of said complaint or by any of them or otherwise.

14. This defendant denies each and every allegation contained in paragraph 18 (a) of said complaint.

15. Answering paragraph 18 (b) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits that this defendant, through its ownership of the capital stock of South Buffalo, at meetings of the stockholders of South Buffalo is enabled to and does control and direct the election of the members of the Board of Directors of South Buffalo; that during a period of years prior to July 19, 1938, a majority of the members of the Board of Directors of South Buffalo were employees of the Steel Company; that since July, 1938, one of the members of the Board of Directors of South Buffalo has been an employee of this defendant or of the Steel Company; that the present directors of South Buffalo do not have any interest in any of its capital stock; that this defendant owns the entire equitable interest in all the outstanding stock of South Buffalo; that D. M. Petty is President of South Buffalo and of the six other railroad companies which are named in said unnumbered paragraph; that Paul A. Trageser is Vice President thereof; that C. J. Fatzinger is Auditor thereof; and that G. E. Sellers is Secretary and Treasurer thereof. This defendant avers, however, that each of said officers holds his office in said seven railroad companies, respectively, pursuant to authorization granted by an order of the Interstate Commerce Commission. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 18 (b) and in said unnumbered paragraph.

16. This defendant denies each and every allegation contained in paragraph 18 (c) of said complaint, except that it admits that some of the industrial plants which are located on the line of

South Buffalo have been or are competitors of the Steel Company in the production and sale of steel products.

17. This defendant denies each and every allegation contained in paragraph 18 (d) of said complaint.

18. Answering paragraph 18 (e) of said complaint and the unnumbered paragraph that immediately follows said paragraph, this defendant admits that South Buffalo has performed and now performs connection terminal switching services to and from, and intraplant switching services at, the above-mentioned plants of the Steel Company, and the spotting of cars at or in said plants. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph 18 (e) that almost all of the total intraplant switching services performed by South Buffalo for all industries which it serves are performed solely for the Steel Company and within its plants. This defendant denies each and every other allegation contained in said paragraph 18 (e) and in said unnumbered paragraph.

19. This defendant admits the allegations contained in paragraphs 18 (f) and 18 (g) of said complaint, except that this defendant denies that either of the contributions therein referred to was made without legal consideration.

20. Answering paragraph 18 (h) of said complaint and the two unnumbered paragraphs that immediately follow said paragraph, this defendant admits that prior to July 1, 1942, pursuant to and in accordance with the provisions of duly filed tariffs of car demurrage rules and charges then in effect and to which South Buffalo was a participating party, South Buffalo entered the detention of railroad cars handled by it in intraplant switching service for the Steel Company with interstate cars in the average demurrage account of South Buffalo with the Steel Company which South Buffalo maintained under and pursuant to an average demurrage agreement entered into between South Buffalo and the Steel Company in accordance with the provisions of said tariffs. This defendant denies that on or after July 1, 1942, on which date changes in the provisions of the filed tariffs applicable thereto became effective, South Buffalo has so entered the detention of any railroad cars handled by it in intraplant switching service for the Steel Company, and denies that its so entering the detention of any railroad cars so handled by it in intraplant switching service for the Steel Company at any time has resulted in the fixing for the detention of cars by the Steel Company of any charges lower than the charges provided in the published tariffs in effect at the respective times of the detention thereof. This defendant alleges that it is without knowledge

or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph 18 (h) and in said two unnumbered paragraphs.

21. This defendant admits the allegations contained in paragraph 18 (i) of said complaint and avers that the relief plan referred to in said paragraph is a voluntary plan insofar as the employees participating therein, including employees of South Buffalo, are concerned, and that benefits in accordance with the provisions of said plan are paid to the participants therein out of the relief fund maintained pursuant to said plan.

22. Answering paragraph 19 of said complaint, this defendant admits that South Buffalo, as a switching carrier engaged in common carrier service by railroad, now transports, and for many years last past has transported, in the course of interstate commerce accomplished by means of railroad carriers that connect with the lines of South Buffalo, but only within the limits of Erie County of the State of New York, from plants of the Steel Company located in Buffalo, Lackawanna and the Town of Hamburg, in the State of New York, great quantities of articles and commodities, other than timber and the manufactured products thereof, which have been manufactured, mined or produced by the Steel Company at and shipped from said plants, including all such commodities as are enumerated in the first sentence of said paragraph 19, and that such articles and commodities so transported were not intended for the use of South Buffalo in the conduct of its business. This defendant further admits that, in operating within the limits of Erie County of the State of New York, South Buffalo, as a switching carrier engaged in common-carrier service by railroad, transports, and for many years past has transported, bituminous coal, gravel, sand, iron and steel scrap, and other raw materials and ingredients for use in the production and fabrication of steel which commodities have been shipped over the lines of railroad carriers having connections with South Buffalo from points in other States to said plants of the Steel Company. Except as herein specifically admitted, this defendant denies each and every allegation contained in said paragraph 19.

23. Answering paragraph 20 of said complaint, this de-
61 fendant denies that either South Buffalo or the Steel Company is completely or otherwise dominated or controlled by this defendant, and this defendant also denies that either South Buffalo or the Steel Company is completely owned by this defendant otherwise than through the ownership of its capital stock. This defendant denies each and every other allegation contained in said paragraph.

24. This defendant denies each and every allegation contained in paragraph 21 of said complaint and in subparagraphs numbered 1, 2, 3, and 4 of paragraph 22 of said complaint.

Wherefore this defendant demands judgment dismissing the amended complaint of the plaintiff herein.

KENEFICK, COOKE, MITCHELL,
BASS & LETCHWORTH,
Attorneys for Defendant Bethlehem Steel Corporation,
Marine Trust Building, Buffalo, N. Y.

By LYMAN M. BASS.

CRAVATH, SWAINE & MOORE,
15 Broad Street, New York, N. Y.,
Of Counsel.

1 In the United States District Court, Civil Action File No. 1464 Western District of New York

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY, AND BETHLEHEM STEEL CORPORATION, DEFENDANTS

Reporter's transcript of trial proceedings

Trial before Honorable JOHN KNIGHT, United States District Court Judge for the Western District of New York, presiding, without a jury, at the U. S. Court House, Buffalo, New York, commencing Tuesday, January 22, 1946, at 10 o'clock A. M.

Appearances: Honorable George L. Grobe, United States Attorney for the Western District of New York, by David S. Craig, Esq., and Robert W. Strange, Esq., Special Assistants to the Attorney General, in behalf of the Plaintiff. Kenefick, Cooke, Mitchell, Bass & Letchworth, Esqs., Marine Trust Building, Buffalo, New York, by Lyman M. Bass, Esq., of counsel. Cravath, Swaine and Moore, Esqs., 15 Broad Street, New York City, by Bruce Bromley, Esq., and William R. Robinson, Esq., George M. Billings, Esq., and Frank M. McGarry, Esq., for the defendants.

2 PROCEEDINGS

The COURT. Are you ready to proceed?

Mr. CRAIG. Yes.

Mr. BROMLEY. Yes.

Mr. CRAIG. If the Court please, in this case the plaintiff asks for a separation of witnesses. The situation is that due to the nature of the case the plaintiff is obliged to rely to a considerable

extent upon testimony adduced from persons who are connected with one or more of the defendants. Some of them are directors, some are officers and some are employees of one or possibly more of the defendants. I anticipate enough difficulty in developing my case from these witnesses. I think it will be a rather considerable handicap to the plaintiff if a separation were not had. Therefore, we make the request.

Mr. BROMLEY. It seems to me in a civil action of this kind, your Honor, it is totally unnecessary. These witnesses are responsible businessmen and bankers in the City of Buffalo. I see no need for it in this kind of a case.

Mr. CRAIG. The witnesses to whom I refer are not persons connected with the case who are the businessmen of Buffalo. I include them, but there are others also.

3 Of course, we have no objection to the presence of such persons who may be necessary to assist the defendants in the conduct of their defense. Beyond that, we would like to have the separation.

Mr. BROMLEY. I certainly would like to have the officers of the Railway to assist me in the defense. I think that is absolutely necessary.

Mr. CRAIG. Whom would they be?

Mr. BROMLEY. Mr. Petty, the President, Mr. Trageser, the Vice President, and Mr. Handwerk.

Mr. CRAIG. Mr. Handwerk is not an officer, is he?

Mr. BROMLEY. No; he is General Agent of the Railroad and in that capacity extremely helpful to me.

Mr. CRAIG. We have no objection to the presence of Mr. Petty, who is the President of the South Buffalo Railway, nor to the presence of Mr. Trageser, who is Vice President of the Railroad.

The COURT. What about these other two that were mentioned?

Mr. CRAIG. I am willing to have Mr. Handwerk present.

The COURT. We are agreed; are we?

Mr. BROMLEY. We are agreed. I do not think the rule, however, should apply to the directors of the corporation who, I say again, are responsible bankers and businessmen of this city. If they want to come in and listen to some of the evidence, I think

4 they should be permitted to.

Mr. CRAIG. I am concerned with the directors of the South Buffalo Railway Company. It is quite likely that the plaintiff will put them on the stand and it will put the government to quite a disadvantage if they were here during the course of the trial.

Mr. BROMLEY. I do not think they are going to be influenced in what they say by anything they hear here, Mr. Craig.

The COURT. I do not think it makes much difference one way or the other as far as that is concerned. They can be informed what the testimony is outside of the courtroom, as far as that is concerned. How many are there of these directors?

Mr. CRAIG. There are five out of the total membership on the Board of nine.

Mr. BROMLEY. Which ones do you refer to?

Mr. CRAIG. I refer at least to the best of my knowledge as to who these directors are. They are Raymond T. Fiske, Francis A. Smith, Edward S. Gram, Benjamin Klopp, and Burton F. Gale, Jr.

Mr. BROMLEY. Their testimony is not going to be affected in the slightest whether they come here or whether they do not.

The COURT. They will be excluded, then. After they
5 are once sworn, I suppose they can be present after that.

Opening statement by Mr. Craig.

If the Court please, this is a case brought by the United States of America by its attorneys acting under the direction of the Attorney General at the request of the Interstate Commerce Commission against South Buffalo Railway Company, Bethlehem Steel Company and Bethlehem Steel Corporation, in which the plaintiff seeks an order of the Court enjoining the defendants from violating the so-called "Commodities Clause" of the Interstate Commerce Act which reads:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except
such articles or commodities as may be necessary and in-
6 tended for its use in the conduct of its business as a common carrier."

As stated by the Supreme Court, the purpose of the Commodities Clause was to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds which inevitably grew up where a railway company occupied the inconsistent position of carrier and shipper. When the unity of the railroad carrier corporation and the shipper corporation is established, a case is made out under the Commodities Clause. It is not incumbent upon the plaintiff to

show any discrimination against other shippers. The statute is general in its terms and applies not only to the particular instances in which the carrier uses its power to the prejudice of the shipper but to all shipments which, however, innocent in themselves come within the scope of probability of the end to be prevented. The evidence and the pleadings, among other things, will show the following:

The affairs of the three defendants have been and in fact are so commingled and the community of interest among them is such that in substance and reality they are virtually one and the same organization at Lackawanna, New York, consisting of one branch known as Bethlehem Steel Company producing steel and steel products, and a second branch known as South Buffalo Railway Company transporting materials to, from and within the steel-producing branch, with both branches being wholly owned and dominated by the same financial organization known as Bethlehem Steel Corporation. There is such a unity of interest among these three companies that the articles and commodities transported by South Buffalo for the Steel Company are in reality manufactured, produced, and transported by and under the control and direction of the same authority. South Buffalo is practically the agent for Bethlehem Steel Company in the operations involving both companies. As we understand it, the defendants contend that South Buffalo is a wholly independently operated company separate and distinct from both the Steel Company and the Steel Corporation.

7

South Buffalo Railway Company is a railroad corporation, engaged in interstate commerce and subject to the Interstate Commerce Act, with trackage as shown by the maps which will be offered in evidence, in Erie County, New York, consisting of about six miles of main track and having approximately 80 miles of other track, about 58 miles of which is within the main steel plant of the Steel Company in Buffalo, Lackawanna, and Hamburg, New York. Other trackage is used in connection with other plants of the Steel Company near to the main plant and still other track, comparatively small in amount, is used in connection with the relatively minor business done by South Buffalo for each of some 25 other industries on its line.

8

The Steel Company is a corporation manufacturing steel and steel products made of steel in whole or in part. It owns large facilities for the conduct of its business in various parts of the United States. One of its large producing establishments is at Lackawanna, New York, which likewise is shown on the maps to which I have referred. It sole connection by rail with the trunk line railways is South Buffalo Railway Company.

The Bethlehem Steel Corporation is a Delaware corporation which owns all the stock of South Buffalo and all the stock of the Steel Company save for directors' qualifying shares. It is a holding company and owns all, or substantially all, of the stock of some 55 other corporations. It is the dominating and controlling force of a vast organization which supplies and transports many of the raw materials used in the manufacture of steel and products made of steel in whole or in part, which manufactures steel and steel products and which transports many of the products so manufactured. It owns the stock of companies which mine iron ore in Chile and in the United States. It owns the stock of steamship companies which transport that iron ore from Chile to the United States and destined for various plants of the Steel Company and which transport iron ore produced by its subsidiaries from the Upper Great Lake ports to the lower ports. Whenever possible it ships in the bottoms operated by its wholly owned steamship companies because it wants them to make money for the Bethlehem organization. It owns also the stock of steamship companies engaged in coastwise shipping. It utilizes the bottoms used by these companies whenever it can to transport raw materials and Bethlehem products from one port in the United States to another of our ports. It owns the stock of seven railroads, including South Buffalo, each of which is in direct physical contact with a steel plant of Bethlehem Steel Company and which is the sole rail connection between it and the line haul carriers. It owns the stock of companies producting coal, limestone, and other products used in the manufacture of steel, and whenever possible these products are shipped over carriers owned by subsidiaries of the Steel Corporation. This method of operation is pursued not only for the purpose of making money, but for rendering the best possible service to the Bethlehem organization as a result of which steel and steel products can be manufactured with a maximum of efficiency.

All matters of a financial character are handled by the Steel Corporation for its subsidiaries. When a subsidiary needs funds it goes to the parent organization for them. It is not permitted to do otherwise. At least once a month each subsidiary submits detailed financial data on operations and financial standing to the parent corporation which consolidates that information into a single statement. The results of the operations of all of the subsidiaries is the ultimate in which the corporation is interested. It cares not for the showing made by any single subsidiary but is concerned with the net result of all the numerous subsidiaries. The stock of Bethlehem Steel Corporation is listed on the New

York Stock Exchange, but no stock or other security of any of the subsidiaries is listed on any stock exchange. Without
11 making any distinction as to whether a subsidiary is claimed to be a free agent independent of control of the corporation or is one concededly and obviously controlled, the corporation makes contributions to its subsidiaries as distinguished from loans or stock purchases, always, however, for specific purposes selected by the corporation. Mr. Eugene Grace is the chief executive officer of both the Steel Corporation and the Steel Company and is the leading influence in the Bethlehem organization. Mr. Robert E. McMath is a vice president of both the corporation and the Steel Company and is in charge of all legal and financial matters for both. Mr. Grace and Mr. McMath will figure in the testimony in this case. The Steel Company and the Steel Corporation have numerous directors common to both. Mr. Hoyt A. Moore, of the firm of Gravath, Swaine and Moore of New York City, is general counsel for the Steel Corporation and the Steel Company. He is also general counsel for South Buffalo Railway Company.

One of the companies which is an integral part of the Bethlehem organization is South Buffalo Railway Company. South Buffalo was incorporated in 1899 under the railroad laws of the State of New York and was granted shortly thereafter a
12 certificate of convenience and necessity by the Board of Railway Commissioners of the State of New York. All of its stock belonged to Lackawanna Steel Company, which owned and operated a large steel plant at Lackawanna, New York, which we understand is located in the area west of the Hamburg Turnpike as shown by the maps to which I have referred. Then, as now, South Buffalo was the sole rail connection between the steel plant and the line haul carriers. On and prior to October 10th, 1922, the Lackawanna Steel Company owned all the track within its plant save for the main line of South Buffalo which passed through the plant. On October 10th, 1922, Bethlehem Steel Company purchased the steel plant belonging to Lackawanna Steel Company. On that date also the Bethlehem Steel Corporation bought from Lackawanna Steel Company all the stock of the South Buffalo Railway Company. As the pleadings indicate, there are some intermediate corporate steps, which I will not detail here. I have stated, I believe, the ultimate.

On the same date, October 10, 1922, the Steel Company sold to South Buffalo much of the track and railroad property within the plant of the Steel Company, but not the land on which
13 they were situated, for $857,608.93, subject to certain incumberance. The bill of sale, which will be offered in

evidence, placed unusual burdens on the Railway Company for the benefit of the Steel Company.

On the same date, October 10th, 1922, the Steel Company leased to South Buffalo for a term of 99 years the land on which were located the tracks and railroad property sold by Bethlehem to South Buffalo on that date. This lease called for a rental of $22,000 for each of the first five years and thereafter a sum equal to 5% of the settled valuation of the leased premises, but in no event less than $22,000 for each year. This lease, which will be offered in evidence, contained provisions which placed unusual burdens upon the Railway Company to the advantage of the Steel Company.

On October 10th, 1923, one year later, a further lease was entered into whereby certain lands within the steel plant at Lackawanna, and not included in the 1922 lease, were leased by Bethlehem to South Buffalo for a term of 98 years. The terms and conditions of this lease, which will be offered in evidence, were similar to those of the lease of October 10th, 1922. None of these transactions, either the sale or the leases, was ever
14 authorized by the Board of Directors of South Buffalo prior to their execution.

Within the main plant of the Bethlehem Steel Company at Lackawanna, which is practically coextensive with the plant which was previously operated by Lackawanna Steel Company, there is an intricate system of trackage designed to serve the plant. It consists of approximately 129 miles of track, about 58 miles of which is owned by South Buffalo and about 71 miles is owned by the Steel Company. One could not tell by looking where the tracks of South Buffalo ended and those of Bethlehem began. On these maps, which will be offered in evidence, the tracks of the Bethlehem and South Buffalo, respectively, are shown in different colors. The Bethlehem standard-gauge tracks are shown in red; the Bethlehem narrow-gauge tracks are shown in yellow, and the South Buffalo tracks are shown in white. In about the year 1937, the Interstate Commerce Commission began an investigation of the relationship existing among South Buffalo, Bethlehem Steel Company, and the Bethlehem Steel Corporation. The investigation included other aspects, but we are not interested in them. Thereafter attempts were made to mark the dividing line of the tracks of the Bethlehem Steel Company and
15 South Buffalo by means of metal plates.

Now, there seems to be very little, if indeed there is any, doubt that until 1938 or 1940 South Buffalo and Bethlehem were one and that one was Bethelem. The plaintiff contends that this relationship now exists. At this point I shall not refer to the sit-

uation existing at the present time, because in 1938, 1939, and 1940 changes were made in the personnel of the directorate and management of South Buffalo which, it is said by the defendants, made South Buffalo independent of Bethlehem. Repeatedly, in correspondence, the general manager of the Steel Company at Lackawanna is addressed by officials of South Buffalo as general manager of South Buffalo Railway Company. In this correspondence the officials of South Buffalo ask for instructions and advice in matters relating to railroad company matters and received them. South Buffalo policies were established by the Bethlehem people. The Steel Company's general manager asked for and received information from South Buffalo officials concerning problems which related solely to South Buffalo Railway Company matters and which had nothing to do with the
16. Steel Company. The Steel Company's manager or other employees had control over the pay to be granted to South Buffalo employees and what persons should be employed by South Buffalo. He was consulted on the problems of the operation of South Buffalo and his judgment controlled therein. Although a new manager came to the Steel Company plant in Lackawanna in 1936, the system was carried on by him and he perpetuated the method of operation as he found it, not only because he found that it was in the accepted method of procedure but because from the point of view of the manager of the Steel Company it was the most desirable way to conduct business. Important bookkeeping transactions on the books of South Buffalo were approved by Bethlehem auditors before they were made. In case of discrepancy in the books between South Buffalo and the parent company the books of the latter controlled. Employees of South Buffalo were and are permitted to participate in a relief plan intended by the Steel Corporation for its employees and the employees of all of its subsidiaries. South Buffalo's chief engineer was on the Bethlehem pay roll and South Buffalo paid the Steel Company for his services. The man who handled employment matters for South Buffalo was like-
17 wise a Steel Company employee. For the most part, the executive officials and chief operating officials of South Buffalo were formerly Steel Company men. One president had been long and intimately associated with John M. Gross, Vice President of Bethlehem Steel Company at Bethlehem, Pennsylvania, the home office for all Bethlehem activities, and who was in charge of traffic matters for the entire Bethlehem Steel Company. Another president for years had worked with Mr. Gross. The offices of South Bethlehem and the Steel Company at Lackawanna were in the same building. At Bethlehem, Pennsylvania,

where were located the officers common to South Buffalo and the other six subsidiary railroads of the Steel Corporation; all offices were in a building owned by Bethlehem Steel Company.

Not only was there created the opportunity for the Steel Company and the Railway Company to engage in practices calculated to be forbidden by the Commodities Clause, but, in fact, these practices were indulged in. The operations of South Buffalo were subject to the convenience of the Steel Company. The railroad was operated as a part of the Steel Company's business and not as an independently operated railroad. Erroneous
18 demurrage was charged the Steel Company by South Buffalo for the use of cars. South Buffalo and line-haul carriers which were in competition for the Steel Company's business made false records as to the time when South Buffalo received freight cars, and, thereby, South Buffalo profited at the expense of these line haul carriers.

Prior to 1934, South Buffalo had lost a great deal of money. Its surplus had shrunk from $1,447,605 at the end of 1923 to a deficit of $93,548 at the end of 1933. In November 1933, Mr. Paul Trageser, long associated with the Steel Company under the direction of Mr. Gross, became President of South Buffalo. Under the leadership of Mr. Trageser and with improved business conditions, South Buffalo saw better days. In 1936, it had an operating profit of over $500,000. There was a deficit of only $46,163 at the end of 1935, as shown on the books of South Buffalo and as by it reported to the Interstate Commerce Commission. However, for some reason the books of the Steel Corporation showed that South Buffalo had a deficit of $211,616. The Steel Corporation desired that South Buffalo pay a divided in 1936 that South Buffalo might avoid a tax on undistributed earnings. There was plenty of earnings in 1936 to clear up the
19 deficit as shown by South Buffalo's books and to permit the declaration of a handsome dividend. The situation was not handled in this way, however, because of Bethlehem's control over South Buffalo's finances. At the end of 1935, South Buffalo reported to the Interstate Commerce Commission accounts payable of $2,036,193. Most of this, in fact practically all of it, was owed to the Steel Corporation. This indebtedness was considered by the Steel Corporation to be deterrent to the declaration of a dividend by South Buffalo, although in previous years dividends had been paid by South Buffalo when its indebtedness on accounts payable was in about the same sum as in 1935, and in one instance was greater. Nevertheless, the Steel Corporation, through its Vice President, Mr. McMath, and its general counsel, Mr. Moore, and without consultation with any official

of South Buffalo, proceeded to arrange matters in its own way, looking toward the declaration of a dividend by South Buffalo. Messrs. McMath and Moore at first concluded that the Steel Corporation should buy additional stock of South Buffalo for $2,800,000. Later this was reduced by them to $1,900,000. Before the end of 1936, the sum of $1,900,000 was paid in cash by
20 the Steel Corporation to South Buffalo. In addition, a cash payment was made by the Steel Corporation to South Buffalo in the amount of $211,616 to clear up the deficit of South Buffalo, as shown by the books of the Steel Corporation, and not in the lesser amount as shown by South Buffalo's books, if, indeed, at the time of payment there was a deficit at all. A dividend of $375,000 was declared and paid by South Buffalo to Bethlehem Steel Corporation before the end of 1936. In January 1937, however, Mr. Moore made the discovery that under the mortgage covering the plant purchased by Bethlehem from the Lackawanna Steel Company, and which was still in effect, it would be necessary to pledge the stock to be issued for the two payments by the corporation to South Buffalo totaling $2,111,616. He embodied his discovery in a letter to Mr. McMath. In February 1937, Mr. McMath wrote Mr. Moore that either the issuance and sale of the additional stock of South Buffalo should be cancelled or postponed until the mortgage on the Lackawanna plant should have been discharged. He stated that, if the obligation were to be merely postponed, it would be necessary for Mr. Schick, Comptroller of the Steel Corporation, to consider how the pay-
21 ment of $1,900,000 should be treated on the books of South Buffalo Railway Company. Later in February 1937, the Steel Corporation, by Mr. McMath, wrote South Buffalo calling off the issuance of stock and declaring the payments to be a contribution. In this South Buffalo acquiesced. Then Mr. Schick's representatives fixed up South Buffalo's books. These two payments totaling two million dollars plus were not to be used by South Buffalo in any way it saw fit. They were received by South Buffalo with the distinct understanding that they were to be used solely as dictated by the Steel Corporation. The payment of $1,900,000 was to be handed back immediately to the Steel Corporation to apply on the accounts owed by South Buffalo to the Steel Corporation. This was done. The payment of $211,616 was to be used to wipe out the deficit of South Buffalo as shown by Bethlehem's books. We have never discovered how South Buffalo handled its books in connection with the contribution to wipe out a deficit which on South Buffalo's books did not exist or was in an amount much less than the payment.

Early in 1936, there was another financial development between South Buffalo and the Steel Corporation. The Steel

Corporation concluded that in view of a change in the tax laws it should charge interest in the amount owed it by South Buffalo on open account. Previously no interest had been charged. Thereafter, interest at 6 per cent per annum was charged but payable only out of South Buffalo's income. It was agreed that if the net income of South Buffalo was not sufficient to cover the interest due in a given year, South Buffalo was to be under no obligation to make good the deficiency in any subsequent year.

On May 25, 1936, the Supreme Court of the United States decided the case of United States of America v. Elgin, Joliet and Eastern Railway Company at 298 U. S. 492. The Court will probably hear more of that decision before this case is disposed of. It involved an interpretation of the Commodities Clause and is, I believe, the most recent pronouncement of the Supreme Court on this subject. The Court held on the record before it that there was no violation of the Commodities Clause. Nevertheless, this decision stirred up action in connection with the relationship existing among South Buffalo, the Steel Corporation, and the Steel Company. Mr. Moore and Mr. McMath conferred on the subject and concluded that there should be
23 some changes made. The first step was taken in 1938, when all five Steel Company employees who were South Buffalo directors resigned from the directorate. In their places were chosen five South Buffalo employees, making a directorate of nine members solid with South Buffalo men. There were no other changes at this time. The same people continued to run South Buffalo in the same way.

The real attempt to change appearance came in late 1939 and early 1940. One of Mr. Moore's associates procured the consent of five Buffalo, New York, businessmen to serve as directors of South Buffalo. They assumed office in January 1940. Before they became directors, however, the new facade was placed over the front of the old South Buffalo structure. At a meeting of the Board of Directors on or about December 5, 1939, a new President and a new Vice President of South Buffalo were chosen. Mr. Paul Trageser had served well as President of South Buffalo and the other six subsidiary railroads of the Steel Corporation for a compensation of $10,000 per year since November 29, 1933. There had been no complaint about his work and South Buffalo had made money each year of his presidency. South Buf-
24 falo reports to the Interstate Commerce Commission show that in no comparable period of time were South Buffalo operations so successful financially as during the period when Mr. Trageser was President. Nevertheless, late in 1939, Robert E. McGath, Vice President of Bethlehem Steel Corporation, and

Vice President of Bethlehem Steel Company, in charge of legal and financial matters, and who had no connection whatever with South Buffalo Railway Company, asked Mr. Trageser to resign as President of all seven of the Railroad Companies. Mr. Trageser obeyed. He then was elected Vice President of all seven railroads at no decrease in compensation.

As President the directors of South Buffalo chose Mr. David M. Petty. At or about the same time the directors of the other six subsidiary railroads chose Mr. Petty President of their roads, respectively. Mr. Petty for thirty years had been associated with Bethlehem Steel Company. Immediately upon his graduation from Lehigh University, in Bethlehem, Pennsylvania, in 1909, Mr. Petty went to work for the Steel Company. He was and is an electrical engineer. His work in later years was with the service department of the Steel Company. All he knew
25 about railroading had been acquired by virtue of working out the Steel Company's operating problems as they pertain to railroads. He was thoroughly indoctrinated in Bethlehem's practices. For over 20 years prior to his becoming president of the Bethlehem railroads he had a great deal of contact with Mr. Quincy Bent, Vice President of Bethlehem Steel Company in charge of operations. His knowledge of railroad problems was gained in connection with his work in solving steel company problems involving transportation. He knew as a result of his long experience just what the steel company in its operations wanted from railroads and what in particular it wanted from the seven railroads wholly owned by the Steel Corporation having direct physical contact with seven different plants of the Steel Company and providing their only rail outlets to the trunk lines.

About the middle of the year 1939, Mr. Eugene Grace, President of both the Steel Corporation and the Steel Company, but holding no position whatsoever with South Buffalo or any of the other subsidiary railroads, called Mr. Petty to his office and asked him if he would be willing to become President of all seven railroads. Mr. Petty acquiesced. Mr. Grace told Mr. Petty
26 that the compensation would approximate $25,000 per year for work done for all seven railroads. He did not say how the compensation was to be divided among the seven railroads. As a matter of fact, six of them, including the South Buffalo Railway Company, pay 16 per cent each and one road pays 4 per cent of the fixed compensation. When we took Mr. Petty's deposition at Bethlehem, Pennsylvania, on October 4, 1944, his memory was dim as to what compensation he had received since becoming President even for the year 1943. But it has been fairly

close to $25,000 per year for each of the years 1940, 1941, 1942, and 1943.

In 1939 and 1940, the General Manager of the Steel Company at Lackawanna was Edward F. Entwisle. He still holds that position. He openly exercised domination and supervision over South Buffalo's affairs. Such was the system he found in effect when he became manager in 1936 and he perpetuated it. This system was best for the Steel Company. In late 1939 or early 1940, Mr. Entwisle received orders from his superior, Quincy Bent, Vice President of the Steel Company in charge of operations, to keep hands off South Buffalo's affairs.

27 There was a change in the position of chief engineer. William James had been chief engineer since 1922, although on the pay roll of the Steel Company. He resigned effective June 30, 1940, and his place was filled by Hugh Dalziel, a Bethlehem Steel Company employee who had done engineering work for South Buffalo. As in the case of Mr. James, Bethlehem had billed South Buffalo for work done by Mr. Dalziel. The other six railroads also chose Mr. Dalziel as chief engineer. A new Secretary-Treasurer was elected by all seven railroads. He was G. E. Sellers, a man who, up to that time, had been an employee of the Steel Company. The several auditors and purchasing agents of South Buffalo and the other railroad companies, after the purchase of South Buffalo by Bethlehem, were and always have been men who had been employed by the Steel Company before assuming their positions with the railroad companies. Thus all seven subsidiary railroads of the corporation have officers common to all, who are former Bethlehem men.

When the reorganization of South Buffalo was completed whereby South Buffalo was to become independent of Bethlehem, every executive officer and chief operating official of South Buffalo, save one, was a former Bethlehem Steel Company

28 man. The offices filled by these men are President, two Vice Presidents, General Superintendent, Secretary-Treasurer, Auditor, Purchasing Agent, and Chief Engineer. The Assistant Secretary-Treasurer alone is not a former Bethlehem man. The same man is General Agent of all seven of the subsidiary railroads. His entire business life has been with one or more of the railroads.

South Buffalo put up its own building at Lackawanna and no longer were South Buffalo's offices housed in the same building with the Bethlehem offices. At Bethlehem, Pennsylvania, all seven railroads moved to their own building where their affairs are now conducted. Formerly these offices were in the building of Bethlehem Steel Company.

In spite of the meticulous care which has been taken to preserve separate corporate identities, we shall present evidence that operations between Bethlehem Steel and South Buffalo exist as they had prior to the purported reformation and that the same unity of interest among the defendants continues. We contend that with the management of South Buffalo firmly in the hands of former Bethlehem men, thoroughly acquainted with Bethlehem's methods of operation and who know what best
29 can be done by a wholly owned Bethlehem railroad serving a Bethlehem steel plant and which is the steel plant's sole rail connection with the line haul carriers, no specific orders from Bethlehem are needed. It is a matter of reflex action. If there had been a sincere desire to separate Bethlehem and South Buffalo, outsiders would have been put in the important positions of South Buffalo instead of placing Bethlehem people there.

If the Court should find, however, that domination has ceased, but which, of course, we contend is not the fact, relief should be granted because if the pressure of the Interstate Commerce Commission investigation and of this Act should be lifted the domination of Bethlehem over South Buffalo would be resumed because the Bethlehem people prefer the old system of operations.

In this statement we have not attempted to give all the evidence which will be adduced to support the allegations of the complaint. We have attempted to present, in general outline, the position maintained by plaintiff together with a portion of the evidence which will be forthcoming.

As a part of this statement we include all the allegations of the amended complaint.

30 *Opening statement by Mr. Bromley*

May it please the Court, the Supreme Court in the Elgin, Joliet & Eastern Railway case had before it a situation closely analogous to this, because there were involved the United States Steel Corporation, a holding company, its subsidiary steel companies, and one of its wholly owned railroads, the E. J. & E. Judge Woodward on the trial found that there was no domination, and that decision was finally affirmed by the Supreme Court in 1936. The evidence there presented of the interest which the holding corporation took in the affairs of its railroads presented a situation much more extreme than even the Government contends existed here. The Court held in that case that the ownership by a holding company of all the stock of a steel company and all the stock of a railroad company does not, as a matter of law, result in a violation of the Commodities Clause, and

it held further that such ownership is not even prima facie evidence of such a violation; and it held further that the interest which the holding company through its officers exhibited in the affairs of the railway was only the natural interest which any stockholder owning all the stock of a company has the
31 right to show, and did not amount to a destruction of the separate existence of the subsidiary railroad, so as to destroy its identity as a corporation and make it a mere department of the steel business.

It is clear, I submit, that the purpose of this action is to begin the process of inducing the Supreme Court to reconsider the E. J. & E. decision. Now, I say that because the Assistant Attorney General who signed this complaint is Mr. Craig, Sr. A man by the name of Wiprud, now Judge Thurman Arnold's law partner, wrote a book in 1945, and in the book he had something to say about the case which is starting today before your Honor. In the book at page 134 he says—and I quote: "The discriminations, disguised rebates and unfair competitive advantages which followed in the wake of the Elgin, Joliet and Eastern Railway Company decision impelled the Attorney General, at the instance of the Interstate Commerce Commission, to institute a civil suit in the United States District Court for the Western District of New York, against the South Buffalo Railway Company, the Bethlehem Steel Company, and the Bethlehem Steel Corporation, for the purpose of securing a reexamination of the principle
32 enunciated by the Court in that case. The basic facts are analogous in that the Bethlehem Steel Corporation owns all the stock of the South Buffalo, a manufacturing subsidiary which operates a large steel plant near Buffalo, New York. The South Buffalo has direct connections with six important railroads and interchanges freight with five other railroads. Though the defendants tried to avoid the more outward appearances of domination and control, the relationships and practices are substantially similar to those in the Elgin, Joliet and Eastern Railway Company case."

Now, from that statement it is apparent to me that the Attorney General then thought when he wrote the book that the evidence of domination which he had found in this case fell short of that which had been produced in the E. J. & E. case; and, secondly, it is apparent that unless this Court is prepared to hold that relations and practices are illegal which the majority of the Supreme Court held legal in the E. J. & E. case, the defendants are entitled to judgment. Mr. Wiprud conceded in his book that the relations and practices in our case are substantially similar to those in the E. J. & E. case. His purpose and the
33 Government's purpose and the Attorney General's purpose

in bringing this suit is, as Mr. Wiprud says, to secure a reexamination of the principles enunciated by the Court with respect to stock ownership. In other words, what they they hope to induce the Court to hold is that stock ownership in a railway company by a steel holding company is prima facie illegal, which violates the Commodities Clause.

Now, stated in terms of the Commodities Clause, which Mr. Craig read to your Honor, the question raised and decided in the E. J. & E. case and raised again in this case is whether the South Buffalo Railway Company has any interest, direct or indirect, either as owner or producer in any commodity which it transports.

Your Honor will recall that the Commodities Clause refers to railroad companies, that no railroad company can transport any commodity which it owns or which it has produced. It is perfectly clear that the South Buffalo Railway Company as a matter of fact, has no interest in the steel which the Bethlehem Steel Company produces. The Railway Company does not produce it or own it. So that the ultimate question, assuming that the law applies to this situation at all, which I do not believe
34 it does, will be whether the Government can pierce the corporate veil and apply the Statute backwards so as to say that the Railway Company, although it does not own or produce anything, nevertheless, must be deemed to be held to be the owner of the steel which the Steel Company produces, because it has no separate corporate existence. As I say, the Supreme Court has placed the stamp of approval on things done by the U. S. Steel Corporation, which far transcended anything which has ever been done by any Bethlehem official in this case.

Now, there is a second question and an independent question under the Commodities Clause which is present in this case, which was not present in the E. J. & E. case at all. The E. J. & E. Railroad was a trunk-line railroad which operated in two different States and across State lines, and was 175 miles or more long. It was a typical trunk-line carrier. The South Buffalo Railway is an industrial switching railroad. It is located and it operates wholly within the Buffalo switching district, which is entirely within the State of New York. The Government is trying to show that the South Buffalo Railway Company, or some corpo-
35 rate entity of which it is a part, transports commodities of which it is an owner or producer. But the Interstate Commerce Act contains two separate provisions which are diametrically opposite. One of those is the Commodities Clause, which directs that a railroad owner may not transport its own commodities from one State or territory to another. The other provision is a provision which follows shortly after the Commodities

Clause, entitled Section 15, subdivision 13, and that provision in substance says that if the owner of property transported performs any service or provides any facility in connection with its transportation he is entitled to be paid reasonable compensation by the common-carrier railroad, a part of whose service the property owner provides.

Both of these sections obviously cannot apply to the same railroad operations. They would be hopelessly in conflict if so applied, and the Court in this connection, it seems to me, must determine first in which of these two statutory classes this little switching line falls. Is it subject to the Commodities Clause at all? I submit it is not, because it is not a railroad corporation in the sense in which Congress used that word in the Commodities
36 Clause. This is not to say that the South Buffalo Railway, or either of the Bethlehem Steel defendants, is entitled to compensation under Section 15, subdivision 13. They would not be so entitled unless one of them both owned the commodity and performed the transportation service, which is not the case here. We do say, however, that these two statutes necessarily divide the over-all transportation service and all railroad facilities into two parts, one governed by the Commodities Clause, and the other by Section 15, subdivision 13, and that from the standpoint of the type of service which this railroad renders, the South Buffalo belongs in the latter category and not in the Commodities Clause category.

We say further that if contrary to the facts these three corporations defendants here could be treated as one entity for interstate transportation purposes, that that entity would fall under Section 15, subdivision 13, and that the Commodities Clause would not apply to it. In other words, if the Government should succeed in convincing your Honor that the corporate veil should be pierced, the only result is that Section 15, subdivision 13, would apply, and the question of what compensation that resultant
37 entity was entitled to from the trunk-line carriers would be presented and no question of the Commodities Clause would be appropriate.

Now, there is a fourth and final question to which my friend has adverted, one not related to the Interstate Commerce Act, but to general equity jurisprudence. He has indicated, I think more or less clearly, that all the factors in the relationship between the holding company and the railway which could possibly be suspect in any sense at all were five or six years ago completely eliminated, and now the separation of the stockholder and its subsidiary is complete in every respect, except, of course, the stock ownership relation.

You have been told by Mr. Craig that in 1937 the Interstate Commerce Commission commenced an investigation. Well, it did so, and some years later its Examiners made a report on this very subject, and the Examiner have this to say about this question, and I quote them:

"So far as the record shows, since October 1922, the Delaware corporation and its predecessors, as holding companies of the South Buffalo's stock, have not demonstrated an interest greater than may be expected from a controlling stockholder for the purpose of a bona fide separate administration of the carrier's affairs. None of the holding company directors or officers ever has been a director of the South Buffalo. * * * However, consideration should be given to the fact that the Delaware corporation and its predecessors also have been the holding companies of the stock of the Steel Company, raising the question as to whether the latter may be regarded as the agent through which is being done by indirection that which the Commodities Clause prohibits."

So that this case does not present concededly any proof of abuse by the Company which owns the South Buffalo stock of its power as a stockholder; and the report of the Examiners following this quotation recommended that no violation of the Commodities Clause be found to exist.

When the practices and relations (other than stock ownership) which the Government mainly criticizes and which were referred to by the Commission's Examiners whom I have quoted were brought to the attention of the holding company officers in 1939, they were corrected down to the last detail, I believe we shall be able to show, and have not existed since.

Now, I submit that it is familiar law, too familiar to need citation of authority here, that relief by injunction will issue only to prevent a threatened injury, and in view of these facts and the fact that the railway is subject to the constant supervision not only of the Interstate Commerce Commission but the Public Service Commission of the State of New York, there is no such threatened injury, and for that reason the action must fail.

I have indicated that one of the principal questions at the outset in this case is as to the intended scope of the Commodities Clause and whether it can be applied to a situation in which it is perfectly clear that the railroad does not own anything which it is transporting. I submit that the history of the Act shows clearly that it was never intended to apply to industrial terminal railroads, that it was intended only to apply to line-haul railroads, and then only if they themselves had produced and retained

an interest in, or owned, the commodities which they were transporting.

Both the Commodities Clause and Section 15 (13), to which I have referred, came into the Act in 1906 as the Hepburn Amendment. It came into the Interstate Commerce Act as the Hepburn Amendment, and the circumstances which lay behind the
40 enactment of the Commodities Clause are clearly demonstrated to have reference to the fact that for a number of years prior to 1906, interstate trunk-line carriers which had lines of railroad tapping the anthracite coal regions in West Virginia and Pennsylvania, had been engaged in an attempt to gain control of the coal business, both its production and its transportation, and the railroads had obtained title to a large part of the coal lands in those states and had used their position as carriers to exclude from the markets independently owned mines and had been guilty of various antitrust practices in this connection.

In 1905, the Supreme Court had decided under the antidiscrimination section of the Interstate Commerce Act that the Chesapeake & Ohio Railroad could not sell coal to the New Haven at less than the going market price plus the cost of transportation. The substance of that decision was that an interstate railroad company could not use its ownership of coal to defeat the antidiscrimination part of the Interstate Commerce Act, and it was following the publication of that decision in 1905 that Senator Elkins introduced the Commodities Clause as a part of
41 the Hepburn Amendment. Thus the Commodities Clause has two sources: First, the attempt of the eastern interstate trunk-line railroads to obtain a monopoly of the anthracite coal trade by purchasing coal lands, mining the coal, and themselves shipping the coal to tide water; and, second, the power which the Supreme Court had declared to exist in Congress to prevent the railroads from making use of their ownership of the commodity transported to defeat the public policy embodies in the Statute.

So that it is perfectly clear—and I think that when the time comes we will be able to demonstrate by reference to the Congressional Debates—that the Commodities Clause was intended to prevent interstate railroad companies from transporting commodities from one state to another which they owned or which they had produced.

The Supreme Court, I believe, has never extended the scope of this law beyond that statement, and I should like to take just a moment to refer briefly to the very few decisions on this question which have come from the Supreme Court. The Delaware & Hudson case in 213 U. S. 366, was the first one. It was a consolidation of six cases brought against six major eastern

42 anthracite trunk line carrying railroads. In that case the Court declared the Act constitutional, subject to two limitations. Those limitations were, first, that the Court said the Act was inapplicable to railroads which owned the stock of all coal-producing companies in the absence of domination. So that we find that principle right at the very outset.

And, second, that the Act was likewise inapplicable to railroads which had produced coal, but which had sold it before they transported it. That case was followed by the Lehigh Valley and the Erie decisions to the same effect.

Then the fourth case was a case against the Delaware, Lackawanna & Western Railroad Company in 231 U. S., where that railroad had purchased itself and transported hay for use at its coal mines. The Court ruled that this was a violation of the Commodities Clause since the railroad was both the owner of the hay and the transporter of the hay. The situation obviously fell squarely within the language of the law.

A few years later, in 238 U. S., there was a second Delaware, Lackawanna & Western Railroad case, in which the railroad, which owned coal mines, had mined coal and purported to

43 sell it to a coal company, but the coal company had the same stockholders as the railroad, and under the contract between the two corporations the Court held that the railroad actually continued to control the coal until it reached its ultimate destination at tidewater. This contract the Court held did not transfer the ownership of the railroad in the coal, and therefore the railroad not having effectively disposed of its interest the further transportation of coal under that kind of a contract was enjoined. Again the Act was applied as its words would mean to the ordinary reader.

The next case was the Reading Railroad Company case in 253 U. S. In that case an action was brought jointly under the Sherman Act and the Commodities Clause. The defendants were the Reading Company, a holding company, its railroad subsidiary of the same name, and its coal company subsidiary, together with the Central Railroad of New Jersey, in which the Reading Company had a controlling stock interest, and the coal subsidiary of the Central Railroad of New Jersey. Domination and a policy to monopolize the ownership and transportation of coal in the anthracite region were proven conclusively. The relief

44 granted was principally under the Sherman Act. The Court held, however, that under the Commodities Clause a decree requiring the Reading Company and the Central Railroad of New Jersey to sell their stock and security interests in their coal subsidiaries was also required. The basis of the decision

under the Commodities Clause, however, was not that the Reading Company (the holding company), or the Reading Railroad had any interest in the coal which the railroad was transporting, but that the officers and directors of the holding company were also officers and directors of both the railroad company and the coal company. The operation of the three companies resulted in the production and transportation of the coal under the same authority. It clearly appears from the record that the holding company in that case was in fact a railroad company. The record shows that originally both coal lands and the railroad line had been owned by the old Reading Railroad, and that the division into three corporations, a coal company, a railroad company, and a holding company, was brought about in the course of a reorganization and was motivated by a desire to evade the legal requirements of the Constitution of the commonwealth of
45 Pennsylvania, which forbade a railroad to trans- coal which it owned. So that the Reading Company case I submit cannot be relied upon by the Government as asserting the proposition that the Commodities Clause applies to a holding company which is not primarily a railroad company at all.

The last case prior to the E. J. & E. case, and the last one in which relief was granted under the Commodities Clause, was United States against Lehigh Valley in 254 U. S. That also was brought under the Sherman Act and the Commodities Clause. The decision is based almost entirely on the Sherman Act, the relief g..nted under the Commodities Clause being limited to an injunction against a contract of sale of the coal which is said to be identical with the one reviewed by the Supreme Court in the second Delaware, Lackawanna & Western case, and which was there held not really to transfer ownership in the coal at all until after the transportation had ended.

The results then of these cases, all decided before the E. J. & E. case, it seems to me are these: In all of the cases the corporations and their subsidiaries being deemed to be a single entity were in fact railroad companies, and that is what the Com-
46 modities Clause says, railroad companies cannot transport goods which they own. Secondly, in all of the cases in which relief was granted, except the Reading case, the railroad either then owned or produced the commodity transported, and in those situations where it had produced it continued to retain control over the commodity by contract, and the Reading case rests not upon any property interest in the commodity by the railroad which was transporting it, but upon the fact that the commodity had been produced and transported under the same authority, that is, the authority of the common officers and direc-

tors acting for the holding company which was in substance a railroad company. Thus in point of fact the Reading case falls squarely within the language of the Clause.

Finally, all of these cases ruled that stock ownership alone was not enough to bring the situation into conflict with the Commodities Clause. And that brings us to the E. J. & E. case itself. As I have said that involved a similar corporate set-up, the United States Steel Corporation, a holding company owning all the stock of the E. J. & E., a trunk-line railroad, and all the stock of its various steel-manufacturing subsidiaries. However, there
47 was the essential difference in the character of the two railroads, the E. J. & E. being a trunk-line carrier going into at least two States and being nearly 200 miles in length. In that case the Government argued that the holding company form of stock ownership was illegal per se, because the holding company's ownership of the stocks of its railroad and manufacturing subsidiaries was not simply for the purpose of investment, but was for the purpose of controlling such subsidiaries. The Government also argued that if it was not per se illegal, it was at least prima facie evidence of violation of the Clause. And finally the Government also argued that if they were wrong about those two things, domination in fact was disclosed by the evidence in the record, and the Government pointed to such facts as these: The United States Steel Corporation's bylaws and perhaps its certificate of incorporation authorized its president to supervise the activities of all of the subsidiaries. The evidence showed that pursuant to that direction in the bylaws, the president and officers and directors of the holding company supervised closely the finances and the management of the railway company. The Government pointed to the fact that the railway officers, which
48 there was strong evidence, were completely under the domination of the holding company, executed all contracts for the benefit of the railroad, and then thereafter submitted them to the railway directors for formal ratification; that the president of the Steel Corporation, the holding company, himself had negotiated some of the railway's most important contracts; all of which the Government argued showed a domination so extensive as to bring the Clause into operation regardless of any other fact.

In spite of this evidence and more of the same character, the Supreme Court ruled, with three judges dissenting, that the Commodities Clause had not been violated, stating that under the construction of the Clause which had been established by the cases to which I have referred the corporation device of having a holding company and two subsidiaries was not itself a violation and that the evidence of domination was not of such a char-

acter, strong as it was, to bring the Clause into operation, because forsooth the holding company, a stockholder, had a legitimate field of activity, it had a right to be interested in the affairs of its subsidiary.

The Government complains here that the Bethlehem Steel
49 Corporation has invited Buffalo businessmen to act as directors and says that that makes the Buffalo businessmen but agents or creatures of ours, without any independent judgment or existence. We answer to that that that is only normal, the exercise of a right which our stock ownership gives us. We have a right to vote the stock for the election of directors. That is the law. Of course, Mr. Grace as President of the Company which owns the stock is only acting normally and not in violation of the Commodities Clause when he sends for Mr. Petty and asks him if he will accept if nominated by the Board of Directors the office of President, and he is only acting normally if he sends to New York or to Buffalo to ask certain prominent members connected with institutions having business relations with the Steel Corporation and the Steel Company and the Railway Company as to whether or not they will accept election on the Board of Directors.

The minority in the Supreme Court in the E. J. & E. case did not disagree with the proposition of law that there was nothing wrong about stock ownership, the normal exercise of a stockholder's interest in a subsidiary. What the three dissenters disagree about was as to whether or not the evidence showed a
50 complete destruction of the subsidiary. They thought it did.

After the decision had been rendered and after the Interstate Commerce Commission's examination had continued it was only natural that companies such as ours, whose situation was so closely analogous to the United States Steel Corporation's situation should look into their own affairs, and put their house in order, and try to conform with the doctrine laid down by the Court, and if there was anything in the dissent which raised any question in their mind as to how far the interest of the holding company could be exercised, I think it quite properly took steps to correct it even though perhaps it was not wrong. And that is what happened in 1939 and 1940, and that is what has existed ever since.

Now, it is of great significance, I think, in considering the Commodities Clause to realize that for years the Attorney General of the United States has been petitioning Congress, urging Congress to amend the Clause so as to give it the scope which he now seeks to induce the Court to decide that it has.

Further than that, beginning in 1933, I think, the Co-ordinator of Railroads commenced to send out inquiries to shippers

and others with respect to their views as to the possible extension of the Commodities Clause, and in 1939 a bill was introduced in Congress which subsequently became the Transportation Act of 1940. In that bill as originally introduced it was proposed that the Commodities Clause be amended and extended so as to cover commodities of railroads, their subsidiaries, their affiliates and their controlling persons. Now, the words "controlling persons" is a very broad term. It results, I think, in the perfectly clear realization that it was aimed primarily at industry owned railroads, because both the United States Steel Corporation and the Bethlehem Steel Corporation are certainly controlling persons of their respective railroads. It was aimed then at all industrially owned railroads, of which there are several hundred in this country, many of them entirely similar to the South Buffalo. The Senate Committee rejected that proposal as far too drastic. The amendment did not pass and was never heard from again. But in the Act that did pass we find that Congress extended to motor carriers and to water carriers the provisions found in Section 15, subdivision 13, with respect to compensation of owners of property for services rendered in connection with the transportation, and we find that Congress did use the phrase "subsidiaries, affiliates, and controlling persons" in connection with many clauses in the new Transportation Act. Those clauses had to do mainly with reports to be filed with the Commission, with consolidations and things like that, but the Act provided specifically that the definition of control to be found in the phrase "controlling persons" should not apply to the Commodities Clause. So that it seems to me to be perfectly clear from both the prior and subsequent history of the Act and the attempts, all of which have failed, to amend it by extending it that the Commodities Clause must be applied as it was written and specifically that it cannot now be held that under that Clause a commodity produced or owned by a parent of a railroad is owned or produced by the railroad. That cannot be held under the Act in view both of its words and in view of its history.

Secondly, that a steel holding or manufacturing company owning a short-line railroad whether by stock ownership or otherwise is a railroad company under the Act. That cannot be held. The phrase "railroad company" cannot be held, I say, to include a steel holding or manufacturing company owning a short-line switching terminal railroad. And, finally, that a short-line railroad performing switching operations within one State is not a railroad company which transports commodities from one state into another. The language in the Commodities

Clause "transporting a commodity from one state to another" was used advisedly as its history shows and not merely a shorthand designation of interstate commerce. This line may be engaged in interstate commerce because its initiates an interstate movement, but it does not transport commodities from one state to another.

So I say that it is perfectly apparent that this Clause applies only to interstate trunk-line railroads.

Now, it is, of course, true that where a parent subsidiary relation is actually being used by a railroad company or by a railroad holding company, which by reason of the primary character of the business is in fact a railroad company, to evade the Clause and do what it forbids, a cause of action was made out. That clearly was the situation in the Reading case. There the actual character of the enterprise, the obvious attempt to monopolize the ownership and transportation of coal, made a strong cause for
54 granting relief. The same situation of domination prevailed in the Delaware, Lackawanna & Western and the Lehigh Valley cases, although those decisions actually rested upon the fact that the railroads had not surrendered control over the coal which they produced, and the only relief granted against them was, as I said, to enjoin transportation of coal under the existing form of agency contracts. In all of those cases in point of substance an interstate railroad was so dominating the affairs of a subsidiary, either by contract or common officers and directors or otherwise, as to permit in substance the railroad to monopolize the coal trade.

Now, may I compare for a moment that situation with the charges of alleged misconduct against us. Mr. Craig says that the railroad is operated as a unit in a steel business and the railroad's chief customer is the Steel Company and 30 per cent of its business comes from other customers. It serves the railroad and its other customers without discrimination in favor of the Steel Company. I mean it serves the Steel Company and its other customers without discrimination toward the Steel Company. Of course, it tries to render the best service it can.

56 Mr. Craig said that it has officers in common with six other short-line subsidiary railroads. Does that indicate that it has no separate existence apart from the company which owns its stock because its officers are officers of other railroads? That is all done with the permission of the Interstate Commerce Commission, and subject to their jurisdiction and their regulation.

He says that we moved cars at the Lackawanna plant at the plant's convenience and not ours. We shall show from the testimony of shippers on our line and from testimony of other railroad men that we render no greater, no more specialized, no more

favored services to the Lackawanna plant than we do to anybody else, or that any railroad in that situation faced in that business would do and does do in this very switching district so far as their relations with large shippers are concerned. He says that we falsify car-delivery records and thereby make money dishonestly. He says that we received two capital contributions from our parent, but he has very little to say about whether we got it or not, and that our employees had the benefit of a relief plan which is presumably operated by our parent.

57 Now, I submit to your Honor that those charges have no relation to domination whatsoever. What relation have they to the purposes or the provisions of the Commodities Clause? If we falsify car-delivery records maybe we do something which violates the Interstate Commerce Act; and I may say that that charge has been made against us in a proceeding which has been pending here for years, and which is still pending. Practically all of the evidence which Mr. Craig will seek to introduce here in that connection, as well as many other connections, has been taken at tremendous length before the Interstate Commerce Commission on both sides and has been fully explored, and will be completely handled by the decision when it comes down, and is finally affirmed or reversed in the proper tribunal. It seems to me to have no place here whatsoever, and yet a large part of his case is going to be through a thousand-paged deposition of an Interstate Commerce Commission expert named McLean who came out here and conducted a hearsay investigation of our records and then testified at great length in this Interstate Commerce Commission proceeding with respect to practices indulged in by our railroad which he said violated the Interstate Commerce Act. Now,

58 Mr. Craig having taken this long deposition from him in Washington, in which he has gone over the same ground again, proposes to introduce that here on some theory that it is relevant to the Commodities Clause. Of course, that throws the burden on us of putting in again the very voluminous and complicated defense which we have already done once in the proceeding entitled "Ex Parte 128" before the Interstate Commerce Commission. There will be no evidence affirmatively that it ever was a part of the holding company's policy to dominate the railway.

I have referred to the statement of the Interstate Commerce Commission Examiners in which they state that fact explicitly. There will be no evidence of a continuous supervision of the railway by the high executive officers of either the holding company or the Steel Company. At most the evidence to which Mr. Craig has referred is evidence of perhaps too much of an interest in or

advice to the railway by plant officers out here at Lackawanna whom, of course, were very much interested in getting as good service from the railway from day to day as they could.

59 My friend has referred to the fact that the railway utilized the services of Steel Company officials such as chief engineers and employment men and other advice and services of a specialized character. That was all done pursuant to an arms-length arrangement between the two companies when we utilized as our chief engineer the chief engineer of the plant. We paid for that service and we did it then because we thought in that way we could get the best service, and when we utilized the facilities of the Steel Corporation for our employees, we only did it because they had a well-equipped medical dispensary where they could give a physical examination, and we didn't, and we paid for that. But the Steel Company did not tell us what men to hire or set our rates of pay. We hired our own men and set our own rates of pay. We used our medical department for the rendition of that special service but we paid for it.

60 I say again that any consideration of the Transportation Act drives one to the conclusion that the commodities clause and Section 15–13 divide interstate transportation service into two parts; one of which being line haul transportation service and one that the owner of the property is forbidden to perform; the other consisting of the switching and terminal service, the owner may not only lawfully perform but may insist upon being compensated by the Trunk Line carrier for whom he, in effect, the owner, renders that part of the service; and that the South Buffalo Railway and its services and its facilities fall within the contemplation of Section 15, subdivision 13, and not under the commodities clause. Indeed, since switching and terminal roads perform the first and the final stage of transportation, Section 15–13 must apply to those services if it applies to any. And, of course, that is all this little railroad does, is to deliver empty cars, which it gets from the big trunk line carriers, to the plants which desire it on the line of the little railroad and then switch them away again after they are loaded and deliver them back to the trunk line carriers, which take them on their road haul journeys.

61 It is only necessary to look at the map to see that what this little terminal line does is to switch the cars which come in on the trains from the trunk line carriers—and there are eight or nine or ten or them—by connecting with this line and deliver them to the plants and switch then on the proper tracks and spot them where they belong, and then, after they are loaded, pull them out and deliver them back to the trunk line carriers.

I submit that this kind of a service cannot be subjected both to 15–13 and the commodity clause. And I submit that while the

Legislature has continued to limit the commodities clause strictly to railroad companies and their commodities, it has extended 15–13 to common carriers generally. Even if the question were otherwise open, which it is not, I believe, the interpretation uniformly placed upon the clause by the Commission and the Attorney General precludes an interpretation of the commodities clause so as to make it applicable to the South Buffalo Railway. For forty years the Interstate Commerce Commission has known of the stock and the plant relations between the Lackawanna Plant and this railroad. For that period of time the Interstate
62 Commerce Commission has known the manner of the operation of the railway and the kind of services which it renders. Prior to our acquisition in 1922, the Interstate Commerce Commission knew that the plant and the Railway had common officers. Yet, in spite of its clear duty to report to the United States Attorney if there were a violation, it never made complaint of the South Buffalo. More than that, it has permitted for years and accepted commodity tariff schedules filed by the trunk line carriers which disclose the trunk line carriers were paying the South Buffalo eighteen cents, I think it is, a ton for connection terminal service. It has likewise on file, and has had for years, South Buffalo tariff schedules showing the rates of payment due to use for switching and related terminal service in connection with these shipments and movements of cars to and from the Bethlehem and other plants.

So I submit that, on all of these grounds, we shall show that the commodities clause would not apply to the present case, even if the South Buffalo Railway Company were industry-owned and operated directly. And I submit that in this connec-
63 tion there is no issue of fact present in the case. The character and extent of the South Buffalo Railroad as a local terminal and switching line will be clear on the record and I think is substantially conceded by the Government; and, in the last analysis, I take it there is no question presented except one of law. And I am reenforced in that conclusion because the only charging part of the complaint here is to be found in paragraph 18, which has subdivisions, I think, a to i. Now, in paragraph 18 the Government begins by alleging that the Holding company, Bethlehem Steel Corporation, directly and through the Steel Company, uses its stock ownership in the Railway in a manner not usual with stockholders, to dominate the operations of the Railway, to destroy its independent management, and to bring it within the control of the holding company and the Steel Company. All of those allegations are conclusionary allegations. If they set forth any allegation of fact at all, it is that the purpose of the Holding company and the Steel Company is to operate the

Railway substantially as a branch of the business of the Steel Company. We shall show that it is not the fact that
64 the Holding company uses its stock for any such purpose.

Obviously, in order to establish the affirmative of that allegation, it is necessary for the Government, in some manner, to tie together elements of stock ownership and of alleged domination. But they cannot do it directly. They cannot show any policy or any domination on the part of the Steel Corporation directly. So they seek to have recourse in the charge that the Steel Company is doing it as agent. But there is no evidence of this whatever, except evidence that certain Lackawanna Plant officials did things which the Government says constitute domination.

Now, an examination of the evidence, in the light of what we shall show, I believe will establish that these incidents stem, not from a policy of domination, but, first, they stem from the undoubted desire of Steel Plant executives to obtain from the Railway the best service that they can get. And, second, they stem from other relations between the Steel Plant and the Railway, such as this: The Steel Plant owns and leases part of the land over which the Railway runs, and is interested as landowner then in certain questions which arise between the two, as the evidence will show, in connection with the land.

65 A third source of proper interest on the part of the Steel Plant executives in railroad affairs arises from the fact that, as we have said, the Steel Company performs certain engineering and electrical technical services for the Railroad, because the Steel Company is more expert in that field, if you please. And, fourthly, there is a relationship, perfectly proper as a matter of business, between the two companies, in such matters as fire protection and police protection, and, as we have said, the examination of prospective employees for the Railroad, perfectly proper matters which could just as well be performed by outsiders and which would be performed in the same manner were they to be performed by outsiders.

My friend has also said that there are some instances in which it appears that plant executives of the Steel Company are referred to in communications as executives of the Railway, when they were not. All of these communications are old and the circumstances under which they were written and the reason for the misdescription is not clear and probably will not be made clear because the participants in the correspondence are dead.

But whether due to the fallibility of the human element,
66 whether the writer of the letter did not know the official capacity of the one to whom the letter was addressed, or whether the practices date back to the time of Lackawanna Steel Corporation operation, they are, I submit, far too haphazard to

indicate any such policy of vicarious domination of minor steel executives, as my friend indicates had to come down from Mr. Grace through the Holding Company, through the Steel Company, and these little men who wrote these misdirected letters.

In the deposition of Robert MacMath, the Secretary of the Holding Company, Mr. Crag has already asked him about this and he has said that in some instances in the Railway-Steel Company relation the theory of Management may have slopped over; and that is, I think, the most that can be said for any of this evidence.

The Holding Company, which, like other stockholders, had a right to be interested in the affairs and operations of its subsidiary certainly did not exercise that kind of domination, even through the Steel Company, which one would expect had domination been intended.

I shall refer, with your Honor's permission, to one or two
67 more of the factual allegations all contained in paragraph 18. It is alleged that the Railway is a unit in a steel manufacturing organization operated largely by the Steel Company and that, as Mr. Craig has said, the Holding Company is not interested in the operations of the Railway as an independent company, but only as a unit in a larger organization. Well, I suppose that the interest of an ordinary stockholder in his stock ownership is in his investment, rather than in the company operations as such. But the fact that the interest which the Holding Company has in the Railway activities is in its activities rather than in the stock ownership as an investment, it seems to me, is unimportant. The thing that is important is not what the interest was but what they did about it. Like so many charges in the complaint, this charge could be directed against any corporation which owns all the stock of a subsidiary. They own it because they want to be able to elect its directors and have a hand in making the policies of operation and not merely just to silently receive their dividends. That kind of interest has never been held to violate the law.

68 It is also charged that we elect the Railway's directors, and through them we control the appointment of its officers and thus control the acts of the officers. Well, stockholders always elect directors to the extent that stockholders can change directors when they want to. They may be in a position ultimately to control the identity of the officers, and through them to influence policies. But the directors on this Board certainly do not subordinate their own judgment and prostitute their duties as directors just because they happened to be invited to serve and to have been elected by the Steel Corporation, which owns the stock. That would be true if all the directors were employees of the Steel Company, which they are not and have not been since prior to July 1938.

Mr. Craig, in the complaint, or the Department in the complaint, alleges that the directors are not stockholders, as though that in some way robbed them of the power to act independently. Of course, the directors of a wholly owned subsidiary can never be stockholders, and unless there is some requirement that they must own at least one share, are never stockholders.

The complaint alleges that no important step is taken by
69 the Railway without the approval of the Steel Company's Lackawanna Plant management. Since 1939 he has been specifically instructed that the Holding Company does not desire him to try to say anything about the Railway operation, will not permit it, and he should make no suggestions of any kind. Prior to that time, I think the correspondence and the testimony of Mr. Entwistle, who will be produced here as a witness, either by the Government or the defendants, will show that he never overstepped the proper limits of his function as the head of the customer of a railroad, and at no time was trying to run the railroad, with which, of course, he had no connection at any time.

The same comment can be made to the charge that the Railroad subordinates its transportation policy to the desires and wishes of the Steel Company. I think we shall show that it does no more than any railroad would do who has a customer which yields large income and which it is anxious to please.

There is an allegation that the Steel Company supervises the Railway cash funds. Our testimony will be that there has never been any supervision at any time. In the E. J. & E. case, the
70 United States Steel Corporation did supervise the cash funds of the railway and required it to deposit all the money it made with the Holding Company and the Railway could not get any of it back unless it drew a draft on its parent, which the parent had to accept in order to have it binding. That has never existed here. This Railroad has kept its own funds, and the only interest which auditors of the Steel Corporation ever had in its books was in transactions which were between the Railway and the parent, in which the nature of the entry in the Railway's books bore vis a vis of taxing authority some relation to the nature of the entry made in the Steel Corporation books and the auditor of the parent suggested or approved or advised upon the kind of entry made in the books of the Railway. But the entry was made by the Railway's auditor, not by the Steel Corporation's auditor.

I have commented upon the charge that car movements are made at the convenience of the Plant and not the Railroad, and I say again I think we render service in a way that we are obligated to render for your customers and do not discriminate in favor of our biggest customer.

71 There is a charge which has been the subject of bitter dispute between the Government and the Railway, that the Railway has performed services for the Steel Plant without lawful compensation. And this expert witness, MacLain, whose deposition will be presented here, testified that he came up here in 1943 or 1944 and arbitrarily selected a ten-day period of June, June 1 to 10, 1943. He was not here during those ten days but he came up much later. But, having come up here, he selected that period and went to summaries or compilations of our records which had been made by some of his subordinates. And, by the use of the most complicated business machine routine conducted by the Bureau of Census that I have ever heard of, he assumed to analyze our records to show how many cars were moved in the ten days for the Steel Company. And they ran into the thousands. And then he analyzed our records to see whether we got paid for them or not, and he came out with the conclusion that we had not charged for but seventy percent of those movements. Well, like most everything else that he testified to, it turned out to be completely and absolutely false and wrong. But it took us weeks and months to show it. One of the first things that

72 we discovered, on his cross examination, was that when he came to look to see whether we had been paid for it or not, he found that there was a bill of lading form called R–115 which would show whether the movement had been billed for or not and that if he found one of those covering a car movement, why, he admitted we had been paid. But he did not make any examination prior to the 1st of June or subsequent to the 10th of June. He just confined his examination to those ten days. And, of course, when we made ours we found that many movements that he said were not paid for were covered by bills issued on May 31st, and other movements which he said were not paid for were covered by bills issued on June 11th.

Now, I spend that much time on that subject because it is that kind of testimony, through the MacLain deposition, which will put us to weeks and weeks of work and expense and testimony, all of which has already been done, so it is no burden on me personally, the result of which, after many weeks, will be to disprove practically everything MacLain said. I go into it in this much detail because I do not think it has any place in this case.

73 I do not think even Government Counsel claims that he can prove that this Railroad deliberately failed to charge the Steel Company, at the direction of the Holding Company, through the Steel Company as agent to us, to render free service to the Steel Company. I think he is going to content himself with asking your Honor to decide whether to believe MacLain's hearsay examination or our witnesses. And if you believe that we did

make movements without a charge, then he is going to infer that that must have been done because we are dominated. I think it is all improper. I think it is all incompetent as hearsay. But, beside that, I think it is all immaterial here, because it is the subject of an independent proceeding by an administrative tribunal which has complete jurisdiction and power to check it and correct it if it is wrong. And when you get all through with it, if we have not charged enough demurrage, if we have not charged enough freight revenue for movements of this kind, we may have violated the Interstate Commerce Act and maybe we ought to revise our practices. If we have falsified car records so we cheat the New York Central, maybe we should be called to account
74 by the Interstate Commerce Commission and ordered not to do it any more; although, of course, we can show we never did do it, and it is based upon an entire misapprehension of MacLain's, but I say it has no proper place in this case.

The COURT. Did this examination cover any other period except the ten days?

Mr. BROMLEY. Mainly the ten days. He did testify to certain things which subsequently he personally observed, such as he said he saw one of our locomotives sitting on a track doing nothing, and he thereby deduced from that that we were awaiting the convenience of the Steel Plant. He did make a personal examination for one or two days, I think, and noticed certain things that he testified to, but in the main his testimony is confined to his analysis of our records for the ten days. And, as a result of that examination, he makes many, many charges of improper practices, of which failure to charge is only one. He goes into the whole demurrage question, as to whether we have a right to charge demurrage and whether we do it properly. It all depends upon the interpretation of these complicated demurrage rules; and, even if established, I say, falls short of being any evidence of domination.

75 So that I say, when this trial is finished, we expect that we will have shown that the relations between these companies are only normal business relations and the normal relations to be expected from a company which owns all the stock of a switching railroad; and that if the Act applies at all, which we think it does not, we are clearly within the principles laid down by the Supreme Court in the E. J. & E. decision, and we have a right to own the stock and to elect our directors and to do those things in the future which we have done in the past and that we should not be enjoined and should have judgment in our favor.

Thank you.

The COURT. Well, I think we will adjourn now until two o'clock.

(Whereupon a recess was taken until 2 o'clock p. m.)

76 AFTERNOON SESSION, 2 P. M.

Mr. CRAIG. May it please the Court, there were some jurisdictional questions suggested by Mr. Bromley. I do not care to touch on them. There has been no issue raised up to this time. I had supposed that, in view of the state of the pleadings, those jurisdictional questions would have been raised prior to trial time, and I think I should prefer, in the main, to pass up a discussion of those questions until and unless they are made issues in the case.

There has been a good deal of reference, a number of references, of course, to the so-called E. J. & E. case, being the Supreme Counrt case decided in 1936. I might point out on that case that the situation was that the Steel Corporation was alleged to be the dominating influence and the Railroad Company was subordinate, which, of course, is the situation we have here, the Steel Corporation owning the stock, not only of the Railroad but of the Steel Company. I should think that that case would dispose of the contention that in order for the commodities clause to apply that the Railroad Company had to be the dominating influence.

77 There was some reference to what was styled a report of the Examiners of the Interstate Commerce Commission. As I understand it, there never has been a report. Some years ago the Examiners filed a proposed report, to which South Buffalo Railway Company filed many exceptions. The case was reopened and since that time both the Commission and South Buffalo have submitted a great deal of evidence. So that there is no report.

I inferred from what Mr. Bromley said that he takes the position that the Interstate Commerce Commission has exclusive jurisdiction over cases involving the commodities clause. If he did, of course, we disagree with that and, rather, the cases which of course have gone up to the Supreme Court came up through the courts, were instituted in the courts, were not I. C. C. proceedings at all.

Also relative to the E. J. & E. case, I trust I made it clear in my opening statement that we contend that the evidence in this case will bring it within the rule announced by the majority and by the Court in the E. J. & E. case. It is true that we prefer the dissenting opinion by Mr. Justice Stone, but nevertheless, taking as correct the majority opinion, we still claim we come

78 within that, in that we show, I think, that domination of the Bethlehem organization over South Buffalo continues down to date. In the E. J. & E. case it seemed to be conceded all around that the acts of domination had ceased long before the trial, and even long before the complaint had been filed in court. The difference, as I understand, was that the majority said that these acts of domination occurred long, long ago and they have no bearing on the case, whereas the minority felt that the acts of domination were such that they furnished a guide as to the probable conduct in the future.

I think that the other matters which he mentioned, with which I find myself in disagreement, will come up during the course of the trial and no doubt will be the subject of discussion.

You have not anything, Mr. Bromley, before I start?

Mr. BROMLEY. No.

Mr. CRAIG. There has been marked as Plaintiff's Exhibit No. 1 this map, which bears date January 1, 1945, and which at this time the map shows, among other things, the trackage of Bethlehem Steel Company and South Buffalo Railway Company, and at this time the plaintiff offers its Exhibit 1 in evidence.

The COURT. Well, I suppose you are going to show us
79 what these different lines as shown on the map indicate?

Mr. CRAIG. Yes. I propose to put a witness on the stand to explain the map.

The COURT. All right. Received. Marked Exhibit 1,

(Map referred to was received in evidence and marked as "Plaintiff's Exhibit No. 1.")

Mr. CRAIG. And there has been marked as Plaintiff's Exhibit 2 a map showing, among other things, the trackage of Bethlehem Steel Company and South Buffalo Railway Company, dated October 15, 1945.

The COURT. Do you mean by that that they are different dates?

Mr. CRAIG. Yes, sir.

The COURT. Showing changes, you mean, as between those dates?

Mr. CRAIG. Yes. There are some differences between the two maps.

Mr. BROMLEY. May it please the Court, is Counsel offering these maps in evidence?

Mr. CRAIG. I have offered No. 1, this map.

Mr. BROMLEY. I did not hear you. I wanted to object to No. 1. I object to No. 1 on the ground it is immaterial, that he has another map which is closer to the date of the trial. I do not see any reason for two maps.

80 The COURT. The reason I asked, I did not know what bearing it had, showing the different dates.

Mr. CRAIG. I might say, your Honor, that both these maps have been prepared by South Buffalo Railway Company.

The COURT. They are both taken in 1945, you say?

Mr. CRAIG. That is true.

The COURT. What is the reason for both of them?

Mr. CRAIG. There have been changes made since the preparation of this map (referring to Exhibit 1), which I think have a bearing on this case. For all purposes we prefer this map which was originally prepared; and the second map was not submitted to us until in November. As between the two, of course, we prefer to use this map (referring to Exhibit 1), which, as I say, was prepared by the Railway Company. It contains certain tracks which the second map does not contain. And there will be reference in the testimony to tracks which are included on the January map, which are not included on the October map. As I say, both maps were prepared by the defendant.

The COURT. Mr. Bromley, your objection is not to the insufficiency of the proof, as I understand it; it goes to the competency of the map itself?

Mr. BROMLEY. Yes, sir. My point is that the second map,
81 which has been offered as Plaintiff's Exhibit 2, more correctly represents the situation as of the date of trial. There is nothing in the case that depends upon Exhibit No. 1. And the more correct situation, or current situation, is shown in Plaintiff's Exhibit 2. It seems to me one map would do and that two maps are surplusage to the extent of one and we had better rest on the latest dated one, which shows a situation nearest the date of trial, as near as we can make it.

Mr. CRAIG. Your Honor, perhaps if the plaintiff had prepared these maps there might be some substance to that. We look upon this first map in connection with the testimony in this case in the nature of admission by the South Buffalo. It is not a question of simply which map is nearer to the time of trial. It is a matter of tying this map in with certain testimony in this case. It is the South Buffalo that prepared both these maps, not the plaintiff.

The COURT. Well, I think they had better be received, Mr. Bromley. I do not see what bearing any changes have on the questions involved in this case.

Mr. CRAIG. We propose to bring them up.

The COURT. Objection is not raised to the proper proof of
82 the map. Of course, that goes to another question.

Mr. CRAIG. That is right.

The COURT. You object to its materiality. Objection overruled and the map will be received.

Mr. CRAIG. Plaintiff now offers its Exhibit 2, which is the map of October 15, 1945.

The COURT. Received.

(Map referred to was received in evidence and marked as "Plaintiff's Exhibit No. 2.")

Mr. CRAIG. Has that been admitted?

The COURT. Yes, both are admitted.

Mr. CRAIG. Counsel have entered into a stipulation relative to Exhibit 2, as follows:

The map dated October 15, 1945, prepared by South Buffalo Railway Company, which shows, among other things, the trackage of South Buffalo Railway Company and Bethlehem Steel Company at Lackawanna, New York, may be admitted in evidence relative to the property belonging to Bethlehem Steel Company west of the Hamburg Turnpike—and we will identify it later, your Honor. This is the Hamburg Turnpike to which I point.

The COURT. All right.

Mr. CRAIG. The terminology employed was had at the specific request of the plaintiff. Nothing herein shall be
83 deemed to prejudice the right of the defendants to contend that the areas west of the Hamburg Turnpike, designated on the map by number, is a separate plant, or the right of plaintiff to contend that the area west of the Hamburg Turnpike belonging to Bethlehem Steel Company is one plant.

Mr. Bromley, may we have a similar stipulation relative to the Exhibit 1, being the map of January 1, 1945?

Mr. BROMLEY. Yes, sir.

Mr. CRAIG. I might say, your Honor, that, due to the shape of these two maps, we have the directions different from the normal way of placing a map. North is not at the top, as is usually the case. North generally is to the left of this map. The west, Lake Erie, below here, is at the bottom, and so forth.

The COURT. Well, the Hamburg Turnpike runs generally north and south?

Mr. CRAIG. Generally north and south; yes, sir. I will ask Mr. Trageser to take the sand, please.

84 PAUL A. TRAGESER, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Trageser, you are a Vice President and a Director of South Buffalo Railway Company, are you not?

A. I am.

Q. And you are familiar, are you not, with Plaintiff's Exhibits 1 and 2, being the maps previously identified?

A. Yes, sir.

Q. Mr. Trageser, I wish you would come to the Exhibit No. 1, and, using a pointer if you care to, point out and describe the location of the main track of the South Buffalo Railway Company.

A. Starting on the north at the connection of the South Buffalo with the Buffalo Creek Railroad, the Baltimore & Ohio, the D. L. & W., the Erie, and the Nickel Plate, moving south past the plant of the Donner-Hanna Coke Corporation, a plant of Bethlehem——

The COURT. What did you say? What plant?

The WITNESS. Fabricating plant of the Bethlehem Steel Company. (Continuing.) Across Tifft Street, down to Marilla Street—you said the main line, did you, Mr. Craig?

85 Q. Yes, sir.

A. On what we call the Seven Railroad bridge over seven trunk lines, past the plant of the Buffalo Slag——

Q. The track is now headed in a westerly direction, is it not?

A. Yes, sir. (Continuing.) Hanna furnace, across Hamburg Turnpike on the North Hamburg Turnpike bridge, parallel to the Hamburg Turnpike, to the south across the South Hamburg Turnpike bridge—I will go that way first—over to connection with the Pennsylvania Railroad and in another direction to connections with the New York Central Railroad and the Lehigh Valley and following down through the village of Woodlawn——

The COURT. That follows from another direction? The one you have just been describing, is that one extension of the line across Hamburg Turnpike and up into the Pennsylvania connection there?

The WITNESS. Yes, sir.

The COURT. Then you go back to your point on the main line: You are describing another point, are you not?

The WITNESS. That is right; yes, sir.

The COURT. All right.

A. (Continuing.) Down through the village of Woodlawn, past the Western New York Water Company, to the plant of the Federal Portland Cement Company.

Q. What mileage is involved in that main line, approximately?

86 A. That I cannot answer.

Q. Well, is it about six miles?

A. No; I dont think so; not the way I have described it.

The COURT. Is that map drawn to any scale?

The WITNESS. No, it is not. Now, of course, I may say this: That while I have described the main line from one end of the railroad to the other, the railroad has, and in accordance with the rules of the Interstate Commerce Commission, main line tracks which are known as yard main line tracks in this area west of the Hamburg Turnpike [indicating].

The COURT. That is the area dov n toward the Lake?

The WITNESS. Yes, sir. This is Lake Erie here [indicating].

The COURT. That is on account of the service charge there?

The WITNESS. No, sir; it is the way the railroad is set up. Well, that has to do with the matter of designation of the tracks in connection with the Bureau of Valuation of the Interstate Commerce Commission.

Q. What about the distance of the main track beginning here where you did at the Buffalo Creek, and so forth, heading in a southerly direction and westerly, crossing Hamburg Turnpike, following Hamburg Turnpike, then going in an easterly direction up to the—I think you said the Pennsylvania and perhaps other roads?

87 A. Pennsylvania, New York Central, and Lehigh Valley.

Q. Yes. Now, what is that distance, approximately?

A. That distance approximately, if you also take in track here, which I forgot to mention——

Q. Oh, I did not take that in.

The COURT. When you say "here" that does not mean anything. You mean some track?

The WITNESS. Connecting with the main line of the Railway near the Marilla Street crossing.

The COURT. Going east from there?

The WITNESS. Yes, sir. May I have your question, please?

Q. Well, I wanted to know the distance of the main track, starting here at Buffalo Creek and heading south, thence west over the Hamburg Turnpike, thence generally south again paralleling the Hamburg Turnpike, recrossing the Hamburg Turnpike and the points of connection with certain railroads I think you named as being Pennsylvania Railroad as one, New York Central——

A. And the Lehigh.

Q. And the Lehigh Valley.

A. Using your designation, the distance is about six miles.

The COURT. Are you including that? You said a while ago that it was not six miles. You are now including the portion that runs north from Marilla Street—or east from Marilla Street?

88 The WITNESS. Up there; yes, sir.

Mr. BROMLEY. Is it not a fact that you asked him the length of the main line track but you excluded from the question the area which runs south through Woodlawn?

Mr. CRAIG. Yes. I did not include any track—when you say "Woodlawn," I am having trouble to find Woodlawn. I have got the town of Hamburg [referring to map].

The COURT. It runs down to the Cement Plant. You show the point where you separate them. Can I have the line you have indicated at that point there?

Mr. CRAIG. This point south of the Hamburg Turnpike [indicating].

The COURT. What mark is there to indicate that?

The WITNESS. That is a Y there, your Honor.

The COURT. I suppose there is a Y there, but——

The WITNESS. And the one leg of the Y goes up on an overhead bridge over Hamburg Turnpike; the other leg of the Y goes down here; this is Woodlawn Avenue here and this is Woodlawn here [indicating].

The COURT. What I am getting at is, how do we know, the record here, where this Y is? Have you got some point on the map to identify it? That is all. Are you identifying a description of that point by number or letter?

Mr. CRAIG. It is very near to a point marked "Car
89 Repair Shop" on the map.

The COURT. All right. That might identify it quickly.

Mr. BROMLEY. I do not think the witness understood the question, therefore I do not think his answer was accurate. Did you?

The WITNESS. Track in this distance from that point [indicating] up around this way and not down here [indicating].

The COURT. When you say that it does not mean a thing in this record.

The WITNESS. I am sorry.

The COURT. The stenographer takes down just what you say and that does not indicate anything.

The WITNESS. Mr. Craig indicated the track from the connections.

The COURT. We have been all over that. Get down to the point where you said that something in there——

Mr. CRAIG. Marked as "Car Repair Shop."

The COURT. All right. The point there indicated as "Car Repair Shop," isn't there?

The WITNESS. Yes, sir.

The COURT. At that point the main track separates, does it not?

The WITNESS. Yes, sir.

The COURT. One goes up to the Pennsylvania and the
90 Central connection; the other goes down to the Woodlawn cement plant, down there, as I understand it.

The WITNESS. That is right, your Honor.

The COURT. The six miles you have included does not include the extension down through Woodlawn to the Cement plant?

The WITNESS. No, sir.

The COURT. All right.

Q. How much of what you call main-line trackage is from that point very close to the Car Repair Shop, down past Woodlawn, toward or to the Portland Cement Company?

A. I think there is about a mile.

Q. All right. You have—when I say "you", I mean South Buffalo—you have interchange connections with certain line-haul carriers, do you not?

A. Yes, sir.

Q. Will you point out and describe where they are?

A. On the northern end of the line the connections with the line-haul carriers are with the Baltimore & Ohio Railroad, the Delaware, Lackawanna & Western, and, while not a direct physical connection, the Erie Railroad and the New York, Chicago & St. Louis Railroad connect with the South Buffalo by operating over the Buffalo Creek. At the other end of the line, near to the
91 plant of the Buffalo Tank Corporation and the Strip Mill plant of the Bethlehem Steel Company, South Buffalo connects with the Pennsylvania Railroad; and at a point farther east than that South Buffalo connects with the New York Central Railroad; and at a point north, generally north of the connection with the New York Central, immediately adjacent to the roundhouse of the South Buffalo Railway and its locomotive repair shop, it connects with the Lehigh Valley Railroad.

Q. Are there any others?

A. Line-haul carriers, you said?

Q. Yes, sir.

A. Indirectly, on the northern end of the Railroad the South Buffalo connects with the Michigan Central, the Canadian National, the Wabash and the Pere Marquette. Those lines get into the South Buffalo over the Delaware, Lackawanna & Western. I think that is all the line-haul connections.

Q. You have connections with any other types of rail carriers?

A. Yes.

Q. What are those and where?

A. With the switching carrier Buffalo Creek Railroad on the north near the Buffalo River.

Q. Will you please point out and describe the location of the various yards of South Buffalo Railway Company as shown on that map?

92 A. At the northern end of the Railroad, where the connections with the Baltimore & Ohio, Erie, D. L. & W., and Nickel Plate Railroads are, and near the plant of the Republic Steel Corporation, there is a classification and interchange yard.

Just east of that—I am sorry: Just south of that and west of the plant of the Donner-Hanna Coke Corporation there is another interchange yard, interchange and classification yard. Further south—you want me to talk about this map, do you?

Q. Yes, sir.

A. Further south, and near the overhead bridge crossing of the Baltimore & Ohio Railroad, there is shown on the map dated January 1, 1945, tracks which may be said to comprise a yard at the plant of the Buffalo Cindering Corporation; on the map dated January 1, 1945, there is a series of tracks just south of the North Hamburg Turnpike crossing and west of the Hamburg Turnpike, which was known as the North Yard.

Q. When you say "which was known" you mean as of the time of the January 1, 1945, map it did exist, did it not?

A. Yes, sir.

Q. All right.

A. South of that, west of the Hamburg Turnpike, there is a series of tracks known as the South Yard. At the southern
93 end of the Railroad, near the Y, following the track going over the South Hamburg Turnpike bridge, there are a series of tracks which were known as the South End Yards. North of Smokes Creek and north of the South End Yards I have just referred to there is shown on the map dated January 1, 1945, a series of tracks which was called the High Line Yard. There is shown on the map dated January 1, 1945, a series of tracks which was known as the Boat Yard.

Q. Where is the Boat Yard located?

A. It is located south of the Ship Canal dock.

Q. South of and west of or just south of?

A. Just south of. That is the Ship Canal dock. This is the series of tracks I am talking about here [indicating].

Q. Very well.

A. I think that is all of them, Mr. Craig.

Q. You have shown there what is known as the Pocahontas yard or was known as?

A. Well, this series of tracks shown on this map where track scale No. 4 is indicated, was called by the local operating people the Pocohontas yard. It is one of the Railroad's south end yards.

Q. That is south of Smokes Creek, is it not?

A. South of Smokes Creek; yes, sir.

The Court. What you indicate by Smokes Creek is shown there running into, extending into the Lake?

94 The Witness. Yes, sir.

Mr. Craig. It is marked, your Honor, on the map.

The Court. I could not see from here. It would be immediately south of there, would it not?

The WITNESS. Yes, sir.

Q. And what we have referred to as the Pocohontas yard is west, is it not, of another one of your yards?

A. Yes.

Q. West of what yard?

A. I am sorry, I don't remember what designation the local operating people gave to these four or five tracks here [indicating] that I think you are referring to.

Q. Is that known as the coke yard?

A. Some of these tracks here [indicating], one of these yards was referred to as the coke yard, but I don't remember which one.

Q. Well, at any rate, south of Smokes Creek what we referred to as the Pocohontas yard is the most westerly of the South Buffalo yards; is that not true?

A. It is the most westerly of the three south end yards.

Q. Yes. By the way, on this map isn't it true that South Buffalo tracks are shown in white?

A. Yes.

Q. And that the Bethlehem Steel Company's standard gauge tracks are shown in a color which is approximately red?

95 A. Well, I would call it red. That is what the legend says.

Q. It does not state the color?

A. Yes; that is right.

Q. But that is my idea of the approximate color.

A. Yes; that is right.

Q. And the Bethlehem Steel Company's narrow gauge tracks are shown in yellow?

A. Yes, sir.

Q. And then there are other tracks, are there not, shown on the map in green? They represent the tracks of other industries, do they not?

A. That is right.

Q. Will you just point out a few? I do not care to cover them all, but just point out to the Court where some of those other industry tracks are.

A. Yes, I will do that, Mr. Craig, but will you tell me catch up with myself? I have just realized that when I was talking about the yards I overlooked some.

Q. Oh, yes, yes; go ahead.

A. At the interchange of the New York Central Railroad there is, of course, a yard; and at the interchange with the Pennsylvania Railroad and the Lehigh Valley Railroad there are, of course, yards. I think those are the ones I overlooked.

Now, as to the next question, may I have it?

96 Q. Well, that was concerning the tracks shown in green, which are the tracks of other industries, and just to direct the Court's attention to where they are, but you might point out a few of them.

A. The Maritime Milling Company, Germania Street, J. D. Cousins Boiler Works——

Q. Which is up toward the north end of the map?

A. That is right. (Continuing.) The Bliss & Laughlin Corporation, Donner-Hanna Coke Corporation, Republic Steel Corporation, Buffalo Cindering Corporation, and another plant of the Republic Steel Corporation, North of Marilla Street——

Mr. CRAIG. Unless your Honor wants more description of that?

The COURT. Well, if you are inquiring about the—I cannot see it in yellow. You referred to these yards as being colored in yellow. It all looks white from here.

Mr. CRAIG. The tracks to which reference has just been made, which are tracks of industries other than Bethlehem Steel Company——

Mr. BROMLEY. They are green.

Mr. CRAIG. Are green. The Bethlehem Steel Company standard gauge tracks are in red and the narrow gauge of Bethlehem——

97 The COURT. You asked about that before but I cannot see the mark in green up there.

Mr. CRAIG. That is right.

The COURT. It makes a very incomplete record here where you refer to the Donner-Hanna Steel Company and the Bliss & Laughlin Company and some of these others, without some markings on the map to show where they are. The stenographic record does not help us any. That is the point. We can see here that all the tracks are off the premises of the Steel Corporation.

Mr. CRAIG. Yes. Those industries are named on the map.

The COURT. Oh, they are?

Mr. CRAIG. Yes, sir.

The COURT. Well, I could not see that.

Mr. CRAIG. Yes, sir; they are named there.

The COURT. All right. I did not know they were.

Mr. CRAIG. My present point is, unless your Honor wanted some more illustrations, pointing out more of those other industries, I will not pursue the matter.

The COURT. No. I cannot see. I see some lettering down at the Hanna Furnace Company, but I could not see the others.

By Mr. CRAIG:

Q. Mr. Trageser, will you point out and describe the location of what is known as the dock property?

98 A. The last time you asked me about that, Mr. Craig, I said that I supposed when you asked me about the dock

property you were referring to the property along the Union Canal. Is that the property you have in mind?

Q. Yes; that is my understanding. Of course, I have never seen it, but it is my understanding of it.

A. The dock property is indicated by the letter M on this map south of the Union Canal, west of the Hamburg Turnpike.

Q. And how far south does it extend from the Union Canal?

A. The dock property?

Q. Yes, sir.

A. This area here [indicating] abuts on the Union Canal.

Q. What do you mean by "this area here"?

A. Marked "M" on this map.

Q. Yes. That is the northern boundary of the dock property, isn't it?

A. Yes, sir.

Q. Do you know what the southern boundary, approximately, is?

A. No, sir.

Q. Does it extend to what is shown on the map as the line dividing the city of Buffalo from the city of Lackawanna?

A. I don't think so.

Q. You think that it is north of the line on the city of Buffalo side; is that right?

99 A. Yes, I do.

Q. Now, will you please locate on the map what is marked as Union Canal?

A. [Witness indicates on map.]

Q. Well, you have indicated. Will you describe its general location?

A. Well, the Union Canal is what I believe to be an artificial body of water extending from Lake Erie east across Hamburg Turnpike and still farther east along the plant of the Hanna Furnace Corporation.

Q. And is all located, is it not, within or north of the dividing line between the city of Buffalo and city of Lackawanna and in the city of Buffalo?

A. Yes, sir.

The COURT. How is that marked on the map?

MR. CRAIG. It is marked "Union Canal," your Honor.

The COURT. All right.

By Mr. CRAIG:

Q. Now, will you point out and describe generally the location of what is marked on the map as "Ship Canal"?

A. Ship Canal is an artificial body of water extending from marks on this map, Buffalo Harbor, south along the ore dock

of Bethlehem Steel Company on the east and what is referred to on the map as the Ship Canal dock on the west.

100 Mr. CRAIG. And I might say, your Honor, that when he refers to "ore dock" it is so marked on the map.

Q. Are you able to locate and define the location of the blast furnaces of the Bethlehem Steel Company?

A. They are indicated on this map as No. 48, No. 49, No. 50, No. 51, No. 52, No. 53, No. 54. That is the map dated January 1, 1945.

Q. And those blast furnaces are located, are they not, east of what is indicated on the map to be the ore dock?

A. They are.

Q. And the ore dock, of course, is immediately east of what is marked, and you have pointed out as the Ship Canal?

A. It is.

Q. There is a Bethlehem Steel track, is there not, which runs between these blast furnaces and the ore dock, known as the high line?

A. No, there is not.

Q. Where is the high line?

A. Well, the high line, which is an elevated trestle, extends from a track of South Buffalo Railway, which is one of a series of tracks east of the scrap reclamation plant.

Q. As shown by a number?

A. No. 40 on the map. That elevated trestle extends north on an elevation along the blast furnace plants of

101 Bethlehem Steel Company that I have indicated.

Q. Well, when you speak of its being a trestle, there is a track on that trestle; is there not?

A. Yes.

Q. And the trestle on which there is a track, which we referred to as the high line, connects, does it not, at its southern end with a track of South Buffalo Railway Company?

A. It does.

Q. And the track with which it connects; that is, the South Buffalo track, is a part, is it not, of what previously you described as the—I think you have described as the High Line yard of South Buffalo Railway Company?

A. That is right.

Q. That is, when I spoke of a track being between the blast furnaces and the ore dock, I would have been more accurate, would I not, if I had spoken of a trestle?

A. Yes, sir.

Q. But there is a track on this trestle?

A. Yes, sir.

Q. Belonging to Bethlehem Steel Company?

A. That is right. I have never been up on the trestle but I understand, Mr. Craig, that there is more than one track. In fact, this map indicates that there is.

102 Q. Well, I have been referring to the one Bethlehem Steel track as shown by this map, which joins the South Buffalo track, which is one of the tracks of the High Line yard. That is, there are no other Bethlehem Steel tracks there that connect with a South Buffalo track coming out of the High Line yard, is there?

A. No, sir.

The COURT. The witness has indicated that there is more than one track at the blast furnaces on this elevated section. I suppose your inquiry is whether there is more than one track down to the connection with South Buffalo Railroad.

Mr. CRAIG. Yes. I am trying to narrow it, your Honor, to the one track on the trestle which joins the South Buffalo track in what is known as the High Line yard.

The COURT. Is there one track there that makes the connection, one or more?

The WITNESS. One track, sir.

Q. Will you please point out and define the location of what is known as the structural shipping yard of Bethlehem Steel Company?

A. Shown as No. 35 on this map; 35 on the map.

Q. Will you point out and define where 35 is?

A. It is in the area west of the Hamburg Turnpike and
103 north of Smokes Creek. I don't know what else to say about it.

Q. Well, it is also east, is it not, of what is marked on the map as track scale No. 3, Yardmaster's office?

A. Yes, sir.

Q. Is that correct?

A. That is right.

Q. But will you point it out for the benefit of the Court, please?

The COURT. I can see it. It is numbered there.

Mr. CRAIG. Yes, your Honor.

Q. Will you point out, please, and define the location, of what is known as the Seneca Plant of Bethlehem Steel Company?

A. Shows on the map as No. 72, lying west of the New York Central Railroad, as indicated on the January 1, 1945, map and directly north of Mile Strip Road.

Q. That is the south end of the map, is it not?

A. Yes, sir.

Q. And is there what is known as the—is it the Kalman Plant of the Bethlehem Steel Company? Is there such a thing?

A. No, sir—not that I know of.

Q. That which is marked 71 on the map and which is just north of 72, which you have described as the Seneca Plant,
104 is marked here on the map; that is, the key to the map, as "Building and Highway Specialty Shop No. 2." Do you know whether or not that formerly was known by any other name?

A. Well, I believe, although I have no positive knowledge, that some part of whatever is indicated here as No. 71 was formerly the property of the Kalman Steel Company.

Mr. CRAIG. Your Honor, we will want Mr. Trageser to testify on another subject, as the case progresses, but for the time being that is all.

The COURT. Just let me ask a question: Does this map show all of the lines of the railroads inside of the Bethlehem property? You were speaking here of yards. I cannot tell from here whether any switches or other parts of any extensions and lines other than are shown on this map, or does that show everything? I mean so far as the railroads are concerned.

The WITNESS. Yes, your Honor.

Mr. CRAIG. Of course, your Honor, I have not had him point out all of the tracks of South Buffalo here.

The COURT. No. I mean the map itself.

Mr. CRAIG. Oh, yes.

The COURT. Does the map itself show all of them? That is what I want to know.

Mr. CRAIG. Yes.

105 The COURT. I did not know whether he was referring to these yards or whether he was conveying the impression that those yards, some of those yards, were used as switches that were not shown on this map.

The WITNESS. If it please you, sir, Mr. Craig has been asking me about the map of January 1, 1945.

The COURT. I understand that.

The WITNESS. You have just asked me about the map.

The COURT. Yes.

The WITNESS. I would like to say that the tracks shown on this map are not the same as the tracks shown on Plaintiff's Exhibit No. 2.

The COURT. I understood there was some claim of some changes, some differences. I suppose we will get into that.

By Mr. CRAIG.

Q. I might ask you: In your operations of the South Buffalo Railway Company you are divided into three districts, are you not?

A. Do you mean operating districts or rate districts?

Q. Well, for any purpose.

A. Well, as far as the operating districts are concerned, while I do not operate the Railroad, I happen to know that it is divided into more operating districts than three.

Q. Well, in connection with switching charges?

106 A. That is a rate matter and the Railroad is divided into three rate districts.

Q. Where are those districts?

A. Well, I have not got a copy of the tariff. I would prefer to be definite about that and read them right out of the tariff.

Mr. CRAIG. That is all right. We can get that later, your Honor.

The COURT. Well, do you want to cross-examine now or later?

Mr. BROMLEY. With your Honor's permission, I would like to ask him one or two questions now.

The COURT. All right.

Cross-examination by Mr. BROMLEY.

Q. You mentioned operating districts. You mean by that something equivalent to a division of a trunk-line railroad?

A. Well, not as significant as that, Mr. Bromley, but the matter of a Yardmaster on the Railroad having a certain number of engines under his jurisdiction in a certain district and another Yardmaster adjacent to him having other engines under his jurisdiction, and another Yardmaster adjacent to that having engines under his jurisdiction.

107 Q. How many such operating districts are there on the Railroad?

A. I am sorry, I cannot answer that question.

Q. Do you think there are more than three?

A. Yes, sir; there are more than three.

Q. His Honor asked you whether on this map of January 1, 1945, all of the South Buffalo Railway track were shown in white and you said yes, didn't you?

A. I think I said yes.

Q. I want to direct your attention to some of these green lines that you were pointing out on the map, which you said, as I recollect, indicated tracks owned by industries other than Bethlehem Steel; is that right?

A. That is right.

Q. Will your direct your attention to the north end of the map, entitled "Buffalo Cindering Corporation," and underneath it a figure 4 in a circle? Do you see that?

A. Yes.

Q. Now, there, those white lines that are underneath the 4 in a circle merge into green lines, do they not?

A. Yes, sir.

Q. And that indicates that—take this northerly white line to the north of Buffalo Cindering Corporation—perhaps the
108 easterly one is best: That indicates that your track comes up to a point, I suppose a part of a continuous line of track, the outer part of which the Railway owns and the inner part of which the Buffalo Cindering Corporation owns; is that right?

A. That is right.

Q. And that is true of each one of these instances where there are green lines, almost, is it not? That is to say that you have one line of track that comes off your main line into an industry and the outer end of it will be owned by the Railroad and the inside part of it, or some other part of it, will be owned by the industry?

A. That is right.

Q. That is quite common in all railroad operation, is it not?

A. Yes, sir.

Q. Now, here, for instance, near this figure 35 about which you were talking, the structural shipping yard?

A. Thirty-five is the mill.

Q. We see here that some of the white lines merge into red lines, do they not?

A. Yes, sir.

Q. And in that instance it means that the part of the track that is in white is owned by your Railway and the part that is in red is owned by the Bethlehem Steel Company; is that right?

A. That is right.

109 Q. And these yellow lines on the map, which you said indicated the Bethlehem Steel Company narrow gauge, have no connection with your Railroad at all, have they? They do not run into your tracks and you cannot—your equipment cannot run on them and their equipment cannot run on yours because of the difference in the gauge; isn't that right?

A. Yes, sir.

Q. And those narrow gauge tracks are for the Steel Company's purposes, with their own small locomotives and their own small cars, to haul certain things around in or between their plants; isn't that so?

A. Yes, sir.

Q. Now, there is a part of the railroad which you did not describe at all, which runs north at a point on the north end of the map where it crosses the Baltimore & Ohio Railroad Company. Will you please tell us what that is?

A. Well, that runs north and east. It runs—it is known—it is shown on this map as the Howard branch and runs, I think, in a bed of Colgate Street——

The Court. Runs south; it does not run north; it runs south and east, does it not?

The WITNESS. South and east; yes, sir.

The COURT. You said north.

110 A. (Continuing.) Howard branch was an old—it was formerly the Howard farm all over there, Colgate Street and Germania Street; and Colgate Avenue continues on up Colgate Avenue and out Hopkins Street; on the east side of Hopkins Street spreads out and one part goes up parallel with the south side of Colgate Avenue to the Newcomb Products Corporation plant and on parallel with the north side of Colgate Avenue to the Van Ott Machine Company corporation's plant. On the Germania Street line there is a Bliss & Laughlin plant, the United States Corrugated Fibre Company factory, Maritime Milling Company's mill, and the Cousins Boiler Works.

Q. At the south end of the map this line that you have described as running south of the Y, near the car repair shop, does that have any other purpose than to serve the plant of the Federal Portland Cement Company?

A. There is one siding connecting with that line that goes into the plant at the Western New York Water Company.

Q. So that that line that runs south from the Y then serves two plants?

A. That is right.

Q. The Water Company plant and the Federal Portland Cement plant?

111 A. That is right.

Q. Does the Federal Portland Cement plant have its own tracks that are joined onto yours, indicated in green on the map?

A. Yes, a trestle track and other tracks.

Q. The Federal Portland Cement has a trestle, does it?

A. Yes, sir.

Q. And is there a track on that trestle, too?

A. Yes, sir.

Q. What is that used for?

A. The unloading of gypsum, stone, sand, and other materials.

Q. Does the Western New York Water Company also have its own tracks that join onto yours, indicated in green on the map?

A. Yes, sir.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. On this line leading from the car repair shop to Federal Portland Cement Company, doesn't that line serve some Bethlehem Steel Company tracks?

A. South of the Western New York Water connection——

Q. And west of it?

A. South of the Western New York Water connection
112 there is a lead track that connects with the Bethlehem Steel Company tracks in their miscellaneous storage material yard.

Q. Which is numbered 63 on the map, is it not?

A. Yes, sir.

Q. Isn't it a fact that the only way access can be gained to this Bethlehem Steel Company's tracks is over the South Buffalo track leading from the area near the car repair shop to the Federal Portland Cement Company?

A. I don't so conceive it, not unless you are going to say to start up here with the line to the Federal Portland Cement; but here is a connection here that comes off and connects with these tracks in the material storage yard of the Bethlehem Steel Company that is north of the Western New York Water Company's plant.

Mr. CRAIG. Well, I think that is all.

Re-cross-examination by Mr. BROMLEY:

Q. When you refer to the south end yards, do I understand you to say they were two in number, Pocahontas and Coke?

A. No; there were three of them.

Q. Pocahontas, Coke, and what else?

A. I don't know that the other one has any designation,
113 special name.

Mr. BROMLEY. That is all.

(The Robert E. McMath deposition was marked "Plaintiff's Exhibit No. 3.")

Mr. CRAIG. There has been marked as Plaintiff's Exhibit 3 the deposition of Mr. Robert E. McMath, which was taken at Bethlehem, Pennsylvania, on October 3, 1944.

At this time the plaintiff offers that deposition in evidence.

Mr. BROMLEY. Since there are objections contained within it and may be objections now, which were specifically reserved to the trial, I do not believe it is proper to offer it in evidence.

The COURT. I thought it was stipulated.

Mr. BROMLEY. No, sir. He offered it in evidence. I object.

The COURT. Well, of course, the rules control that.

Mr. CRAIG. Yes. Pursuant to the pretrial conference, it was understood, I think, that the depositions should be read. Certainly I have not the slightest objection to Counsel's entering objections. When I say "offer in evidence," I offer to read it. The deposition has been taken and, as a matter of fact, it was stipulated at that time when it was taken, by and between Coun-
114 sel for all parties, that all objections except as to the form of questions were reserved to the trial.

Mr. BROMLEY. My only point is that the deposition should not be marked as an exhibit. If he wants to read from it, he may do so just as though the witness were here on the stand.

Mr. CRAIG. Well, I am perfectly agreeable to have the mark removed.

The COURT. That is true. Of course, objections may be made in the course of the examination.

Mr. CRAIG. Yes. In that event, I will have the mark withdrawn.

The COURT. Yes, that is true.

(The mark "Plaintiff's Exhibit 3" was withdrawn and crossed off the deposition of Mr. McMath.)

Mr. CRAIG. And in connection with the reading of the deposition it has been agreed, subject to confirmation and subject to the Court's approval, that when it comes to the cross-examination by Counsel for defendants, when it comes to questions which were propounded by defendants' Counsel during the direct, that those questions and answers will be read by defendants' Counsel and adopted as his own. I say that because Counsel for the plaintiff did not want to take any chances of getting in the
115 position of reading all that, including cross examination, and having them contend at any time that we adopted that as the plaintiff's testimony. Is that correct, Mr. Bromley?

The COURT. Well, proceed. You are going to read that?

Mr. CRAIG. Yes, sir. I have the stipulation we entered into relative to the defendants.

The COURT. All right.

116 Mr. CRAIG. If Your Honor please, I will now read the deposition of Mr. Robert E. McMath. It reads as follows:

Mr. ROBERT E. MCMATH, called by the plaintiff; sworn, and testified as follows:

Examination by Mr. CRAIG:

Q. Will you please state your name and address?

A. Robert E. McMath; Bethlehem, Pennsylvania.

Q. You are a vice president of the Defendant Bethlehem Steel Corporation?

A. Yes.

Q. How long have you been such?

A. Since 1930.

Q. What are your duties as vice president thereof?

A. I am in charge of finances and of legal matters which affect the Corporation.

Q. Are you a director of Bethlehem Steel Corporation?

A. Yes.

Q. How long have you been a director thereof?

A. Approximately some time prior to 1930.

Q. Were you associated with Bethlehem Steel Corporation prior to your becoming a vice president thereof?

A. Yes.

Q. In what capacity?

A. Secretary.

117 Q. Were you associated with the Corporation prior to 1919?

A. Yes; for one year I am assistant secretary, elected in 1918.

Q. And, prior to 1918, were you associated with the Corporation?

A. Not in any official capacity; I was connected with—well, employed in the firm of our general counsel.

Q. Who was the general counsel?

A. Cravath & Henderson, I think was the name at that time.

Q. Was that firm the predecessor of your present counsel of the Corporation?

A. Yes.

Q. You are a vice-president of the Defendant Bethlehem Steel Company?

A. Yes.

Q. And what are your duties as such vice president?

A. In charge of finances and legal problems, primarily.

Q. When did you become such vice president?

A. Approximately 1927.

Q. Were you associated with the Bethlehem Steel Company prior to that time?

A. Yes; prior to that I was secretary of Bethlehem Steel Company, elected in 1919; and assistant secretary in

118 the year preceeding my election as secretary.

Q. And, prior to 1918, you were associated with the law firm?

A. That's right, but in no connection—no official connection—with the Bethlehem Steel Company.

Q. Are you a director of Bethlehem Steel Company?

A. Yes.

Q. How long have you been a director thereof?

A. Since 1919.

Q. Will you state whether or not you are familiar with the relationship existing between the Bethlehem Steel Corporation and the South Buffalo Railway Company?

A. Yes.

Q. Are you also familiar with the relationship existing between the Bethlehem Steel Company and the South Buffalo Railway Company?

A. I am familiar with the relationship of those two companies in so far as they may be said to have any relationship. I believe

the relationship to be only such relationship as arises out of having a common owner of the stock, plus the relationship that Bethlehem Steel Company is a shipper and a consignee of materials which come over the line of the South Buffalo Railway Company.

119 With the details of that relationship I cannot claim any particular familiarity.

Q. Are you familiar with the relations between the Bethlehem Steel Corporation and the South Buffalo Railway Company as they have existed from time to time during the last ten years?

A. Yes.

Q. And isn't it a fact that it has been part of your duties to be so familiar with that relationship?

A. Yes.

Q. Now, Mr. McMath, can you describe generally what is the Bethlehem Steel Corporation?

A. Bethlehem Steel Corporation is a Delaware Corporation whose business consists very largely in the ownership of the stock of numerous subsidiary companies. It has some real estate—coal properties in West Virginia—but does not operate them. It is not an operating company, purely a holding company.

Q. How many, or approximately how many, subsidiary companies does it have whose stock it owns?

A. Approximately fifty—it might be five more, or so.

Q. Is the stock of Bethlehem Steel Corporation listed on any stock exchanges?

A. Yes; the New York Stock Exchange.

Q. Is the stock of any of the subsidiary companies described by you listed on any stock exchange?

120 A. No.

Q. Will you state whether or not Bethlehem Steel Corporation owns all the capital stock of the Conemaugh & Black Lick Railroad Company at Johnstown, Pennsylvania?

A. Yes; with the possible exception of directors' shares which are required in the laws of some states, and I am not quite certain whether there are any of that company.

Q. Does the same situation exist as to the Cornwall Railroad Company at Lebanon, Pennsylvania?

A. Yes.

Q. Is it the same with the Fore River Railroad Corporation at Quincy, Massachusetts?

A. Yes.

Q. And the same with the following: Patapsco & Back Rovers Railroad Company at Sparrows Point, Maryland; the Philadelphia, Bethlehem & New England Railroad Company at Bethlehem, Pennsylvania; the Steelton & Highspire Railroad Company at Steelton, Pennsylvania?

A. Yes.

Q. Is it not true that the relationship existing between the railroad companies which we have just been discussing and the Bethlehem Steel Corporation is the same or much the same as the relationship existing between South Buffalo Railway Company and the Bethlehem Steel Corporation?

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Mr. BROMLEY. I object to that as incompetent because it calls for a conclusion.

Mr. CRAIG. Your Honor, in the complaint there is the allegation that the holding company, meaning, of course, the Bethlehem Steel Corporation, controls and dominates by reason of stock ownership and otherwise seven short line railroads. At this stage of the proceedings we are interested in showing the integration of this entire Bethlehem organization.

The COURT. Your inquiry, I suppose, is directed to the question of its holding the stock of these corporations, is it not?

Mr. CRAIG. That is admitted. We are really going beyond that to show that all these railroads are part and parcel of the over-all organization in operations.

The COURT. You have asked him to compare it with the South Buffalo Railroad?

Mr. CRAIG. Yes; whatever that relationship is. Are they operated in about the same way, therefore tending to show the integration of the entire Bethlehem organization?

The COURT. The question as has been suggested by counsel may be said to call for a conclusion. Do you show later on what

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the relationship was between the corporation and the railway in respects other than the holding of all the stock?

Mr. CRAIG. No; we do not go into the particulars of the operations, and so forth, other than, of course, as I believe is admitted in the pleadings, namely, that the seven railroads do have their officers in common and their offices in common, and so forth. That is, I could not say exactly that we say nothing more about them, but when it comes to detailed operations, no, we do not.

The COURT. The way to avoid any objection as to the form of the question would have been to inquire about these particular relations with the South Buffalo Railway Company and ask him if those were the same as these others. Just what you mean now I do not know unless it later appears. You have not inquired about these other things?

Mr. CRAIG. No; we do not go into the particulars other than what I have mentioned with the other railroads, but we do go into the matter, as I recall it, with this witness.

The COURT. I will withhold any ruling. You go ahead with the testimony and we can go back to that. It may appear other-

wise later. I will withhold ruling for the moment, and you
123 may go ahead with the next question.

Mr. CRAIG. I will give the answer to that question?

The COURT. No.

(Mr. Craig continues reading as follows:)

"Q. Could you say whether or not the relationship, if not identical, is substantially the same?"

Mr. BROMLEY. The same objection.

The COURT. Proceed.

(Mr. Craig continued reading as follows:)

"Q. Could you say whether or not the relationship, if not identical, is substantially the same?"

Mr. BROMLEY. The same objection.

The COURT. Proceed. Leave out the answer until I hear the further testimony.

(Mr. Craig continues reading as follows:)

"Q. I don't believe I inquired as to whether the relationship was identical, but I did inquire and I do inquire now if the relationship is similar or substantially similar?"

Mr. BROMLEY. The same objection.

The COURT. Proceed.

(Mr. Craig continues reading as follows:)

"Q. So far as you know, is the relationship existing similar or substantially similar?"

Mr. BROMLEY. The same objection.

124 (Mr. Craig continues reading as follows:)

"Q. Do I understand that so far as you know the relationship is similar or substantially similar?"

Mr. BROMLEY. Same objection.

(Mr. Craig continues reading as follows:)

"Q. Well, so far as you know?"

Mr. BROMLEY. Same objection.

(Mr. Craig continues reading as follows:)

"Q. Isn't it a fact that all seven of these subsidiary railroad companies which we have been discussing, is operated in the vicinity of a plant or plants of Bethlehem Steel Company?"

A. Yes.

Q. By being "in the vicinity of," do you mean similar to, or substantially similar to being in the vicinity of, as in the case of the South Buffalo Railway Company and the Bethlehem Steel Company?

A. I do not know that I can draw an accurate—make an accurate definition of the word "vicinity." The physical circumstances differ somewhat; I think perhaps the greatest difference is in the case of the Cornwall Railroad Company which hauls ore for a considerable distance, and the other companies are located in the

vicinity of the plants of the Bethlehem Steel Company
125 within the sense that they touch on or reach into the property lines.

Q. That is, there is direct physical connection between the Bethlehem Steel Company and each of the railroads we have been discussing?

A. Yes; in the sense that the tracks of the railroad company either go to, or, in some cases, into the plant properties of the Bethlehem Steel Company.

Q. What is the chief subsidiary of the Bethlehem Steel Corporation?

A. The Bethlehem Steel Company is the operator and owner of the steel plants and of most of the manufacturing activities in that sense, and in the sense that it has the largest financial investment, I should say that the Bethlehem Steel Company, a Pennsylvania corporation, is the company that is the principal subsidiary.

Q. That's the Bethlehem Steel Company which is a Defendant herein?

A. Yes.

Q. Would you describe generally what its business is—what it does?

A. Well, it is engaged in really lots of businesses—many businesses. It's in the steel business——

Q. What do you mean by "steel business"?

A. By that I mean the production of steel in the form of
126 ingots or slabs, and the further processing of the steel into what are known as the "commercial rolled steel products," which consist chiefly of structural shapes, plates, bars, rails, sheets, ternplate, and rods. In addition to that business, Bethlehem Steel Company is engaged in several other operations—it is engaged in shipbuilding and is, I believe, the largest shipbuilder in the world. It's engaged in the ship repairing which is usually a business conducted apart from shipbuilding, and it is, I think, the largest ship repair operator in the world. It is engaged in numerous manufacturing operations which are not usually associated with the steel business. For example, it makes bolts and nuts—there is only one other large steel manufacturer in the country that makes those. The Bethlehem Steel Company also is a large manufacturer of ordnance products, probably the largest in the world. It makes armor plate, guns, projectiles, bombs, aircraft forgings, and numerous other articles as well; those are largely the products of the forging business. It also makes wire rope; it makes frogs and switches for railroad tracks; it makes numerous specialties—road-building specialties, mats that are used in the construction of roads. Bethlehem Steel Company

127 is also the largest fabricator of structural steel products, I think I may say, in the world. In that business it will fabricate the steel and erect it into all sorts of structures; it builds bridges—we built the Golden Gate Bridge, for example, in San Francisco Bay. There are numerous other businesses in which Bethlehem Steel Company is engaged, but I think I have mentioned the major products.

Q. In shipbuilding, considerable quantities of steel are required, isn't that true?

A. Ships are largely constructed of steel, yes, but probably not as much as in ships ordinarily as, for instance, in automobiles. I mention that because I think that while the ship business is a consumer of steel, it is probably true that almost every manufactured article that you can think of is also made in whole or in part of steel. Ships are, at the present time, an important outlet for steel; under ordinary times they are of less importance.

Q. In the building of ships by Bethlehem Steel Company, does it employ or use the steel which it, the Bethlehem Steel Company, manufactures?

A. It does, to a large extent, but not exclusively.

Q. Could you give us an estimate of the Bethlehem Steel Company steel that goes into the ships?

128 A. I can't because everything has been under the direction of the Government during the last few years when we have had an important shipbuilding program, and the Government has, in many instances, sent our steel to other builders and in some instances got other people's steel for our ships; but we are important suppliers of steel products to the shipbuilding industry.

Q. Would you say that the bulk of the steel that goes into the ships which Bethlehem Steel Company builds is manufactured by the Bethlehem Steel Company?

A. That would certainly be true of plates and, possibly, the structural shapes; but, of course, steel takes many different forms; for instance, in the specialties such as refrigeration equipment, motive power, etc., and as to that, I couldn't answer.

Q. Is it true that whenever it is reasonably possible to do so, Bethlehem Steel Company uses its own steel in the ships which it builds?

A. Well, I think these are extraordinary times, and I assume you mean, would it do that under normal conditions? At the present time we would do what the Government told us to, which would probably mean that they would naturally ask us to supply a substantial part of our requirements ourselves because we
129 are equipped to do it and know what the requirements of the shipbuilding division are.

Q. As a matter of fact, isn't that what is being done and what has been done?

A. I would guess so; I can't speak with knowledge—I don't know.

Q. So far as you know that is the situation?

A. So far as I know that is the situation.

Q. And isn't it true that in connection with ship repairing by Bethlehem Steel Company, that that Company employs or uses, as much as is reasonably possible, its own steel manufactured by it?

A. Well, that would be the sensible thing to do, and I think we do it.

Q. So far as you know, you do it?

A. So far as I know, we do it.

Q. Is the same thing true regarding the manufacture of bolts and nuts?

A. Yes.

Q. And in the manufacture of ordnance?

A. Yes.

Q. And in the manufacture of wire rope?

A. Yes—naturally, you use your own raw materials so far as you can.

Q. And the same applies to the manufacture, I take it,
130 of frogs and switches?

A. Yes.

Q. And of structural steel?

A. Yes, and of other products I may have omitted to mention.

Q. Now, we discussed somewhat at any rate, subsidiary companies of Bethlehem Steel Corporation which are railroad companies. Do you have other subsidiary companies engaged in other forms of business?

A. Oh, yes.

Q. For instance, will you give us some instances?

A. Well, we have the Bethlehem Supply Company, which is engaged primarily in the production of some oil company goods, as well as the distribution of those and other oil company products like pumps and other various things they require in connection with the putting in of oil wells.

Q. Are those products made in whole or in part of steel?

A. Yes.

Q. And is steel manufactured by the Bethlehem Steel Company used in the manufacture of those goods?

A. I should suppose so, but they are located at a point where it might not be advantageous to use eastern steel altogether.

Q. So far as you know, such steel is used?

131 A. Oh, naturally, if we can do it cheaper by using our own steel, we will use our own steel.

Q. That, generally, is the case, isn't it?

A. Well, it is in the sense that when you use your own steel you don't have to pay somebody else a profit for the making of it, and usually we have trouble enough selling our steel, so we don't lose any opportunity to sell it to related companies.

Q. In the case of the Bethlehem Supply Company, if reasonably possible, it is preferred that steel manufactured by Bethlehem Steel Company be used, is it not?

A. I should think so.

Q. So far as you know?

A. So far as I know. We have many other activities. We still have a considerable number of houses—real estate. A real estate company has operated those; we have had as many as six thousand houses that are owned by the real estate company.

Q. What is the name of that company?

A. The one that's left is the principal one—the Dundalk Company, which laid out and constructed a substantial real estate development outside of Baltimore, and we have had from time to time other companies which have been dissolved and
132 merged as they ceased to have any business to do.

Q. May I inquire, does any subsidiary presently own houses at or near your plant or plants at Buffalo, Lackawanna, and Hamburg, New York?

A. The company which formerly operated up there, the Bethlehem Land & Improvement Company, was merged into the Bethlehem Steel Company, I think, about three or four years ago, and there may be a few houses left in that vicinity, but most of them were sold and it ceased to be engaged in the business of developing that region.

Q. Do you know if any of those houses are presently rented to any employees of South Buffalo Railway Company?

A. I couldn't tell you.

Q. Do you know what the situation has been in the past as to whether or not any of those houses have been so rented?

A. In the days when the Bethlehem Land & Improvement Company was operating, yes; in other words, when we had a substantial house development, and I am quite sure we would have been very glad to rent them to members or employees of South Buffalo Railway Company or any other railway company.

Q. Do you recall whether you did?

133 A. I don't know, but what I mean to say is that the real estate development was not a success, and there was no great demand from employees or other people there, so that they were rented to whomever might have taken them; there may have been or may not have been some employees of the South Buffalo Railway Company.

Q. All right—may we continue with the business of the subsidiaries?

A. Well, we have important transportation businesses. We hold the stock of two oceangoing steamship lines—the Ore Steamship Corporation and the Calmar Steamship Company; the latter, in particular, under normal times was engaged in coastwide shipping. We have another steamship line which operates on the Lakes and brings down ore——

Q. From where to where?

A. From the upper lake ports to the lower lake ports.

Q. To the Bethlehem Steel Company?

A. Well, I am not sufficiently familiar with the operation to be sure that I am correct in stating this, but it is my understanding that many times the cargoes of the lake carriers are interchanged; in other words, it may not necessarily bring ore down to our plants.

134 Q. Bethlehem Steel Company gets ore from outside sources on occasion, is that true?

A. Oh, yes.

Q. Generally speaking, if you know, where is the ore shipped?

A. I can't answer that with sufficient accuracy to be helpful. I think that, naturally, the ore which is brought down for the plants of the Bethlehem Steel Company would be delivered either at Lackawanna, if it is for the Lackawanna Plant; if it is for the Johnstown Plant, I suppose it might go to one of the other ports.

Q. Do you know as a matter of fact that ore is so shipped on the boats of the company under discussion to Bethlehem Steel properties at Lackawanna, New York?

A. Oh, yes; a good deal would be shipped that way—probably most of it that is used there.

Q. Is that true also of the other plants of Bethlehem Steel Company where that is feasible to be done?

A. Naturally, when you are in a business you get as many orders as you can, and there are instances where our ore boats many times have pretty tough going to have enough cargo to keep them busy. At those times, particularly, we would not like to

135 have the boats of our subsidiaries tied up in order that somebody else could operate. I might say that, primarily, those companies are engaged and operating for the purpose of making money in bringing down ore or taking up coal; they take coal in return cargoes which, in most cases, is not our own coal. They do whatever they can to reduce their costs and make as much profit as they can in the various ways of doing it.

Q. You would prefer to have the ore that is used at the Bethlehem Steel Company at Lackawanna shipped by a subsidiary of the Bethlehem Steel Corporation?

A. Well, I don't know as I would care so far as my viewpoint is concerned; if the ship was busy and made as much money from carrying somebody else's ore as it did from carrying ours, that would be entirely satisfactory. Naturally, you have the steel plants and you must have ore that suits them for their operations, and it would be natural and perhaps necessary for one to know, as the ship comes down, where the ore is going—they are all destined to some place when they leave the upper lake ports, I should assume, but our interest in it, as far as the Bethlehem Steel Corporation is concerned, is the operation of the boats and to give them as good an operation as you can.

136 Q. And by that you mean you want to keep those boats busy?

A. Sure.

Q. If you can help to keep the boats busy by shipping ore on boats of the subsidiary to property of the Bethlehem Steel Company, you are interested in having that done, aren't you?

A. I would be, very much; yes.

Q. Well, so far as you know, isn't the corporation so interested?

A. Well, I think the corporation most certainly is.

Q. You referred to the Calmar Steamship Company as being engaged in coastwise shipping. Will you tell us more about that, please?

A. That's practically largely a thing of the past; the Government commandeered all of our boats, and I guess most of them have been sunk, and the others are still in the control of the Government, so it has been negligible, as far as coastwise business it concerned, for the past two or three years.

Q. And prior to that?

A. Prior to that it was an active steamship company soliciting business, freight business of all kinds, taking as many of the products of Bethlehem Steel Company as it could get, and

137 bringing back cargoes from the West Coast to the East Coast. The lines are primarily in the coastal trade, and I can't better describe it than to say it was a typical shipping company.

Q. It carried products of the Bethlehem Steel Company?

A. Yes.

Q. In large amount?

A. Not as large as they would have liked, but whenever the opportunity was there, they were there to solicit the business, and they didn't carry all of the products going to the West Coast; nor were they exclusively occupied in carrying our products.

Q. Was Bethlehem Steel Corporation interested in having this steamship company carry the products of the Steel Company?

A. Well, I can only answer that the same way I did with reference to the Lake boats—being in the business of transportation,

naturally, you do everything you can to get business for it, and it was never necessary that I can recall for Bethlehem Steel Corporation to ever urge the employees of the Calmar Line to go around to the Bethlehem Steel Company offices and solicit business.

Q. Why was that?

138 A. Well, I think because the Calmar Line operators had sense enough to know that they had a chance to get business there; perhaps better than if they went to a total stranger.

Q. And why a better opportunity?

A. I don't know that it is—let's say they were apt to know the officers and employees of Bethlehem Steel Company, and they, naturally, were aware of the fact that Bethlehem Steel Corporation had an interest in the lines——

Q. That is, wasn't it——

A. I think I may also say that when they were constituted originally it was with the belief that more satisfactory service to the West Coast could be rendered than was then obtainable.

Q. Wasn't it pretty well understood between the officers and employees of the Calmar Steamship Company and the Bethlehem Steel Company that whenever reasonably possible that products from and to Bethlehem Steel Company should be carried on the ships or boats of the Calmar Steamship Company?

A. I don't recall any orders to that effect that were ever given. I should assume that that would be done——

Q. What would be done or should be done?

139 A. That the business, if available, would be shipped over the Calmar Line, but I think that that would be conditioned upon the belief that the service would be, let's say, more reliable. I have in mind particularly problems that we had in the shipment of products to the west coast which were improperly stowed away, or for other reasons—perhaps, improper packing that they were damaged by rust in transit. I think that one of the moving considerations, I should guess, would be the belief that they could get better, more careful handling, through experienced ship operators.

Q. Do you know that to be true, or is that just your belief?

A. Oh, I know that we had a lot of difficulty with shipments; there's no question about that.

Q. Don't you think that an important factor was the fact that the Bethlehem Steel Corporation owned all the stock of both the Calmar Steamship Company and the Bethlehem Steel Company?

A. Naturally, that was in the picture.

Q. You spoke of two companies owning oceangoing ships. Was there another company?

A. The Ore Steamship Corporation, I mentioned.

Q. Yes—will you tell us something about it?

A. That suffered more or less the same fate as the Calmar.

140 Q. Let's take it prior to the time that the Government took it over.

A. Most of its boats are at the bottom of the sea, but in the case of the Ore Steamship Corporation, those boats were specially constructed boats for the purpose of bringing up ore from Chile, and they were, I should say, more suitable for that—they were not suitable for general cargo business. They have been used by the Government to bring up bulk cargoes for, I think, the Aluminum Company—bauxite—but were not suitable for general shipping trade and were not used in the general shipping trade.

Q. Well, when the ships or boats were being operated by the Ore Steamship Corporation, what was their business?

A. Practically exclusively the transportation of iron ore.

Q. To where?

A. From Chile largely to Sparrows Point.

Q. To what at Sparrows Point?

A. Well, our unloading docks at the steel plant of the Bethlehem Steel Company at Sparrows Point.

Q. In Maryland?

A. Yes; now, some of that ore might have been shipped up to Constable Hook over in New Jersey and from there trans-

141 ported by rail either to Bethlehem or any other place where it was needed, but that has not been done to any great extent for a good many years; but the iron ore, you may say that the bulk of the ore brought up there was used at Sparrows Point, and the rest of it was used at our other steel plants.

Q. And again, by Sparrows Point, you mean the plant of the Bethlehem Steel Company there?

A. Yes.

Q. This ore came from Chile?

A. Yes.

Q. Does Bethlehem Steel Corporation own the stock of any producers of ore in Chile?

A. Yes—I was distracted a bit from my previous line—we have subsidiary companies engaged in mining coal and ore, ore being the most important. In the case you asked about, Chile, that is a big ore property which we have been operating for something more than 20 or 25 years. We have owned it since 1913, or rather, own a leasehold interest in it, and have brought up substantial quantities of ore over the past 20 or 25 years.

Q. What is the name of that company?

A. The Bethlehem-Chile Iron Mines Company. We have in addition to that, an important mining operation in Venezuela which is just being constructed.

142 Q. For the production of what?

A. For the production of iron ore. We have companies which own large quantities of iron ore in Cuba which, for certain uses, have furnished a suitable grade of ore for the last few years. I might say that the high-grade ore ran out, and there is a lot of ore that is not suitable for use, but we are operating those mines for special grades of ore. We have companies and interest in companies in the Upper Lake region, some of which we control through a large ownership or entire ownership of the stock, others of which we don't. They are engaged in the business of mining iron ore. We have other subsidiaries which are engaged in the business of mining coal.

Q. May I ask about the disposition of the ore which is mined by the subsidiary companies in the Upper Lake regions?

A. Well, normally it is used in our steel plants for the simple reason that the supply of high-grade lake ores is nearing an end and we are not supposed to sell it—in other words, we use it primarily for our own operations; but in the past it has been, and is by nature a business in which the ore could readily be marketed at times—at other times you can't sell it for anything.

143 Q. Isn't it true that Bethlehem Steel Corporation—that it is understood to have Bethlehem Steel Company, if reasonably possible, utilize the ore which is produced by other subsidiary companies of the corporation?

A. Well, I know just what you mean by that. I have tried to put it the other way—that the ore has become of considerable value to the Bethlehem Steel Company and, at the present time, I think we would rather not have the ore sold to anybody else.

Q. Normally, you don't seek outside customers on that, do you?

A. Normally, we don't.

Q. Tell us something about the subsidiary coal companies.

A. They are engaged in the mining and the shipping of coal.

Q. Where are those property?

A. We have properties both in West Virginia and also in Pennsylvania.

Mr. BROMLEY. When you say 'we', each time do you mean the Bethlehem Steel Corporation? Will you make that clear in your answer?

A. No, I don't—to be accurate. Being an officer of a
144 number of these other companies, I use the word 'we' in a pretty broad sense without attempting to distinguish between ownership. In the case of the coal mines, 'we'—that is, Bethlehem Steel Corporation—own the coal properties in West Virginia.

Q. The Corporation owns the properties?

A. The Bethlehem Steel Corporation owns them; but the properties in Pennsylvania are owned by a subsidiary company.

Q. Do you know whether or not any of that coal is shipped to plants or properties or both of the Bethlehem Steel Company?

A. Yes; very largely.

Q. Are there any other types of businesses conducted by subsidiary companies of Bethlehem Steel Corporation?

A. I don't recall any that I have failed to mention.

Q. Mr. McMath, will you state what is the custom, if any, of Bethlehem Steel Corporation to assemble operating data, including financial operations, from its subsidiaries?

A. I am not sure that I understand that question. It—naturally, the Bethlehem Steel Corporation, I guess under the influence of the New York Stock Exchange and of the Securities Commission, has for—oh, perhaps, I should even say it was
145 started without their influence even before—published consolidated reports of the Corporation and its subsidiaries, and it has attempted to consolidate in there information of the Corporation and all its subsidiary companies. Naturally, it is necessary for the Comptroller of the Corporation to obtain information which it is necessary for him to have for the preparation of the consolidated report and, in addition to that, naturally, the officers of the Bethlehem Steel Corporation are interested in the results of operations of various subsidiaries, and for that purpose they have from time to time received as detailed information as they could get.

Q. How frequently is that material assembled?

A. Speaking generally, I can't answer you. We are speaking of fifty or sixty corporations, and I don't know, but I think it would be fair to say that it is assembled currently and regularly.

Q. Generally as freqently as once each month?

A. Yes; you have some operations in Chile and in places of that kind where, naturally, you are apt to have some lags there.

Q. In connection with getting the information from the subsidiaries and, of course, I include South Buffalo Railway
146 Company in this, is it not true that Bethlehem Steel Corporation is interested in the financial operations of the subsidiaries rather than in the amount of dividends declared by the subsidiaries?

A. I think that would depend upon the times. Naturally, the earnings are fundamentally the most important consideration; dividends are important only to people that need an income from their stock. I should say, to my own way of thinking, that dividends were of secondary consideration, except, possibly, if the sheriff were right behind you.

Q. In the case of the South Buffalo Railway Company if, in a given period, it should show earnings of, say, $300,000, but declared no dividends, would not the $300,000 of earnings be reflected in the consolidated balance sheet of the Bethlehem Steel Corporation?

A. Oh, yes.

Q. That is, it would show up in the consolidated balance sheet whether or not any dividends were declared?

A. Yes—dividends wouldn't make any difference.

Q. Conversely, if there were a deficit in a given period and still, if the South Buffalo Railway were able to declare a dividend, it would still show up as a loss in the consolidated balance sheet?

A. Yes; but it might provide cash—that's all the divi-
147 dend consists of—it puts cash from one corporation to the other.

Q. Is it not true that Bethlehem Steel Corporation is interested in the operations, in a financial sense at least, in the subsidiaries, and has only a secondary interest in the declaration of dividends?

A. I think that's the way it lies in my mind.

Q. Is it the custom of Bethlehem Steel Corporation to make advances of funds to its subsidiaries?

A. Broadly speaking, I think I would say that its subsidiaries have been largely financed by loans through the corporation. That has been more especially true of Bethlehem Steel Company which has a comparatively small capitalization and a large debt; that has been very largely due to the fact that most of the expenditures made by subsidiaries as a whole have been made by Bethlehem Steel Company in its manufacturing facilities.

Q. Isn't it true that when and if the subsidiaries need current funds, that inquiries are made by them of the Corporation as to the availability of funds?

A. I think that's hard to generalize. Take in the case of the Bethlehem Steel Company—naturally, if it has an important con-
struction program, why, you look over its financial picture
148 and see where the money is coming from and that is largely my job as the financial vice president. So that I don't have to go to myself as financial vice president of the Bethlehem Steel Company and ask myself as financial vice president of the Bethlehem Steel Corporation for money. It doesn't—well, it takes considerably more of a short cut than that.

Q. Wouldn't you prefer, if possible, to have the funds advanced from the Bethlehem Steel Corporation to the Bethlehem Steel Company rather than from the outside—that is, rather than have the funds come from the outside?

A. It all depends on whether or not you have enough money.

Q. I said 'if possible.'

A. Ordinarily you don't borrow money if you don't have to, and if you have to borrow money, you borrow it from someone who you think will be kind to you.

Q. Under ordinary circumstances, the subsidiary company would not seek funds from outside sources, would it?

A. I should think that would be correct.

Q. Other than the Bethlehem Steel Company, do you feel the same situation would apply as to the other subsidiaries?

149 A. Well, I can't recall any important instance where the question has been raised, but I think that through—well, in the case of the Bethlehem Steel Company which say has been the chief borrower, the fact has been that the Bethlehem Steel Corporation could borrow money from the outside at a lower interest rate than the subsidiary company could do it if it borrowed direct, and for that reason, since I have been in charge of the financial operations of Bethlehem Steel Corporation, I have more and more shaped the policies toward having the Bethlehem Steel Corporation borrow the money rather than having the subsidiaries do it. I think it's true in every case that the subsidiaries could borrow it, but they probably would have to pay a higher rate of interest.

Q. Hasn't it been your practice to have the subsidiaries borrow from the Bethlehem Steel Corporation, if possible?

A. Practically—well, broadly speaking, yes; however, I have in mind very largely that Bethlehem Steel Company is the chief borrower, and I don't know that it would be fair to say any practice had been built up with respect to the subsidiaries generally.

Q. If the South Buffalo Railway Company were in need
150 of funds, would you not expect it to make inquiries of the Bethlehem Steel Corporation as to the availability of funds?

A. If they needed money I think they would be foolish not to come to me; in the first place, I think I would know more of the ways and means of raising money than anybody they have in their organization, and I believe I could advise them wisely; in the second place, if it was a situation where the money was available in the treasury of the Bethlehem Steel Corporation and they wanted to borrow money, I believe that they could borrow money cheaper from the Bethlehem Steel Corporation than they could from the outside. Now, I will say that it's largely a hypothetical question because I don't recall that the need of borrowing has arisen in recent years.

Q. But isn't it a fact that you would expect the South Buffalo Railway Company to make inquiries of you if they were in need of funds?

A. You mean as a result of any orders that I or anyone else has given?

Q. Not necessarily.

A. I would expect them to do it in the exercise of good judgment on their part; yes.

Q. If they were to go outside, first, to seek funds, you
151 would not be very happy about it?

Mr. BROMLEY. I object to that as speculative, hypothetical, and incompetent; also, it calls for a conclusion.

Q. Does the Bethlehem Steel Corporation make contributions to its subsidiaries?

A. Not as a general practice, no.

Q. That is, would you say it's unusual rather than usual?

A. Well, there was a special situation that occurred four, five, or six years ago at the time of the undistributed earnings tax. The tax, as I remember it, was or might be increased in case a corporation earned money and didn't distribute it, and we had four or five subsidiaries that I think had deficits and I think—that is, accumulated deficits, and current earnings, and I remember at one time there were four or five cases where contributions were made to eliminate deficits so that current earnings could be paid in dividends if that was necessary or desirable. I recall one or two other cases that I think occurred before that where some of our subsidiaries had incurred deficits to the point where their own balance sheets did not give them a very good credit standing, and I think that on one or two occasions we made contributions for the
152 purpose of restoring their credit position.

Mr. BROMLEY. When you say "we," who do you mean?

A. Bethlehem Steel Corporation.

Q. The Bethlehem Steel Corporation is interested to see that the credit standing of their subsidiaries is good?

A. Naturally, yes.

Q. And that applies to the South Buffalo Railway Company as well as the other subsidiaries?

A. I should think so, yes.

Q. I will ask you whether or not any instructions were given in 1939 by you or, if you know, any other officer of or person connected with either the Bethlehem Steel Corporation or the Bethlehem Steel Company to persons connected with the Bethlehem Steel Company at Lackawanna, New York, in regard to the relations to exist between the South Buffalo Railway Company and the Bethlehem Steel Company?

A. Yes.

Q. Now, so far as you know, in the matter of operations prior to the time instructions were given, what was the relationship be-

tween the Steel Company at Lackawanna and the South Buffalo Railway Company?

Mr. BROMLEY. I object to that as incompetent, because calling for a conclusion.

153 The COURT. The relations in what respect do you inquire? It is a very broad question.

Mr. CRAIG. He was able to answer. He seemed to know.

The COURT. Are you seeking to bring out your relations with respect to borrowing money or operation? Read the question again.

(Mr. Craig read, as follows:)

"Q. Now, as far as you know, in the matter of operations prior to the time instructions were given, what was the relationship between the Steel Company at Lackawanna and the South Buffalo Railway Company?"

The COURT. Objection overruled and an exception to the defendants.

A. May I go back a little bit, in answer to that question, and answer it this way: That first of all, the various activities of the Bethlehem Steel Corporation are, under our system of management, divided between a comparatively small group of individuals, usually carrying the title of 'Vice President' or 'President' of various companies. For example, I am in charge of finances; I am responsible for the financial picture of Bethlehem Steel Corporation; I am, naturally, responsible to the Board of Directors of Bethlehem Steel Corporation, and I, naturally, obtain the

154 advice and the opinions, which often conflict with mine, on any problems that I've got. Our operations in the principal activities of manufacturing are divided into two parts—a vice president in charge of operations of Bethlehem Steel Company has the same amount of responsibility for operations——

Q. Who is he?

A. Mr. Quincy Bent. Our shipbuliding activities are all under the direction of Mr. Arthur Homer; our traffic problems are under the direction of Mr. Gross.

Q. Mr. John M. Gross?

A. Yes, Mr. John M. Gross; our sales activities are under the direction of Mr. Paul Mackall.

Q. He is a vice president of Bethlehem Steel Company?

A. Yes.

Mr. BROMLEY. In all your answers you have been referring to the 'Bethlehem Steel Company,' have you not?

A. Yes; I am trying to give the broad picture of the organization of our manufacturing business.

Mr. ADKINS. When you say 'our,' you mean Bethlehem Steel Company?

A. Yes—Bethlehem Steel Company.

Q. Will you continue, please?

155 A. Well, the functions are divided—the responsibilities are divided, I might mention Mr. Jacobs; he is in charge of raw materials; Mr. Holton is in charge of purchasing, and so on. Now, as much as twelve years ago, we felt it necessary to put our—I said 'we' and 'our,' and I mean the Bethlehem Steel Corporation, a matter of organization—felt it necessary to put a man in charge of railroad activities, and Mr. Kemmerer was elected to that position, I think around 1931 or 1932——

Mr. BROMLEY. Kemmerer was elected to what position?

A. He was elected president, I think, of all of the railroad companies.

Q. Yes.

A. Now, Mr. Kemmerer, as such, as I conceived his responsibilities, was responsible for the operation of the railroad companies in the same way that other individuals that I have mentioned have been responsible for the activities which are under their direction. Mr. Kemmerer died, I think, in 1932 or 1933, a year or two after he had been elected. Mr. Trageser was elected to succeed him, and, I think, with the same responsibilities. Now, in the exercise of those responsibilities, as I understood it, he made use to some considerable extent, possibly, of the organizations which

156 Bethlehem Steel Company had for the operation of their steel plants; those plants had fully developed and well-trained organizations, engineering talent, and I guess capable of doing almost anything, and to some extent in the course of his work where there were operating problems such as the most desirable motive power, things of that kind, they could be and were a real help. I think perhaps that to some extent considerable reliance was placed upon them for advice with reference to local operating conditions. In 1936 or thereabout the E. J. & E. case was decided by the Supreme Court, and our general counsel, Mr. Hoyt A. Moore, who is a partner in the firm of Sravath, Swaine & Moore, called my attention to the decision of the Court in which, for the first time, as far as I knew, emphasis was placed upon the complete separation of all railroad activities and control from the activities of the manufacturing departments. In view of some of the language of the Court, particularly the minority opinion in the case, it appeared that the Commodities Clause might conceivably be construed as literally a complete 'hands-off policy' as far as any connection between the manufacturers and the railroads. Following that case, after Mr. Moore had brought it to our attention——

157 Q. There are a few things I want to bring up presently before we get into any other observations. May I go back a little bit?

A. Sure.

Q. You spoke about considerable reliance being placed on the persons connected with the Steel Company at Lackawanna by persons connected with the South Buffalo Railway Company prior to 1936 or some such time; is that right?

A. Yes.

Q. What do you mean by "considerable reliance"?

A. Well, I am trying to give you my impression as an officer of Bethlehem Steel Corporation and, as such, interested in the legal problems which might affect it or the railroads, and my information with reference to that is necessarily somewhat incomplete, and as it has always lain in my mind, and, as I believe was done, the responsibility so far as the operation of the railroads and the discharge of the obligations of the railroads as a public servant were under the direction of the president of the railroad uncontrolled by anyone. Now, I am aware of the fact that the plant managers were at times called upon, called upon from time to time, for advice and assistance, and so far as I know, that's
158 all; but I am not sure that at times, perhaps, even greater reliance might have been put upon the plant managers in the early days than would now be regarded as proper or as required by the Commodities Clause.

Q. Didn't it go beyond reliance and into the field of supervision by the plant managers?

A. I don't think so; not so far as I know; but as I tried to state, at Buffalo, I think, where you are dealing with individuals, somethime you get different results from what you anticipate, and it may well be that the plant manager in some cases assumed a responsibility which I don't think he really had. Now, again I say, people that are more intimately in touch with the day-to-day operations would have to tell you the extent to which that happened, but so far as the responsibility for the operating duties, I would say that the president had those responsibilities uncontrolled by any one in the organization.

Mr. Bromley. You mean by that other than his own Board of Directors, of course?

A. Sure; I have in mind uncontrolled by anyone, let's say, in the operating end of the manufacturing business—that was my complete thought.

Q. You recall, do you not, Mr. McMath, that you testi-
159 fied on May 20, 1943, at Buffalo, New York, in the matter of the investigation of the South Buffalo Railway Com-

pany before the Interstate Commerce Commission, Docket No. Ex Parte 128, do you not?

A. I recall that I testified there; yes.

Q. And I ask you if you recall whether or not this question was put to you and if you gave the answer which I shall read: Question: 'Were any instructions given in 1939 to officers of the Bethlehem Steel Company at Lackawanna in regard to their relations with South Buffalo Railway Company?' Answer: 'Yes; prior to that time there had been some degree of control or, rather, supervision by the manager of our steel plant, and it was felt that the control, whatever it was, should cease—that that control should cease.' Do you recall that question and the answer as being given to you and by you?

A. Yes; that's right.

Q. Did you feel at the time you testified in Buffalo that prior to the giving of those instructions in 1939, that the manager of the steel plant at Lackawanna did exercise some degree of control or supervision over South Buffalo Railway Company?

A. Yes; that's just what I have in mind in saying that
160 there were instances where the theory of management had, to some extent, slopped over. You had in Buffalo a large plant, a large engineering organization, that was close to the job, and I think our people were naturally relying to some extent upon the advice and assistance from the managing departments of the steel plant.

Q. You say 'our people'—do you mean the South Buffalo Railway people?

A. Yes.

Q. Was it your opinion when you testified in Buffalo in 1943 that prior to the time the instructions were given to the officers of the Bethlehem Steel Company at Lackawanna that the manager of the Steel Company's properties there did exercise some degree of control or supervision over the activities of South Buffalo Railway Company?

A. Yes.

Q. On what did you base that feeling or belief or opinion?

A. I think it was largely questions and answers—investigation, etc.—which did disclose that they had done things up there which were a little bit beyond what was in my mind they were doing, and it was—well, we started in after the E. J. & E. case looking into what had happened and we found that there were certain
161 things which had happened which might possibly be within the language, at least of the minority decision, of the Court in that case, and our counsel said that now that had better come to an end; that if there has been anything of that kind at South Buffalo or anywhere else it should be stopped, and whatever safeguards

were necessary should be put in effect so it wouldn't happen again, and that is what I had in mind in answer to your question as to the change that occurred in 1939. At that time, however, sensible and wise it may have been from the viewpoint of economy to get the benefit of a trained organization in the steel plant, we were obliged, under the advice of our general counsel, to discontinue it; and that, as I understand it, was done.

Q. Did you feel, up to that time, at least, that better operating results would be obtained by the exercise of control or supervision, to some degree, by the plant manager of the steel company over the operations of the South Buffalo Railway Company?

A. Well, it's a little difficult to say what I thought at that time, but my impression is that on certain matters the steel company engineering organization could do a better job than the railroad company could for the simple reason that it takes money to hire
162 talent, and where you have a relatively small corporation you can't expect it to hire as capable people as you would find in a very large industrial plant. For that reason I always recognized that it was the sensible thing to do to get the benefit of their advice and help.

Q. And to follow the advice?

A. And to follow it.

Q. As a matter of fact, didn't you expect the South Buffalo Railway people to follow the advice and counsel so given?

A. I would certainly expect them to follow it if they thought it was good advice.

Q. And as far as you know, it was always good advice?

A. I can't judge that, but I would expect that it was. I may say that as far as I know the reliance upon the local plant managers in the case of the South Buffalo Railway and in the case of the other railroads had to do largely, if not solely, with questions relating to the best and most efficient way of doing business. I don't believe that they were consulted on questions relating to the, let's say, the discharge of the duties of the railroad with respect to the public; in other words, any questions of service to the other——

Q. When you say 'to the other,' who do you mean?

163 A. The other shippers along the line I mean.

Q. Shippers other than Bethlehem Steel Company?

A. Other than Bethlehem Steel Company; I would certainly not expect them to have or exercise any control there, and as far as I know, they never did. I am trying to differentiate the kinds of things in which the local organization could be of help, and that is my impression of what the situation was prior to 1939.

Q. Prior to 1939, you did expect, did you not, South Buffalo Railway Company to observe the wishes, counsel, and advise of

the Bethlehem Steel Company manager at Lackawanna in dealings between the South Buffalo Railway Company and the Steel Company?

A. No; no more than you would expect the South Buffalo Railway Company or any other activity of our subsidiary companies, as you would naturally expect them to know and, so far as practicable, conform with the wishes of their customer. Nobody, whether he was connected with the Bethlehem Steel Company—rather, the Bethlehem Steel Corporation—or otherwise, could efficiently shut his eyes to the needs of his good customers, and I think that is just as true of the railroad as it is of any other activities of our subsidiary companies.

164 Q. Do you not feel, Mr. McMath, that there was a chance of some danger that the relationship between the South Buffalo Railway Company and the Bethlehem Steel Company prior to the time of giving your instructions might run afoul of the majority opinion in the Elgin case?

A. Well, there was some language in the majority opinion, yes, that possibly we had to take into account.

Q. Before going into the matter of changes, there is at least one other thing I want to take up. Isn't it true that prior to the time of giving the instructions, by virtue of such control and supervision which the plant manager at Lackawanna of the Bethlehem Steel Company exercised over the operations of South Buffalo Railway Company, it tended to increases the efficiency of the operation of the Bethlehem Steel Company at Lackawanna?

A. I don't know of any instance where I would say that that happened or didn't happen. Naturally, I think the manager of the plant at Lackawanna, if he didn't get his cars from the New York Central, he would holler about it.

Q. To whom?

A. To the New York Central; and in the case of the South Buffalo, I would expect him to do the same thing, and

165 he didn't have to write a letter—maybe he would—but the people were right there in town that he needed to talk to, but I should suppose he would have been derelict in his duty then and not if he wasn't getting proper service from the railroad company, and if he didn't tell them he wasn't getting it. That's what you or I would do if we had difficulties with the services of any public servant.

Q. Do you think or do you know whether as part of the supervision and control which the plant manager of the steel company exercised over South Buffalo Railway Company, that he ordered—gave effective orders—for the rendition of service by the railroad company to the steel company?

A. I don't know, but it's quite conceivable that he did.

Q. Well, as a matter of fact, don't you know that on occasion he did it?

A. Well, I don't because I haven't studied the record, but I could quite believe that he did.

Mr. BROMLEY. You are talking now about a period prior to about 1936, are you?

Mr. CRAIG. Well, prior to 1939—prior to the time instructions were given. I haven't gone into the instructions yet.

Q. Mr. McMath, I believe that in 1936 Bethlehem Steel
166 Corporation made two contributions to the South Buffalo Railway Company? Do you recall that to be the case?

A. Yes.

Q. I believe that the first contribution was made on or about October 31, 1936, in the sum of $211,616—do you so recall?

A. Yes.

Q. Then I believe there was a second contribution made on December 1936—that is, on December 30, 1936—in the amount of $1,900,000—do you recall that?

A. Yes.

Q. Do you recall the purpose for which the first contribution of $211,616 was made?

A. Yes.

Q. What was that?

A. It was to restore a deficit on the books of the South Buffalo Railway Company.

Q. Was that the deficit—rather, do you recall as of what time such was the deficit on the books of the South Buffalo Railway Company?

A. I should assume it to be as of the close of the preceding fiscal year, because I think the contribution was made with the undistributed-earnings tax in mind.

Q. Do you recall on whose books that deficit was shown?
167 A. Well, I should suppose it might be on the books of the South Buffalo Railway Company, but at that time there was some confusion owing to these circumstances: The company had for some years prior to that been charging depreciation on its roadbed which was allowed by the Treasury Department for tax purposes, but which was inconsistent with the rulings of the Interstate Commerce Commission, and about that time, or shortly before possibly, attention had been called to the fact that we had been charging depreciation which was not consistent with the requirements, and the books of the South Buffalo Railway Company, for the purpose of those Interstate Commerce Commission reports, were changed. Now, because of the fact that the accounts of the South Buffalo Railway Company were consolidated with those of the Bethlehem Steel Corporation, the consolidated ac-

count naturally reflected the charge against depreciation which had been made and so, probably what should have happened was to adjust both books at the same time, but that wasn't done at that time, and in view of the doubt as to what was the real deficit of the company, the contribution that was made was equal to the deficit in the larger amount.

Q. As shown by the books of the Bethlehem Steel Cor-
168 poration?

A. Yes—I am not sure but what it would be fair to say that they were shown by both books.

Q. Do you know about that?

A. I can't tell you, but I should suppose it would have been entirely proper to have made adjustments for the purpose of the Interstate Commerce Commission, and without necessarily reflecting them in the consolidated reports to the public. As you know, our published reports very seldom conform to the reports that you'd make for income-tax purposes—you have to observe different rules.

Q. Regardless of what the South Buffalo Railway Company's books or reports may have shown, a deficit was shown on the books of the Bethlehem Steel Corporation—that is, the deficit of the South Buffalo Railway Company at the end of 1935 of $211,616, was it not—it being the amount of the contribution about which we are speaking?

A. Yes.

Q. Do you recall that in the year 1926 the South Buffalo Railway Company, from its operations, had an income of something over $500,000?

A. I don't know.

Q. Do you recall that in that year the South Buffalo
169 Railway Company, or the directors thereof, declared and caused to be paid out dividends of $375,000?

A. No; I don't have any recollection; it's a matter of record, of course, but I don't know.

Q. Now, this contribution of which we are speaking of $211,616, was made by the Bethlehem Steel Corporation to the South Buffalo Railway Company, was it not, for the sole purpose of eliminating the deficit of which we are speaking?

A. That is my recollection.

Q. And the advance was made on that condition and with that understanding, was it not?

A. Well, I don't know just how much of an understanding you might say was entered into, but that was my understanding of it.

Mr. BROMLEY. Well, it wasn't an advance, was it, gentlemen?

Mr. CRAIG. Well, call it a 'contribution,' if you wish.

Mr. BROMLEY. By an 'advance,' you imply a loan, and in the case of a 'contribution,' you take it as a gift—I feel there's a considerable difference there.

Q. Relative to the second contribution in December 1936, amount to $1,900,000, do you recall the circumstances
170 in connection with it?

A. Yes, I think so. At that time South Buffalo Railway Company was pretty heavily indebted to the Bethlehem Steel Corporation, I think, on account of money which it had borrowed for its corporate purposes. It had only, I think it was $500,000 in par value of stock outstanding, and my attention was called to the fact that if the South Buffalo Railway Company were to declare and pay all of its earnings in dividends, it might be subject to criticism and, possibly, to control by the Interstate Commerce Commission on the ground that it wasn't a prudent thing for a corporation that owed nearly two million dollars to be paying all of its earnings, or substantially all of them, out in dividends, and that tied in with the general thought that we have had that corporations which have dealings with the public and are in need of any credit standing, should be properly financed so that they would have that standing, and we—well, I talked it over with some of my associates, and we came to the conclusion that the South Buffalo Railway Company should have more capital and we, therefore, started out to subscribe for additional capital.

Q. Who do you mean by 'we'?

A. I should say Bethlehem Steel Corporation, and we
171 did, as I remember it, we did subscribe to approximately $1,900,000, whatever the debt was, of stock. The issuance of the stock was probably—well, it required the approval of the Interstate Commerce Commission, and we were not sure that we could get that in time to accomplish the purpose of it, and then, as I remember it, we also ran into some difficulty that the stock of the South Buffalo Railway Company had been pledged under the Lackawanna consolidated mortgage which was a mortgage that had been placed on the properties of the old Lackawanna Steel Company and which mortgage we inherited. Now, one of the requirements of that mortgage was that any additional stock of the subsidiary companies whose stock was pledged, the additional stock also had to be pledged, and at that time we didn't want to do anything which would strength, so to speak, that mortgages. It had a Gold Clause in it, and we were in litigation as to the effect of the Gold Clause as I recall it,——

Q. In 1936?

A. I think so—I do not remember whether—yes, I think the litigation was still pending; that was up before the Supreme Court before it was finally settled; I am not sure whether the issue came

up on one of those bonds; I think it may have come up on
172 some others; but my recollection is that that was still outstanding and we hadn't gotten a discharge of the mortgage—a release of the mortgage—and we didn't want to tie up the stock; at any rate, that took the form of a contribution to capital simply because it wasn't thought feasible to issue shares of stock against the contribution at the time.

Q. May I ask with whom you discussed this matter of the issuance of stock vs. contribution?

A. Why, I think that was largely discussed with Mr. Moore.

Q. Mr. Hoyt A. Moore?

A. Yes.

Q. To whom you have referred previously?

A. Yes.

Q. The general counsel for Bethlehem Steel Corporation?

A. Yes.

Q. Did you discuss it with anyone else?

A. No doubt I discussed it with Mr. Schick, who is Comptroller of the Corporation.

Q. Mr. F. A. Schick, Comptroller of the Bethlehem Steel Corporation?

A. Yes.

Q. And with any one else?

A. I don't recall; I have no doubt that it was fully ex-
173 plained to the entire board of Bethlehem Steel Corporation, because I think action was taken by the Board.

Q. Do you know if, in connection with this financing, any attempt was made by South Buffalo Railway Company to do any of its financing other than through the Bethlehem Steel Corporation?

A. No, I don't know of any.

Q. You would have known about it, wouldn't you?

A. I should think so.

Q. Do you know as a matter of fact that the entries on the books of South Buffalo Railway Company in connection with this contribution of $1,900,000 were approved by officers or employees or both of Bethlehem Steel Corporation?

A. I don't know, but I should assume they certainly would have to be.

Q. And why is that?

A. Well, it was an unusual transaction and one which doubtless was supervised by our general counsel; I would suppose that the whole thing were discussed as to what would be the proper entries to make.

Q. That is, at both ends—the Bethlehem Steel Corporation and the South Buffalo Railway Company?

A. Yes.

Q. Do you know to what use this contribution of
174 $1,900,000 was put by South Buffalo Railway Company?

A. Well, I never checked it up, but it was put in for the purpose of paying its debt, and I assume that is what it was used for.

Q. To pay its debt to whom?

A. The Bethlehem Steel Corporation.

Q. As far as you know, that was done?

A. Yes.

Q. And that was the purpose for which the contribution was made?

A. Yes.

Q. And that was the understanding that that is what it would be used for?

A. That's my understanding.

Q. As far as you know it was made clear to the proper officials of South Buffalo Railway Company that it would be so used: isn't that correct?

A. I think so. I don't mean to quibble, but I don't know; however, I should think so.

Q. Well, it would seem so. Is it not true, Mr. McMath, that executives and some employees—not all—of Bethlehem Steel are paid partly on salary and partly on a bonus plan?

A. Yes.

Q. Will you state whether or not that plan extends not
175 only to the Steel Company but to other subsidiary companies?

A. We have throughout the Bethlehem Steel Corporation and the subsidiary companies various incentive forms of compensation—they vary—all the way from a piece rate in the steel plants all the way up. Approximately seventy per cent of our employees are paid in some form that way; there are many varieties of those incentive plans. The one that is applicable to the executives of the Bethlehem Steel Corporation and the principal executives of the subsidiary companies in so far as they are directors of the Steel Corporation, is the participation in the total earnings of the Corporation available for dividends on the common stock of the Corporation. That's applicable principally, if not solely, to the officers and directors of Bethlehem Steel Corporation. As I said, many other plans are applicable to various groups of employees of the subsidiary companies.

Q. Do you know if some varieties of the bonus plan applies to the South Buffalo Railway Company?

A. It is my understanding that it does, but couldn't tell you what it is.

Q. Assuming that some such plan does apply to the Rail-

176 way Company; and believe, gentlemen, that proof will bring out it does——

Mr. BROMLEY. If you mean the Railway Company has its own plan of incentive compensation, maybe that's true—I don't know. Is that what you mean, that the South Buffalo Railway Company has a plan of incentive compensation all its own?

Mr. CRAIG. Yes—if there is any doubt about that, I want to clear it up before we proceed.

The WITNESS. I think that would be the case; there wouldn't be a general plan applicable to the railroads, among others—it would simply be the adoption of a plan by the Railway Company which was consistent with the general policy of paying incentive compensation.

Mr. BROMLEY. Are you laboring under the idea that the officials of South Buffalo Railway Company share in the earnings of some company other than the South Buffalo Railway Company?

Mr. CRAIG. No, I am asking—at least, my questions have been predicated on the assumption that some such plan exists—rather, if it does exist, it's confined to the South Buffalo Railway Company.

Mr. BROMLEY. Then that means the Railway Company
177 has its own plan of incentive compensation, and I don't understand why you call it some 'variation' of some other plan—that would be its own plan.

Mr. CRAIG. But, still, a type of bonus plan—whatever it may be.

Mr. BROMLEY. A type of bonus plan, yes.

By Mr. CRAIG:

Q. May we take a case, Mr. McMath, of a person who has been employed by the Bethlehem Steel Company and who has been under its incentive pay plan, and he ceases to be employed by the Bethlehem Steel Company and then becomes employed by the South Buffalo Railway Company. He would, would he not, cease to be compensated under the system of the Bethlehem Steel Company and be compensated under the system of the South Buffalo Railway Company?

A. Yes, naturally, if he would cease to be an employee of Bethlehem Steel Company, he wouldn't be entitled to any compensation there.

Q. Under that plan, what would happen in a case where a man was employed by Bethlehem Steel Company which at the time was making such a profit as to entitle him to participate in the bonus payment or incentive payment, and he was ordered
178 transferred to the South Buffalo Railway Company which at the time was operating in such a way that he was not entitled to any bonus or incentive payments?

A. I should think he would be out of luck.

Q. No adjustment would be made there, is that right?

A. I wouldn't suppose there would, although, naturally, the fellow that goes from one job to another, you would expect him to be happy and satisfied with his new job. A fellow doesn't ordinarily proceed that way if he feels that he would have less money in his new place. However, a man doesn't always change his position based on the earnings for that year; it's as much a question of opportunity as anything else, but I don't think it's customary, let's say, to try to make a mathematical calculation which would provide any adjustment.

Q. Well, you say it's not customary—is it done?

A. There is no case that I know of that it was done. As I say, if a man is taken from one job and put in another, he isn't much use to us if he is a discouraged employee.

Q. What do you mean by 'one job to another'? Do you mean from one subsidiary to another?

A. I am speaking of a general proposition—a man who has a good job and then gets another; he goes because he
178 thinks he is bettering himself, as a rule.

Q. And that would normally be the case of a man moving from Bethlehem Steel Company to South Buffalo Ralway Company?

A. I would think so.

Q. You would want him to be happy in his new work?

A. I certainly would. As a general director of Bethlehem Steel I would say it would be a poor thing to do to move a fellow to a poorer job and expect him to be happy.

Q. And in connection with having the person involved happy, part of that is some increase in his compensation, is that true?

A. Well, that I think depends on the nature—I think most of us like to get an increase in compensation; some of us are so constituted that we like different kinds of work better than others, and——

Q. Wouldn't you say that increasing his compensation would be a part of happiness with a person involved in such a transfer?

Mr. BROMLEY. I object to that question.

Mr. CRAIG. The question may be withdrawn, and the next question also, which is to the same effect.

(Mr. Craig continues reading, as follows:)

"Q. Mr. McMath, going back for a moment to the contri-
179 butions made in 1938 by Bethlehem Steel Corporation to the South Buffalo Railway Company, I believe you said something about the operation of the tax law, especially in connection with the contribution of $1,900,000 in 1936—do you recall saying anything about that?

A. I had in mind, primarily, the undistributed earnings tax at the time I spoke about that; that would be applicable under the law only to the deficit. The other was not a deficit, but purely a situation where you had relatively a small capital stock with a large debt which was a situation different from where the tax law is concerned. I think that there—as I recall what I said this morning—that there was some uncertainty as to whether we might not be criticised for paying out dividends, even though earned, which left the corporation with that much debt.

Q. Did the making of the contribution have any effect upon the amount of tax to be paid by the Bethlehem Steel Corporation?

A. I shouldn't think so, not as I recall the law at that time.

Q. Was it your idea that it would make a difference in the amount of the tax to be paid by the South Buffalo Railway Company?

180. I think that was the company that would be subject to the undistributed earnings tax rather than the corporation.

Q. And you were interested in seeing that that tax, under the law, was kept down, were you not?

A. Naturally, as interested as any stockholder would be in putting the railroad in a position where it could declare the dividend.

Q. As I understand it, it was thought that if the stock were issued—that is, in order to issue the stock you would have to get the approval of the Interstate Commerce Commission, but the transaction could not be completed in time to get the tax benefit?

A. By the end of the year you mean?

Q. Yes.

A. Yes, with the qualification as to the tax benefit; I think we did want to put the balance sheet of the Corporation in shape as of the end of the year.

Q. But the lessening of the taxes to be paid by South Buffalo Railway Company was a consideration in the transaction, was it not?

A. Well, I think so, in the sense that I put it, yes.

Q. You made reference in your testimony to the decision of the Supreme Court of the United States in the Elgin case, have you not?

181 A. Yes.

Q. The case to which you refer is United States of America vs. The Elgin, Joliet & Eastern Railroad Company, decided May 25th, 1936?

A. I think that's the one.

Q. And reported in 298 U. S.—well, that's the case, at any rate?

A. That's the one I meant.

Q. As I understand, you talked with Mr. Hoyt A. Moore about that case?

A. Yes.

Q. Did you discuss the case and its bearing on your situation with any one else connected with the Bethlehem Steel Corporation?

A. I am sure I did; I do not recall the precise circumstances, but I am sure that I told most of the directors of the Corporation about it.

Q. Did you discuss it with Mr. Quincy Bent?

A. Yes.

Q. Who is President of the Bethlehem Steel Corporation?

A. Mr. E. G. Grace.

Q. Was he president in 1936?

A. Yes.

Q. And has been since that time?

A. Yes.

182 Q. Did you discuss the situation with him?

A. Yes.

Q. Did you discuss it with Mr. John M. Gross?

A. Well, I do not recall any particular conference, but I am sure I did because it was a matter I naturally would discuss with all of the executives.

Q. Did you and the other executives come to any conclusion regarding the situation or the matter under discussion?

A. Yes.

Q. What was that?

A. Well, largely if not wholly under the advice of counsel, we reviewed the relationships between the railroad and the Bethlehem Steel Corporation which had existed and, under Mr. Moore's advice, made one particularly important change——

Q. Well, I am more interested in what decision was reached before the definite action?

A. The decision reached was to have the railroad company so organized that it would be completely independent of any control or influence by the operating and other departments of the Bethlehem Steel Company, and as far as possible, completely independent of the Bethlehem Steel Corporation itself so far as its management and control went.

183 Q. And to bring that about required changes, didn't it?

A. The principal change, as it occurs to me——

Q. May I interrupt, Mr. McMath——

A. Yes.

Q. Now, just a minute, please—wasn't it thought important to have some one connected with South Buffalo Railway Company who had a knowledge of the steel manufacturing business?

A. No. I don't think that was either the principal or the minor objective in the change. I think that the principal thing that we discovered when we came to going into the way the business of the railroad had been conducted, was the fact that the plant managers had, as I explained this morning, been used or useful in connection with certain phases of the railroad operation. When we were told by counsel that we should give up all such connection it, naturally, left the railroad without the engineering advice which it had had. That made it seem desirable to have the company supplied with that information from some other source.

Q. That is, the same information——

A. The same type of information which was no longer available. Mr. Trageser was not an engineer, I think, by train-
184 ing, and he had, perhaps for that reason, sought and obtained help from the steel plants, but as long as we were precluded from that, it was thought desirable to have somebody who was, let's say sufficiently trained to deal with the practical and operating problems; it was that, rather than the necessity of knowing the steel business, that was involved. Naturally, the railroads' principal shippers was the steel company, and it was naturally an asset to Mr. Petty that he did know a good deal about the steel business and what the plants required in the way of service.

Q. You felt it was necessary to have somebody in the organization of the South Buffalo Railway Company who could assume the full responsibility for the things that had been contributed by the steel organization?

A. Yes.

Q. And you wanted a man of those qualifications as president of the South Buffalo Railway Company, did you not?

A. Well, I think I would say; yes.

Q. Do you know whether or not movements of freight to and from the Steel Company over the South Buffalo Railway Company were the chief source of revenue of the Railway Company?

185 A. It was by far the largest shipper and consignee—I would say, yes, it was.

Q. Now, pursuant to the decision reached, will you state whether or not instructions were given by anyone in the Bethlehem Steel Corporation to any person or persons connected with the Bethlehem Steel Company at Lackawanna, New York?

A. Yes.

Q. Did you give any such instructions?

A. Not directly. I was quite, let's say, instrumental in bringing about the changes which had been recommended by our general counsel, and among those changes was the fact that the local Steel

Company organizations were to be completely disassociated from any connection with the railroad companies in so far as any course of control or attempted control was concerned, and I think that those instructions were given to the plant managers through Mr. Bent.

Q. Mr. Quincy Bent?

A. Mr. Quincy Bent.

Q. Of your own knowledge, do you know what instructions he gave in the case of the South Buffalo Railway Company?

A. I couldn't, no; I wouldn't want to rely on my knowl-
186 edge of that.

Q. But you do know he gave instructions to carry out that decision?

A. That is my understanding.

Q. Do you know whom he called or to whom he gave instructions in the Bethlehem Steel Company at Lackawanna?

A. I don't know; I can make a good guess, because he would normally give those instructions to Mr. Entwisle.

Q. That's Mr. Frank Entwisle?

A. Mr. E. F. Entwisle.

Q. At the time the decision was reached, who was president of the South Buffalo Railway Company?

A. Mr. Trageser.

Q. Mr. Paul Trageser?

A. Yes, Mr. Paul Trageser.

Q. And he had been president since 1933, had he not?

A. Yes.

Q. Had not his services as president been satisactory?

A. Yes.

Q. Will you state whether or not it was deemed advisable to have a new president of the South Buffalo Railway Company?

A. I think I stated that it was felt desirable to re-
187 place, so to speak, the advice and services which the plant manager had been able to give, and that some one with preferably operating experience as distinguished from the more technical side of accounting and so forth, was the type of man that ought to be in charge.

Q. As president?

A. As president.

Q. That decision was reached, wasn't it?

A. Yes.

Q. What was done in the matter of carrying into effect that decision?

A. At about the same time, it was thought advisable to have on the Board of Directors individuals who were completely independent of any suggestion of control by Bethlehem Steel Cor-

poration, in the sense that they were not employees of the Corporation, or of the railroad, and, therefore, not even directly subject to domination by the Bethlehem Steel Corporation or Bethlehem Steel Company officials, and to that end inquiries were made to find people who qualified and were willing to act in that capacity, and at or about the same time that Mr. Petty was elected president of the South Buffalo Railway Company, several
188 directors were elected of the type that I have described.

Q. Well, Mr. McMath, is it a fact that on December 5th, 1939, five directors of South Buffalo Railway Company who were also employees of that company, resigned as directors of the company?

A. Yes, it's about that time.

Q. Was it not on that date that the five new directors to whom you have referred took their places as directors of the South Buffalo Railway Company?

A. Yes.

Q. What, if you know, was done to bring about the election of Mr. Petty as president of South Buffalo Railway Company?

A. I think the suggestion was made to the Board of Directors that in our judgment Mr. Petty was competent and a desirable man to act as president of the company——

Q. Do you know the means employed——

A. I might say that I find myself frequently saying 'we' and 'our' without clearly identifying whom 'we' and 'us' and 'our' are, but, in general, I am thinking of myself in the capacity as officer of the Bethlehem Steel Corporation.

Q. If you know, how was that suggestion communicated
189 to the Board of Directors of the South Buffalo Railway Company?

A. I think it was done through our general counsel, but I am not certain of the precise method by which it was brought about.

Q. That is, Mr. Hoyt A. Moore?

A. Yes, Mr. Moore, or one of his assistants.

Q. Prior to and at the time of Mr. Petty's election as president of South Buffalo, with what organization had he been associated?

A. The Bethlehem Steel Company.

Q. By the way, he actually was elected president of the South Buffalo Railway Company?

A. He was elected president of the South Buffalo Railway Company at or about that time.

Q. That is, about December 5th, 1939?

A. Yes.

Q. Do you know how long Mr. Petty had been with Bethlehem Steel Company prior to his election as president of South Buffalo Railway Company?

A. I don't, but it was a good many years.

Q. As long as twenty-five years?

A. I should think so.

Q. Do you know of what his duties consisted with Bethlehem Steel Company at the time of his election?

190 A. I can't describe those with any accuracy, no; he was in the Operating Department and one of the principal assistants to Mr. R. A. Lewis, then and now the manager of the Bethlehem Plant.

Q. Isn't it a fact that he knew what the practical operating problems of South Buffalo Railway Company were insofar as they affected operations at the Bethlehem Steel Company property at Lackawanna?

A. I can't answer that of my own knowledge. I had assumed that his connection with the Operating Department at Bethlehem would make him familiar with the needs of the steel plant so far as service on the part of the railroads was required. The extent to which he had knowledge of the actual operating problems of the railroad, I don't know.

Q. Well, he had been in charge of transportation problems in the Bethlehem Steel Company plant at Bethlehem, Pennsylvania, had he not?

A. He was, I understand, the superintendent in charge of service in the Bethlehem Plant which, necessarily, included the transportation service at Bethlehem.

Q. Isn't it a fact that the transportation problems in the Bethlehem Plant are similar to those in any other steel plant?

A. In a broad sense, I should think that would be true.

191 Q. Is it not true as it relates to the Bethlehem Steel Company properties and operations at Lackawanna?

A. I can't really speak of that of my own knowledge enough to say 'Yes' or 'No'; I should assume so.

Q. Now, was it not also decided that Mr. Petty was to become president of the other six subsidiary railroad companies of Bethlehem Steel Corporation to which subsidiaries reference has been made heretofore?

A. Yes.

Q. Mr. McMath, can you tell us how it was determined that Mr. Petty should become president of South Buffalo Railway Company?

A. I don't know that I can describe the process in greater detail than what I have. I mentioned that it was decided under the advice of our general counsel that some such change was desirable, and inquiries were made not only in our own organization but elsewhere to find a man with proper experience and training who could take over the running of the railroads and assume full responsibility

for them, and at the same time that meant somebody that knew enough about the practical problems of the railroads to run them the way they should be run. Finally, after an exhaustive consideration of candidates, the suggestion was made by some one—I don't remember by whom—that Mr. Petty was probably
192 the best qualified man. Mr. Moore was advised of our conclusion, and he talked with Mr. Petty at some length, and was satisfied from his viewpoint that Mr. Petty would answer all the requirements and, in particular, the requirement that he most insisted on was to have somebody that would be completely independent of any control or influence on behalf of the Bethlehem Steel Company. The suggestion—the recommendation was made with—rather, it was made, I think, through Mr. Moore to the newly constituted boards of directors of the various railroad companies, and those recommendations were adopted.

Q. Do you recall who participated in reaching the decision referred to?

A. I would say that a lot of people participated in it in the sense that a number of us had known Mr. Petty here at Bethlehem for some years and could express our views as to his qualifications, but I think, perhaps, the last word was passed by Mr. Moore, our general counsel.

Q. Did Mr. Bent participate in the decision?

A. Only in the same general sense that others did in discussion of the matter; Mr. Bent, as I recall it, did not have much of a voice in the decision; it was completely removed from the
193 hands of the operating end of the business.

Q. Did you participate in the decision?

A. Yes, I think I did.

Q. And Mr. Grace?

A. Yes, Mr. Grace, of course.

Q. Mr. Gross—did he participate in that decision?

A. Not that I recall. He doubtless knew of the discussion at the time, but I wouldn't say that he was charged with any part of deciding.

Q. Now, as a part of the decision that Mr. Petty should become president of the South Buffalo Railway Company and the other railroad companies, was the matter of his salary discussed?

A. I don't think that was very generally discussed, although I knew something about it at the time. I didn't think, have much to do with determining the salary, but I possibly did have something to do with passing on to the board of directors our thoughts as to what they ought to consider—as to what it ought to be.

Q. What were those thoughts that were passed on?

A. I can't remember the figure, as a matter of fact, exactly. I somehow have the recollection that we thought the job of run-

ning the railroad companies was worth around $25,000, and
194 that suggestion was passed on.

Q. That is, a total of $25,000 for all seven railroads?

A. Yes.

Q. Did you pass on any thought as to how that compensation was to be allocated among the seven subsidiary railroad companies?

A. I don't recall that I did, but I think it more than likely that I did, either directly or indirectly.

Q. Do you know if those thoughts or suggestions were carried out?

A. No, I don't, except that I think that if they were not, I would have heard about it.

Q. Isn't it a fact, Mr. McMath, that it is not unusual for a man to transfer his labor—his employment—from one subsidiary company of the Bethlehem Steel Corporation to another subsidiary company?

A. I think it's rather unusual, but that arises out of the nature of things. Ordinarily, a man who is in one job retains it.

Q. I believe you testified that Mr. Kemmerer went from the Bethlehem Steel Company to South Buffalo Railway Company as president, did he not?

A. Yes.

Q. Did not Mr. Trageser go from the Bethlehem Steel Company to South Buffalo Railway Company as president?

194A A. Yes.

Q. And, of course, Mr. Petty went from Bethlehem Steel Company to South Buffalo as president?

A. Yes, but I would say that they were rather exceptional cases, rather than the rule; I wouldn't say there were many cases of transfer, but it is not too infrequent.

Q. At our morning session there was some testimony about this I believe—at or about the time Mr. Petty was elected president on or about December 5th, 1939, I will not ask you to state whether or not you communicated with Mr. Trageser who was then president in connection with his resigning as president of the South Buffalo Railway Company?

A. Yes, I think I did.

Q. Was that shortly before Mr. Petty was elected president?

A. Yes.

Q. Can you give us the substance of that conversation or of that communication?

A. Well, I don't know that I can beyond this thought, as I have it, that I was naturally anxious that Mr. Trageser understood the reasons for the change and understood that it was in no way a reflection upon him, but had been brought about by the

legal aspects of the case under the advice of our general counsel.

195 Now, I think that I explained that to Mr. Trageser; I think he was aware of the discussions or the views that our general counsel had, and had been aware of it for some months, so that there was no occasion for me to go too much into detail as to the decision or the reasons for it. I think, probably, it would be safe to say that several times in my conversations with Mr. Trageser the subject was up, and he knew it was being discussed, so that it isn't possible to fix any one time at which everything that I said to him about it was said.

Q. Did you make any request of him in connection with his stepping out of the presidency of South Buffalo Railway Company?

A. What do you mean—what sort of a request—request that he resign as president?

Q. Yes.

A. I think probably I did in substance, yes.

Q. Did he agree to do it?

A. He did it; I don't think Mr. Trageser—well, I think he fully understood the reasons for it and didn't regard it as a slap at him or a demotion in any sense; it was simply that there had come about a change in conditions where it seemed advisable to have some one with Mr. Petty's experience to act as

196 president of the railroad, and I don't recall any unwillingness on the part of Mr. Trageser to accept that decision.

Q. Was there acquiescence on his part?

A. Yes, and that is confirmed by his presence here.

Q. He became vice president of the South Buffalo Railway Company, did he not?

A. Yes.

Q. And also of the other six subsidiary railroads?

A. Yes.

Q. Do you know whether or not there was any reduction of salary by virtue of his change of position—not only salary, but compensation?

A. I don't recall any; I don't know.

Q. As far as you know, it was not reduced, was it?

A. I don't think so, but I am not certain—I wouldn't think so.

Q. Reference has been made to the resignation of five directors of South Buffalo Railway Company occurring on or about December 5th, 1939. Can you tell us any of the circumstances surrounding their regulations respectively?

A. No, I don't recall.

Q. Do you recall if you suggested to them or had any one suggest to them——

197 A. Not directly; I don't think I saw them, but it may or may not have been done through our general counsel's office or, possibly, through some one else—I just don't remember.

Q. Do you recall if your general counsel or his office reported to you that arrangements had been made for such resignations to be tendered?

A. No; I don't recall it, but I don't dispute it at all.

Q. You did expect the resignations to take place at that time, didn't you?

A. Yes.

Q. Do you recall anything else that was done at the time to carry into effect the decision that the South Buffalo Railway Company and the Bethlehem Steel Company were to be independent in their operations?

A. I don't at the moment; no.

Q. As a matter of fact, these changes which took place did not increase the efficiency of the operations of the Bethlehem Steel Company properties at Lackawanna, did they?

A. I am not competent, perhaps, to answer that question. I should say that they didn't materially affect the efficiency in operation; in other words, the efficiency had been high before and it continued high, so far as I know.

Q. Will you state whether or not Mr. Petty is respon-

198 sible to Mr. Eugene Grace?

Mr. BROMLEY. Do you mean now?

Q. Now?

A. Well, I don't know what you mean by that word 'responsibility'. I should say that he is responsible in the sense that any officer of a corporation is responsible to the stockholders. In the sense of reporting to him or taking orders from him as such—I do not think the question has ever been raised—if it were, I would say that Mr. Petty's position would more accurately be described this way: That he had, with the knowledge and approval of the Board of Directors of Bethlehem Steel Corporation, been selected to run the railroads, and his job was to run the railroads without interference or control by any one. Now, if——

Q. Yes—do you wish to add anything to your answer?

A. No.

Q. Referring again to your testimony on May 20th, 1943, at Buffalo, New York, in the Matter of the Investigation of South Buffalo Railway Company before the Interstate Commerce Commission, No. Ex Parte 128, I ask you if you recall this question as being put to you and whether you gave the answer as indicated;

Question: 'Does Mr. Petty report to any one in the Bethle-

199 hem Steel Company's organization?' Answer: 'I don't think so; he, like everybody else who is in charge of any particular branch of the activities—any activity—of the Bethlehem Steel Corporation, is responsible to the Board of Directors and probably to Mr. Grace, but so far as our corporate setup goes; no.' Is that your testimony there?

A. Yes.

Q. Isn't it a fact, Mr. McMath, that Bethlehem Steel Corporation has two interests in the South Buffalo Railway Company, one is to see that the Railroad company is financially sound and that its results are incorporated in the consolidated income account of the Bethlehem Steel Corporation for the purpose of taxation and other purposes?

A. That statement is true, although perhaps a little unfortunately put. I wouldn't say those are its two interests in the railroad. I think perhaps something like that was said in connection with the reasons for getting statistical data from the railroad that it was necessary from those two angles to get the data; that is to say, Bethlehem Steel Corporation had to have the information in order to consolidate the accounts of the railroad company with the parent company and, naturally, as a

200 stockholder in the South Buffalo Railway Company, it has the same interest that any stockholder has—it likes to see the corporation make money; possibly, that's the angle that was in my mind at the time I testified before.

Q. Did Bethlehem Steel Company or the Corporation purchase the Seneca Iron & Steel Company, do you recall?

A. Yes—do you want to know which one, or did either one?

Q. Well, which one did?

A. I think the Bethlehem Steel Company purchased it.

Q. Do you recall about when that was—when the plant was purchased, I mean?

A. Well, I can't give you the exact date, but I think it was approximately ten or twelve years ago—between September and November 1932, I think."

The COURT. Does that conclude the direct examination?

Mr. CRAIG. Yes.

The COURT. I think we had better suspend at this time.

(Whereupon an adjournment was taken until Wednesday, January 23, 1946, at 10 o'clock a. m.)

201 Proceedings of Wednesday, January 23, 1946, 10 o'clock A. M.

Appearances: Same as before noted.

Mr. BROMLEY. I will read the cross-examination of the witness McMath, may it please the Court [reading.]

"Cross-examination by Mr. BROMLEY:

Q. Your attention was called to testimony which you gave at Buffalo, New York, before the Interstate Commerce Commission in Ex Parte No. 128, and you were asked concerning this: Question: 'Does Mr. Petty report to any one in the Bethlehem Steel Corporation's organization?' Answer: 'I don't think so; he, like everybody else who is in charge of any particular branch of the activities—any activity—of the Bethlehem Steel Corporation, is responsible to the Board of Directors and probably to Mr. Grace, but so far as our corporate, etc.' When you used the phrase 'is in charge of any particular branch of the activities—any activity—of Bethlehem Steel Corporation,' you meant, didn't you, any activity of a subsidiary of the Bethlehem Steel Corporation?

A. That's it; it's quite wrong to refer to an activity of the Bethlehem Steel Corporation, because it really doesn't have any.

202 Q. And the only responsibility which Mr. Petty has either to Bethlehem Steel Corporation or to Mr. Grace arises from the fact, does it not, that Bethlehem Steel Corporation, the president of which is Mr. Grace, owns substantially all of the stock of the South Buffalo Railway Company of which Mr. Petty is the president?

A. That's right. My reference to Mr. Grace was naturally the fact that as president of the Bethlehem Steel Corporation, he was the administrative head of it.

Q. And the only responsibility which you as an officer of the Bethlehem Steel Corporation would expect Mr. Petty to have to that corporation is the responsibility which you feel the officers of any corporation have to the stockholders of that corporation, isn't that right?

A. That's quite correct.

Q. Now, the Bethlehem Steel Corporation as the owner of substantially all of the stock of the South Buffalo Railway Company, it at all times has it within its power to elect any member or members of the Board of Directors, or change the complexion of the Board completely at any time that it desires to do so, subject to the provisions of the bylaws which may limit such action
203 to the annual meetings, isn't that true?

A. That's correct.

Q. At one point in your testimony just before the noon recess, as I recall it, you used the phrase 'manufacturing departments' in talking about the activities of the subsidiaries, I believe, of the Bethlehem Steel Corporation. Isn't it a fact that in the use of the phrase 'manufacturing departments,' you did not mean manufacturing departments of Bethlehem Steel Corporation, but, on

the contrary, the manufacturing departments of the Bethlehem Steel Company, the operating company?

A. I must have meant that, because Bethlehem Steel Corporation has no manufacturing departments.

Q. It is quite the usual thing, is it not, among large corporations which have important subsidiaries, to publish consolidated balance sheets and income accounts?

A. Yes.

Q. That's also true of a corporation like the United States Steel Corporation, is it not?

A. It is by all odds the most usual method of presenting financial statistics of corporations whose stock is listed, and it is also the case in many instances with corporations whose stock is not listed.

204 Q. In those situations it is the fact, isn't it, as you said was the fact with the Bethlehem Steel Corporation, that the earnings of the subsidiary companies are shown as earnings in the consolidated statements whether or not dividends have been declared?

A. Yes.

Q. And there is nothing unusual in the practice which you described as being the practice of Bethlehem Steel Corporation in that respect at all, is there?

A. No; it's necessary to do it that way if you are going to give out a consolidated statement.

Q. When you said your interest in dividends was only secondary, you were referring to your interest in dividends in relation to the practice of publishing a consolidated statement involving the parent company and all of its subsidiaries, weren't you?

A. I think what I had in mind in saying that our interest in dividends was secondary was the fact that Bethlehem Steel Corporation had as much cash as it needed in its business, and the fact that the railroad company did or did not pay a dividend was not important.

Q. But the Bethlehem Steel Corporation had no means of getting any part of the earnings of the South Buffalo
205 Railway Company for its use except and unless the Board of Directors of South Buffalo declared and paid some part of those earnings out as dividends, isn't that correct?

A. That's right; as long as the money remained in the treasury and ownership of the railroad company, the funds were not usable for any purpose other than that of the railroad company.

Q. And it is a fact, it it not, that at the present time the question of whether or not dividends shall be declared and paid by the South Buffalo Railway Company is something decided by its di-

rectors without any direction or control exercised on the part of Bethlehem Steel Corporation to any extent whatsoever?

A. I think that's entirely correct; I don't remember that we have ever attempted to influence the directors of the railroad company; certainly not in the last five or six years.

Q. In connection with the subject of the two contributions about which you testified, you said in effect, I think, before the noon recess, that the form of the entries on the South Buffalo Railway Company's books with respect to this matter were naturally approved by an employee of the Bethlehem Steel Corporation—do you recall that?

206 A. Yes.

Q. You didn't mean to suggest by that answer, did you, that it was natural for employees of Bethlehem Steel Corporation to tell the South Buffalo Railroad Company how to keep its books as a general matter?

A. No; I think I said this was a very unusual transaction; so unusual that the ordinary accountant would be more or less at sea as to what to do; it was purely a question of advice on accounting procedure.

Q. Furthermore, isn't it a fact that since this transaction involved the payment of money by Bethlehem Steel Corporation to South Buffalo Railway Company, it was primarily and almost exclusively within the knowledge of the Bethlehem Steel Corporation as to the exact nature of the payment, and it was up to the Bethlehem Steel Corporation to tell South Buffalo Railway Company what the payment was for, because it was a contribution—that is, a gift—in a more or less general sense?

A. Yes; I think that the officers of the railroad company understood why it was done and what it was.

Q. But what it was something that was within the determination of the Bethlehem Steel Corporation since it made the payment, isn't that right?

A. Yes.

207 Q. Have you ever been a director or officer of the South Buffalo Railway Company?

A. I am quite sure I have not been.

Q. Have you ever exercised any control over the operations or the finances of the South Buffalo Railway Company?

A. No.

Q. In connection with your testimony before the noon recess about the compensation of officers and employees either of Bethlehem Steel Corporation or of any of its subsidiaries, isn't it a fact that neither Bethlehem Steel Corporation nor Bethlehem Steel Company has ever paid any additional compensation to any officer or employee who was once an employee of Bethlehem Steel Com-

pany and became an officer or employee of the South Buffalo Railway Company or some other subsidiary?

A. I never heard of any.

Q. Certainly, there is no instance of that kind so far as the South Buffalo Railway Company is concerned, is there?

A. I feel quite sure that there isn't.

Q. At one point earlier in your testimony this morning you used the phrase, I think, in connection with the Bethlehem
208 Steel Corporation and the activities of its subsidiaries, 'we have important transportation business.' When you said 'We have,' you merely meant, didn't you, that the Bethlehem Steel Corporation was the owner of the stock of subsidiaries which were engaged in important transportation businesses?

A. Yes; what I had in mind was this: That the Bethlehem Steel Corporation, through the ownership of stock of various subsidiaries, is indirectly interested in a large number of businesses which are by nature completely separate and distinct businesses, and there again I think I used the word 'we' in a loose sense as referring to those businesses.

Q. At the present time, Mr. McMath, and at least since 1938 or 1939, no director of South Buffalo Railway Company is or has been on the Board of Directors of the Bethlehem Steel Corporation, is that correct?

A. That is correct.

Q. And, likewise, at the present time and at least since 1939, there have never been any common directors—that is, men on the Board of South Buffalo Railway Company and on the Board either of the Bethlehem Steel Corporation or any other of its subsidiaries except the six other railroad companies?

A. That's correct; not only since 1939, but for a long
209 time before that also.

Q. And, looking only at the Board of Directors of the seven railroad subsidiaries of Bethlehem Steel Corporation, including the South Buffalo Railway Company, their Boards of Directors are not common Boards of Directors—that is, they are not composed of the same individuals, are they?

A. No; they are largely different; I think that Mr. Petty is a director of all of them, and Mr. Trageser, too; the others, I think, are all different.

Q. Looking at the officers of South Buffalo Railway Company, there is no officer of South Buffalo who is also an officer of the Bethlehem Steel Corporation or the Bethlehem Steel Company, is there?

A. No.

Q. And that is likewise true of the employes of South Buffalo Railway Company, is it not—there is no employee of South Buffalo

who is also an employee of the Bethlehem Steel Corporation or Bethlehem Steel Company?

A. I am quite sure no.

Q. And it is a fact, is it not, that the South Buffalo Railway Company at all times has owned all of the equipment and supplies and property necessary to its operation as a railroad?

210 A. That is my understanding.

Q. At the present time, and indeed at all times, the South Buffalo Railroad Company has been perfectly free to enter into such contracts as in the business judgment of its officers and directors it was thought fit or proper, isn't that right?

A. That's entirely true, and I may say that the officers and directors of Bethlehem Steel Corporation have scrupulously refrained from attempting to or in any way interfering or controlling the officers and directors of the railroad companies.

Q. There is no control, in any sense of the word, exercised by Bethlehem Steel Corporation or its officers over the amount of capital or other expenditures made by the South Buffalo Railroad Company, is there?

A. No.

Q. There is no supervision or control to the slightest degree exercised by Bethlehem Steel Corporation or its officers or representatives over such things as freight or demurrage charges and the amounts thereof as determined or fixed by the South Buffalo Railway Company?

A. No.

Mr. CRAIG. If the Court please, I think I will interpose
211 an objection to that question as calling for a conclusion as to whether or not supervision or control was exercised by any person connected with Bethlehem over certain matters concerning the operation of the railroad. That, of course, is one of the matters to be determined.

Mr. BROMLEY. That is an objection to the form of the question which was not made at the time. Had it been made, I would have corrected it.

The COURT. Objection overruled.

(Mr. Bromley continues reading):

"Q. The Bethlehem Steel Corporation does not draw unto itself the surplus funds of the railroad company in any sense of the word, does it?

A. No; that matter is entirely within the judgment of the Board of Directors; we have never, to my knowledge, exercised or attempted to exercise any control or direction over that subject?

Q. The South Buffalo Railway Company, through its directors and officers, have complete and absolute charge of all of its moneys and finances and keeps them in its possession, does it not?

A. That is entirely correct, and I have made sure that the directors and officers of the railroad understand their independence in that respect.

212 Q. Isn't it a fact that so far as transactions are concerned between the South Buffalo Railway Company and the Bethlehem Steel Corporation or any of its other subsidiaries, that if agreements or arrangements are reached between or among them, it is the result of free bargaining between the officers of the South Buffalo Railway Company on the one hand and the officers of the Bethlehem Steel Corporation or the officers of the subsidiaries on the other?

A. Correct.

Q. Does the Bethlehem Steel Corporation exercise any control or supervision over the amounts of compensation paid by the Railway Company to its officers or employees?

A. No; the only instance I know of was the suggestion originally made at the time Mr. Petty was elected as president of the railroad companies. So far as I know I have never been consulted, and I don't believe any one else has in the organization of the Bethlehem Steel Corporation with reference to compensation; that is entirely up to the Board of Directors of the company under Mr. Petty's advice and direction.

Q. Even in the situation to which you testified and to which reference was made in connection with Mr. Petty's salary, wherein you stated something about reference to the salary being
213 made by the Board of Directors of the Steel Corporation to the railroad companies, that is not the customary procedure—indeed, it has never been done in the case of any other officer that you know of, has it?

A. That's correct.

Q. That is something entirely within the jurisdiction of Mr. Petty as president and of the Board of Directors of the South Buffalo Railway Company?

A. Yes."

Mr. BROMLEY. That is all.

Mr. CRAIG. I will read the redirect examination [reading, as follows]:

"Q. Mr. McMath, Mr. Eugene Grace is president of Bethlehem Steel Company as well as of the Corporation?

A. Yes.

Q. And has been for a number of years?

A. Yes.

Q. And you are a vice president of both the Company and of the Corporation?

A. Yes.

Q. Do you have any other officers in common?

A. We have a comptroller and some assistant secretaries—I am Secretary as well as Vice President—we have some assistant secretaries and some assistant treasurers—that's all, I think.

Q. Are these some directors common to both Corpora-
214 tion and the Company?

A. Yes.

Q. How many—do you know?

A. All of the Directors of Bethlehem Steel Company are also Directors of Bethlehem Steel Corporation; also, and in addition, there are some other Directors of Bethlehem Steel Corporation who are not officers or directors or otherwise connected with the Bethlehem Steel Company.

Q. Would you say that Bethlehem Steel Corporation exercises any control over the affairs of Bethlehem Steel Company?

A. No; I know of no instance where any such control has been exercised or attempted to be exercised. Naturally, perhaps the answer to the question is that no issue on that question has ever been raised.

Q. Is it correct to say that the affairs of the Company are considered in connection with the affairs of the Corporation?

A. I would say rather the other way, that Bethlehem Steel Company, as such, has generally been entirely independent of control by the Corporation. Naturally, the Corporation owns the stock of the Bethlehem Steel Company, and in order to make that statement I have to go back to the time when the directors of
215 Bethlehem Steel Corporation were largely made up of individuals who were so-called 'outside directors,' that is to say, not connected in any way with the subsidiary company's operations, and for many years that was the situation. The officers and directors of Bethlehem Steel Company considered themselves charged with the responsibility of running the Bethlehem Steel Company, and that they did to a far greater extent than is true of any other large corporation that I know of. Our system of management has been, so far as the Corporation is concerned, largely to select people whom we believe to be competent to manage the activities of the various subsidiary companies, and then to let them manage them.

Q. In making up your consolidated balance sheets, or whatever you care to term them, of Bethlehem Steel Corporation, do you follow the same general procedure with all of the subsidiary companies?

A. Yes; there were one or two exceptions, one of which was a small bank which we owned in West Virginia which it was not practicable to consolidate into a picture of an industrial concern, therefore, that was excluded; but all of our wholly-owned sub-

sidiaries are consolidated. We have some companies in which we hold only a minority interest, or, in some cases, a major-
216 ity interest, which are not consolidated, but the wholly-owned subsidiaries are now, I believe, without exception, included in the consolidated picture.

Q. The figures are handled, generally, in the same manner?

A. Yes.

Q. I believe your recollection was that when Mr. Trageser ceased to be president of South Buffalo and became vice president, that his compensation was not decreased?

A. I have no recollection of any change having been made by way of reducing his compensation; I couldn't be certain that it had not been done.

Q. Do you recall if you made any suggestions to the directors of South Buffalo Railway Company or any of the other subsidiary railroad companies in connection with that situation?

A. No, I don't. I don't recall having done so, or known of any one doing so."

Mr. CRAIG. That is all.

Mr. BROMLEY. I will read the re-cross-examination [reading, as follows]:

"Re-cross-examination by Mr. BROMLEY:

Q. In your reference to financial reports, you used the
217 term, 'consolidated reports.' Consolidated reports, in the sense in which you used that term, are consolidated financial statements of the Bethlehem Steel Corporation, aren't they?

A. Yes, consisting principally of an income account and the balance sheet.

Q. And they are prepared on the basis which is as though the parent corporation, Bethlehem Steel Corporation, owned all of the assets of the subsidiary and was liable for all of the liabilities and earnings—all the earnings or losses incurred, isn't that right?

A. That's the theory of them.

Q. And the publication and filing of such reports on such a basis is now required by the New York Stock Exchange of all corporations whose stock is listed on that Exchange, isn't that correct?

A. I think it is. It was ordered that way because no corporation which has various classes of securities can give a true picture without that; you might have inter-company obligations or assets all accumulated in one concern which, if you were to attempt to give individual balance sheets on fifty different companies together with their income accounts, you would have a totally non-understandable financial picture.

218 Q. And, likewise, the Securities Act requires that corporations with subsidiaries in the same situation as the

Bethlehem Steel Corporation, publish for the information of its stockholders and the public at large, such a consolidated statement such as you have described, isn't that right?

A. I believe that's so; yes."

Mr. BROMLEY. That is all.

Mr. CRAIG. I will read the further redirect examination [reading, as follows]:

"Redirect examination by Mr. CRAIG:

Q. It is or is it not a fact, Mr. McMath, that the method of making consolidated reports by the Bethlehem Steel Corporation was adopted before it was required by the rules of the New York Stock Exchange?

A. I don't know when that rule became effective, but to the best of my recollection, we have published consolidated reports from the inception of the Bethlehem Steel Corporation, and that was back in 1905.

Q. Didn't you follow the method described of making consolidated statements of Bethlehem Steel Corporation before it was required, if it is required by the Securities and Exchange Commission?

219 A. Oh, yes; I am quite sure of that, and I might say that for obvious reasons good accounting practice required it; it was not a thing which was invented or discovered by the Stock Exchange or by the Securities Commission—it was merely a recognition on their part of sound accounting practice."

Mr. CRAIG. That is all. I will ask to have marked as Plaintiff's Exhibit No. 3 "registration statement of Bethlehem Steel Corporation as filed with the Securities and Exchange Commission, Philadelphia, Pennsylvania.

(Registration Statement of Bethlehem Steel Corporation marked "Plaintiff's Exhibit No. 3.")

Mr. CRAIG. If the Court please, there has been offered as Plaintiff's Exhibit 3 a registration statement of the Bethlehem Steel Corporation with the Securities and Exchange Commission. The date of filing is June 26, 1945. The effective date is July 16, 1945, as of July 15, 1945. The statement is in connection with certain securities registered and the title or issues is "Consolidated Mortgage Twenty-Five Year Sinking Fund 2¾% Bonds, Series I, of Bethlehem Steel Corporation. Due July 15, 1970," and the amount is $75,000,000.

The COURT. Is that the report of the Bethlehem Steel
220 Corporation or the railroad?

Mr. CRAIG. Of the Bethlehem Steel Corporation to the Securities and Exchange Commission, the registration statement.

Mr. BROMLEY. Are you offering it?

Mr. CRAIG. The Plaintiff offers certain portions of Exhibit 3, which it thinks are relevant. That which is first offered is from Part 1 of the registration statement, on page 3, thereof, although on this page I do not see the page number, but it follows page 2 and immediately precedes page 4, and that which we offer is the heading in bold type toward the bottom of the page beginning "History and Business," being only the fourth paragraph on that page, and on page 4, the first four paragraphs on that page. At this time plaintiff offers in evidence the described material.

Mr. BROMLEY. No objection.

(The portion of the registration statement as described by Mr. Craig was thereupon received in evidence and marked "Plaintiff's Exhibit No. 3.")

(Portion above referred to read to the Court, as follows):

HISTORY AND BUSINESS

The Corporation was incorporated July 1, 1919, under
221 the laws of the State of Delaware, and maintains its principal office (statutory) at 100 West Tenth Street, Wilmington, Delaware. Its New York address is Cunard Building, 25 Broadway, New York City 4.

On February 26, 1936, pursuant to an agreement of merger, dated January 16, 1936, (which is hereinafter sometimes called the Agreement Merger), Bethlehem Steel Corporation, a corporation organized and formerly existing under the laws of the State of New Jersey (hereinafter sometimes called the Old New Jersey Corporation) and three other corporations, all the outstanding shares of the capital stock of each of which immediately prior thereto were owned by the Old New Jersey Corporation, to wit, Bethlehem Mines Corporation, Kalman Steel Corporation and Union Iron Works Company, were merged into the Corporation (the name of which was formerly Pacific Coast Steel Corporation), all the outstanding shares of the capital stock of which were at that time also owned by the Old New Jersey Corporation. The merger that was effected on February 26, 1936, by the filing and recording of the Agreement of Merger is hereinafter in this Prospectus sometimes called the Merger. Said five corporations, the parties to the Merger, are hereinafter some-
222 times collectively referred to as the Constituent Corporations.

The business of the Corporation consists chiefly of holding and owning stocks and obligations of subsidiaries. It also owns some physical properties which are operated by subsidiaries. It does not operate any physical properties.

The subsidiaries of the Corporation are engaged chiefly in, and their present intentions are to continue to be engaged chiefly in,

the businesses of: (1) the manufacturing and selling of iron, steel and certain other products, including: structural shapes, rails and rail accessories, plates, sheet piling, bars, rods, blooms, billets, slabs, skelp, pipe, tubes, sheets, strip, black plate, tin plate, wire, wire rope and other wire products; bolts, nuts, rivets and spikes, car wheels, railroad frogs and switches, armor plate, gun forgings, shell forgings, axles, pressed, hammered and drop forgings, steel, iron and brass castings, pig iron, ferro-manganese, ferro-silicon, ingot moulds, stools and bottom plates, machinery, coke and by-products produced in the manufacture of coke; (2) the construction and selling of steel freight train and mine cars; (3) the fabricating and/or selling and/or erecting of steel for
223 buildings, bridges, tanks and other miscellaneous structures; (4) the contracting for, and the building and repairing of, naval and merchant vessels, tugs, car floats, barges and certain other harbor craft; (5) the mining and quarrying of ore, coal and limestone chiefly for the use of one or more of the subsidiaries; (6) the transporting of ore, coal, limestone and grain and of steel products on the Great Lakes; (7) the operation of short line railroads in the vicinity of plants operated by a subsidiary; and (8) the operation of public water supply systems in the vicinities of certain plants and other properties operated by certain subsidiaries.

The use of seven ocean-going vessels of subsidiaries has been requisitioned by the United States and such vessels are under time charter to the United States. Prior to the requisitioning of such vessels some of them were engaged in (and it is the present intention of the subsidiary which owns such vessels that, when it shall again have the use of them, they shall again engage in) the transporting of ore from foreign ports to the United States and of coal in coastwise traffic on the Atlantic Coast of the United States and from the United States to foreign ports and
224 others of them were engaged in (and it is the present intention of the subsidiary which owns such others that, when it shall again have the use of them, they shall again engage in) the transporting of iron and steel products in coastwise traffic between ports of the United States and of iron and steel products, lumber and miscellaneous merchandise between Atlantic and Pacific Coast ports of the United States.

Incidental to their respective businesses some of the subsidiaries of the Corporation (a) operate warehouses primarily for the distribution of products manufactured by subsidiaries, (b) sell certain oil field supplies and equipment (in addition to those mentioned above) which are not manufactured by any of the subsidiaries and (c) own housing facilities which are held primarily

for rental and are in the main rented to employees of one or more of the subsidiaries."

Mr. CRAIG. Now the plaintiff offers in evidence on page 5, beginning with the seventh paragraph, commencing with the words "During the five-year period," the remainder of page 5 and through the second paragraph on page 6. That portion is offered in evidence at this time.

Mr. BROMLEY. Since it has nothing to do with the South
225 Buffalo Railway Company, I object to it as immaterial.

Mr. CRAIG. Your Honor, we have alleged that in substance the Bethlehem organization is one cohesive organization, starting with the top of the organization, and this is part of our proof. It is much in line with the oral testimony of Mr. McMath on the same subject.

The COURT. What, in substance, do these paragraphs purport to relate to?

Mr. CRAIG. It starts out by stating the source of the iron ore. Of course it has developed that a substantial portion of it comes from subsidiary lines of the Corporation, and relative to the method of shipping that ore, and there is a discussion of coal and the source of that. It appears that a large portion of it comes from mines owned directly or indirectly by the corporation; and the same thing about limestone.

The COURT. It is a part of the history of the Company?

Mr. CRAIG. Yes, of the organization and the relationship of supplies to manufacture and being the supplies in large measure coming from subsidiaries of the Bethlehem Steel Corporation and used by other subsidiaries of the Bethlehem Steel Corporation.

226 The COURT. It seems quite probable that there will be little dispute about that. I think I will receive it. It may be immaterial, but I think I will receive it as part of the history of the operations. You may proceed.

Mr. CRAIG (reading):

"During the five-year period 1935 to 1939, inclusive, subsidiaries of the Corporation obtained approximately 80% of all the iron ore used by them from other subsidiaries of the Corporation or from other corporations in which the Corporation, directly or indirectly, had a substantial stock interest. The corresponding percentage for the five-year period 1940 to 1944, inclusive, is 64%. Subsidiaries of the Corporation have from time to time purchased a part of their iron ore requirements, when such purchases could advantageously be made or during periods of abnormally high operations. The principal normal sources of supply of iron ore of the subsidiaries have been (1) the mines in the Great Lakes region, in which the Corporation, directly or indirectly, has an inter-

est, (2) The Cornwall Ore Banks in or near Cornwall Borough, Pennsylvania, which are owned by a subsidiary and (3) foreign ores, of which the iron ore mines in Chile that are held
227 under lease by a subsidiary have been the principal source.

One of the subsidiaries of the Corporation has been engaged in the development of iron ore properties in Venezuela and another of its subsidiaries has recently acquired and expect to develop additional iron ore properties in Mexico. Under normal conditions it is practicable to use foreign ores in the Bethlehem, Johnston, Steelton and Sparrow Point Plants of subsidiaries.

During the years 1942 to 1944, inclusive, because of loss through enemy action and requisitioning by the Government of the ore-carrying vessels of a subsidiary, it has not been possible for subsidiaries to obtain foreign ores in substantial quantities and the principal source of supply of iron ore during those years has been the above-mentioned mines in the Great Lakes region. During such three-year period, subsidiaries of the Corporation obtained only approximately 56% of all the iron ore used by them from other subsidiaries of the Corporation or from other corporations in which the Corporation, directly or indirectly, had a substantial stock interest. The officers of the Corporation except that upon the resumption of normal ocean transportation foreign ores
228 will again become available for the Eastern steel plants of subsidiaries. It is not expected that there will be any important changes in the sources of supply of iron ore, except such as are due to the depletion of old mines and the development of new mines.

Of the coal required by subsidiaries during the period 1935 to 1939, inclusive, approximately 70% was obtained from mines owned, directly or indirectly, by the Corporation. The corresponding percentage during the year 1940 to 1944, inclusive, is approximately 79%. Coal has been purchased from time to time, when it seemed more advantageous to purchase coal than to use coal from mines owned, directly or indirectly, by the Corporation, or in periods of abnormally high demand for steel or of abnormal conditions.

Of the limestone required by the steel plants of subsidiaries during the period 1935 to 1939, inclusive, approximately 56% was obtained from quarries owned, directly or indirectly, by the Corporation. The corresponding percentage during the period 1940 to 1944, inclusive, is approximately 60%.

Mr. CRAIG. And on page 9 starting at the beginning, the
229 heading and the first paragraph and the fifth paragraph, which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

Mr. CRAIG (reading):

"Properties and plants iron and steel producing and manufacturing plants: At the iron and steel producing and manufacturing plants of subsidiaries are located facilities with an estimated combined annual capacity of 8,358,000 net tons of coke, 9,474,000 net tons of pig iron, 180,000 net tons of ferro-manganese and 12,900,000 net tons of raw steel, together with rolling, forging, casting and other finishing facilities capable of converting such steel into certain semi-finished and finished products. Such plants are more particularly as follows:

Lackawanna Plant, located at Lackawanna, and Blasdell, New York; This plant comprises approximately 1,194 acres of land, on a part of which are located facilities with an estimated annual capacity of 2,022,000 net tons of coke, 2,556,000 net tons of pig iron and 3,120,000 net tons of open hearth raw steel, together with rolling, casting and other finishing facilities capable of converting such steel into certain semi-finished and finished products."

Mr. CRAIG. And on page 12, the paragraph beginning
230 "Railroads" in the middle of the page, which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

Mr. CRAIG (reading): "Railroads: The railroads of subsidiaries are as follows: Seven short-line railroads located in the vicinities of the above-described plants located at Bethlehem, Johnstown, Lebanon and Steelton, Pennsylvania; at Lackawanna, New York; and at Sparrows Point, Maryland; and in the vicinity of the Quincy Yard at Quincy and Braintree, Massachusetts."

Mr. CRAIG. And on page 44, beginning with the part headed "Incentive Compensation Plans," the remainder of page 44 and the first two paragraphs of page 45, which plaintiff now offers in evidence.

Mr. BROMLEY. I object to this as immaterial. It has only to do with the provision of the certificate of incorporation of the holding company as a plan for incentive compensation. It seems to me to be far afield from any questions raised in this case.

Mr. CRAIG. If the Court please, in the complaint we allege, among other things, that the corporation that is the Bethlehem Steel Corporation, owns all or substantially all of the stock of approximately 55 other corporations, all of which, together
231 with the South Buffalo and the Steel Company are operated as one cohesive organization for the manufacture of steel and the products made in whole or in part; that said organization is dominated and controlled by the holding company.

The COURT. Is it your claim that this incentive plan applies to all of the subsidiaries of the corporation?

Mr. CRAIG. No, the quoted part from the certificate of incorporation applies specifically to the corporation, but also makes pro-

vision that incentive compensation plans may be adopted, and the Board of Directors of the corporation will approve such a plan for other corporations.

The COURT. Will approve or may approve?

Mr. CRAIG. Shall have power in its discretion to approve for subsidiary companies. Of course, we will develop that the South Buffalo—in fact allusion has been made to it having its own incentive plan. That is one aspect. Another is, we allege in substance that the corporation and the officers thereof are interested in the net results of operations of the entire Bethlehem organization.

The COURT. You mean the officers of South Buffalo?

Mr. CRAIG. No, the officers of the Bethlehem Steel Corporation. This is part of our contention of the integration of the entire
232 Bethlehem organization, and one of the reasons for that is this incentive compensation plan.

The COURT. Of course, payment is by the Corporation?

Mr. CRAIG. The Corporation; but, of course, that is based upon the net operating results of all of its subsidiaries.

The COURT. And likewise payment of the officers of the officers of the corporation, of the holding company, is dependent upon the income of the subsidiaries?

Mr. CRAIG. As I understand it, they operate in two ways; there is a fixed compensation. That does not vary, but the incentive compensation does vary.

The COURT. Whether it is incentive or regular compensation they are all paid by the same source?

Mr. CRAIG. Yes, but one is a variable and the other is fixed, and it is part of our allegation in here as to the integration of the whole organization; the top organization and the people connected with it are not interested in the operation of this particular subsidiary as such, but they look upon it as a part of a whole integrated organization.

The COURT. The same thing would apply to all salaries because they are up or down dependent on the success of the various subsidiaries.

Mr. CRAIG. It would not be during a given period, I
233 think, your Honor, because there is the fixed compensation during that period, but it is not until the period is over that you can tell what the incentive compensation is going to be.

The COURT. I think it should be received. It may have some bearing. Objection overruled and an exception to the defendants.

Mr. CRAIG (reading):

"INCENTIVE COMPENSATION PLANS

"The Amended Certificate of Incorporation of the Corporation as changed by the Agreement of Merger contains the following provisions with reference to incentive compensation plans as Article Tenth thereof:

"'Tenth. In order to provide an incentive to increased efficient and profitable management there is hereby established a Special Incentive Compensation Fund into which payments shall be made and out of which amounts shall be paid as special incentive compensation as hereinafter in this Article Tenth provided.

"'There shall be paid into said Fund for each fiscal year of the Corporation an amount equal to five per cent of the consolidated net income of the Corporation and its subsidiary companies
234 for such year after deducting all fixed charges and depreciation (including obsolescence) and depletion, and the amount, if any, to be paid into said Fund for such year, and after deducting an amount equal to the dividends accrued for such year upon the preferred stock or preferred stocks of the Corporation outstanding, exclusive of any shares thereof held in the treasury of the Corporation and of its subsidiary companies. Said consolidated net income shall be as shown in the consolidated income statement of the Corporation and its subsidiary companies for such year as certified by independent public accountants after an audit by them of the accounts of the Corporation and its subsidiary companies in accordance with the customary practice of said accountants. When and to the extent authorized by the Board of Directors, payments to said Fund in respect of said consolidated net income for any fiscal year of the Corporation may be made during such year, subject to final adjustment upon the completion by said accountants of their said audit for such year.

"'The persons who shall be eligible to receive special compensation out of said Fund shall be (1) the executive officers of the
235 Corporation, (2) the heads of departments having general control of matters affecting the Corporation and its subsidiary companies as a whole, and (3) the other persons, if any, who shall be directors of the Corporation and in its employ or in the employ of one or more of its subsidiary companies. Said officers, heads of departments and other persons, if any, are hereinafter in this Article Tenth collectively referred to as the executives of the Corporation.

"'Whenever any cash dividend shall be paid upon the Common Stock, then to the extent that the amounts that shall theretofore have been paid into said Fund out of earnings after December 31, 1935, and that the aggregate amount which shall then remain in said Fund shall be sufficient therefor, there shall be paid to the

executives of the Corporation an amount equal to one-fifteenth (1-15th) of the aggregate amount of said cash dividend.

"'The apportionments of the amounts that shall be paid out of said Fund to the respective executives of the Corporation, as well as the amounts of their respective fixed salaries, shall be determined by the Board of Directors or by any one or more committees (none of which shall consist of less than three members)
236 appointed by the Board of Directors from among its members; provided, however, that none of the executives of the Corporation shall as a member of the Board of Directors or of any such committee thereof have any vote in the determination of the amount that shall be paid to him out of said Fund or as a fixed salary.

"'The Board of Directors, acting for the Corporation as the owner, direct or indirect, of capital stock in any other corporation, shall have power in its discretion to approve any plan for the payment of incentive compensation to the officers and employees of said other corporation which shall be used on the net earnings of said other corporation or in any other manner which will make the amount of said incentive compensation dependent upon the results accomplished by them or any of them, and the Board of Directors shall also have power to adopt similar plans for the payment of incentive compensation to officers and employees of the Corporation engaged in the conduct and operation of businesses relating to physical properties directly owned or operated by it; provided, however——'"

The COURT. That is referring to the corporation, you mean, the property owned by it?

Mr. CRAIG. I take it to be so. It says "Relating to
237 physical properties directly owned or operated by it."

Mr. BROMLEY. That means the coal mines.

The COURT. The point I am getting at is whether this provision that you are reading requires the payment of this additional compensation to the officers of the subsidiary company. What you read seemed to carry that meaning in my mind.

Mr. CRAIG. I do not know that it requires it.

The COURT. You said something about the compensation to those who were officers of the subsidiary companies. This last clause that you read recalled the fact to my mind. You read the word "subsidiary".

Mr. CRAIG. Yes, I did earlier.

The COURT. What does that say right there?

Mr. CRAIG. In the paragraph I was reading it referred to "Said other corporation."

The COURT. To whom the incentive payments were to be made, the first classification you read.

Mr. CRAIG. I had better read that over and then we will find the reference back. It reads "The Board of Directors, acting for the Corporation as the owner direct or indirect, of capital stock in other corporation, shall have power in its discretion to approve any plan for the payment of incentive compensation
238 to the officers and employees of said other corporation."

The COURT. Shall have power to approve?

Mr. CRAIG. Yes.

Mr. BROMLEY. Shall have power to approve as stockholders if your Honor please.

The COURT. As stockholders of the Corporation?

Mr. BROMLEY. The corporation as a stockholder of the other companies.

The COURT. Of course, the power would be there to approve; that is true.

Mr. BROMLEY. Yes.

Mr. CRAIG (reading). "Provided, however, that none of the persons who shall receive any amount out of said Fund in any calendar quarter-year shall receive any such other incentive compensation for the whole or any part of the same quarter-year from the Corporation or from any corporation any of the stock of which shall at the time be owned directly or indirectly by the Corporation."

That ends the quotation from the amended certificate of incorporation of the corporation, and then continuing:

"For many years it has been the practice of the Corpora-
239 tion and its subsidiaries also to pay a substantial part of the compensation of their employees other than those entitled to compensation pursuant to the Special Incentive Compensation Fund referred to above upon the basis of results accomplished. Many and varied methods are employed in determining the amount of the incentive compensation so paid to such other employees, each method being designed to suit a particular individual or group. In accordance with the provisions of Article Tenth of the Amended Certificate of Incorporation of the Corporation quoted above, none of the persons who receives any amount out of the Special Incentive Compensation Fund in any calendar quarter-year receives any other incentive compensation for the whole or any part of the same quarter-year from the Corporation or from any of its subsidiaries."

240 The COURT. Is it your contention that any incentive program made by any subsidiary has to be approved by the corporation?

Mr. CRAIG. Well, we hope to establish in this case that the South Buffalo program has been approved by the Corporation.

The COURT. Is that the construction you place on that provision you read? It does say that the programs may be approved by the Corporation.

Mr. CRAIG. Yes. The language is not quite as strong as making it compulsory, but we shall endeavor to develop that that is the practice, and especially as applied to South Buffalo, which has an incentive compensation plan of its own.

Mr. BROMLEY. Of course, our view is, your Honor, that that merely expresses the right of any stockholder of the corporation, that he has the right, if he objects to the payment of compensation to the officers of his Corporation, he can bring a suit and njoih it.

The COURT. Inquiry might be made why the provision was put in there.

Mr. BROMLEY. Just expressing in the certificate of incorporation the power that, as stockholders, the Corporation can
241 have the power to approve, if it wants to.

The COURT. In other words, it would have that power without the certificate.

Mr. BROMLEY. I should think it might well exist without it.

Mr. CRAIG. It is all right where you have corporations which concededly are integrated and controlled. When you get into this field where it is claimed that a subsidiary is operated independently, and so forth, it is something else again.

Mr. BROMLEY. But you concede that the Corporation has the right to vote the stock of the South Buffalo Railway, don't you, Mr. Craig?

Mr. CRAIG. Well, it is open. I think there is no question about that. I do not think that is in issue in this case. But it does elect the directors. I do not know of any reason why it can't.

The COURT. Well, it has full control so far as any activities of the Company are concerned, any action by the Railroad Company is concerned; of course it has; it is a stockholder.

Mr. CRAIG. On page 52 there is a statement which is headed "Bethlehem Steel Corporation and subsidiary companies' consolidated balance sheet, December 31, 1944," which plaintiff now offers in evidence.

Mr. BROMLEY. I object to it only as immaterial.
242 The COURT. Overruled.

Mr. CRAIG. By the way, that page 52 is the assets' side of the balance sheet. Page 53 is Bethlehem Steel Corporation and subsidiary companies' consolidated balance sheet, December 31, 1944, is the liabilities, reserves, capital stock, and surplus, being the other side of the consolidated balance sheet, which plaintiff now offers in evidence.

The COURT. Of the Corporation?

Mr. CRAIG. Bethlehem Steel Corporation and subsidiary companies' consolidated balance sheet.

The COURT. Shows the balances of the subsidiary companies as well?

Mr. CRAIG. Yes, sir.

I am asking your Honor's preference in this matter of marking?

The Court: How much coverage is that? How many pages are there?

Mr. CRAIG. Well, it is divided into two parts; and the last page of the first part is numbered 73. I suppose it goes through consecutively. And part 2, the last page is numbered II–42. I take it that consists of 42 pages. And then there are a number of statements attached, which are rather large and complex. We propose to offer some but not all.

243 The COURT. Would there be any substantial objection to reception of this entire report here and have Counsel point out matters at such a time and such portions as he wants to? I do not know how you feel about that being marked as an exhibit. It is more easily used in that way because we will be able to point to the particular pages which will be an exhibit, which it contains; and probably much material will be immaterial and irrelevant, that is true, but that would not, perhaps, do any harm.

Mr. CRAIG. Perhaps not.

The COURT. I want to hear from Counsel.

Mr. BROMLEY. I have no objection to that procedure.

Mr. CRAIG. I have no objection to it, of course, but there is a lot of material in here.

The COURT. Well, it is offered as an exhibit. It does not have to be transcribed, that is all, now, and later on any appeal, of course, those sections can be transcribed. The only thing I am trying to simplify the matter of the record. I think in your brief and summary of the testimony you would be able to refer to those pages which you claim have any bearing on the particular points with reference to the exhibits.

Mr. CRAIG. Very well. I am quite willing to adopt the
224 suggestion.

The COURT. Report, you say, of the Corporation, made for 1944?

Mr. CRAIG. Well, it is registration statement of the Corporation, filed with the Securities and Exchange Commission in July—filed in June of 1945.

The COURT. Well, I am just offering that suggestion. You Counsel know better what you are advised in that respect. I thought it would be easier for the Court to refer to it as a convenience, and have certain pages referred to. Take these figures here, financial report, insert that in the record.

Mr. CRAIG. Well, I am quite willing to adopt the suggestion; and plaintiff, therefore, offers in evidence its Exhibit 3, heretofore described and identified.

Mr. BROMLEY. Wouldn't it serve the same purpose, your Honor, if it were just marked for identification?

The COURT. It isn't in, then?

Mr. BROMLEY. Well, the parts are read.

The COURT. Marked for identification. You have got to read the parts, that is all; anyway, marked for identification it is not in the record at all.

Mr. BROMLEY. Everything that he wants from it so far is now in the record; and he wants so little of the total material. What are you offering now, just two sheets?

245 The COURT. Well, there are quite a number of sheets.

Mr. CRAIG. I have some more coming up here, but considering the total bulk——

The COURT. The thought came to me that the ordinary way would be to get the whole report in and go ahead in this way, without any objection. It might be easier to present it in that way, that is all. The Court could pick it out of the record. How many pages are there?

Mr. CRAIG. Well, I have got the pages clipped and I see about ten more clips in here. I have covered, with what I have just offered, I appear to have gotten past eight clips. Of course, these statements I do not propose reading, as I did the narrative of the quotation.

The COURT. Well, the stenographer will have to take them or else have to be offered in some way as an exhibit here, get in the record some way.

Mr. CRAIG. That is what I did, offer the assets.

The COURT. You read that part.

Mr. CRAIG. Now I have offered the liabilities, reserves, capital stock, and surplus side of that consolidated balance sheet of Bethlehem Steel Company and subsidiary companies.

Mr. BROMLEY. I have no objection to those two sheets
246 going in as a separate exhibit.

The COURT. All right. Received. Now, what is the next one? Are they identified separately in your stenographic report? The pages are not identified separately, are they, as the exhibits? You have not referred to them as such?

Mr. CRAIG. I have not referred to them as exhibits. I have identified them by page number within the exhibit.

The COURT. All right.

Mr. CRAIG. Perhaps we can straigthten it out this way—I hope we can: It has been suggested by Counsel, and I submit it to the Court, that the preceding matter has been read into the record.

When it comes to these financial statements which are offered, not to read them but to identify them as separate exhibits.

The COURT. All right.

Mr. CRAIG. That, of course, would cause me to do—which I do now—the offer of the entire document in evidence.

The COURT. You have already got the others in the record?

Mr. CRAIG. Yes. And I had offered the volume but I now withdraw that offer and will revert to the other.

The COURT. All right.

Mr. CRAIG. And I will have this consolidated balance
247 sheet of Bethlehem Steel Company and subsidiary companies, both as to assets and to liabilities, reserves, capital stock, and surplus, marked as "Plaintiff's Exhibit 4."

The COURT. That is part of that report?

Mr. CRAIG. Which are included in the registration statements to which we referred.

The COURT. That registration statement was filed in 1945?

Mr. CRAIG. Yes, sir; June 26, 1945.

Plaintiff now offers in evidence its Exhibit 4, heretofore described.

Mr. BROMLEY. No objection.

(Registration statement referred to was received in evidence and marked "Plaintiff's Exhibit No. 4.")

Mr. CRAIG. There has been marked as Plaintiff's Exhibit 5 the statement that is on page 54 of this same registration statement, headed "Bethlehem Steel Corporation and subsidiary companies' consolidated income statement for years 1942, 1943, and 1944," which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

(The statement on page 54 referred to was received in evidence and marked "Plaintiff's Exhibit No. 5.")

Mr. CRAIG. There has been marked as Plaintiff's Exhibit
248 6 statement found on page 55 of the same registration statement, headed "Bethlehem Steel Corporation and subsidiary companies' consolidated statement of surplus," which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

(The statement on page 55 referred to was received in evidence and marked "Plaintiff's Exhibit 6.")

Mr. CRAIG. There has been marked as Plaintiff's Exhibit 7 the balance sheet shown on pages 66 and 67 of the registration statement heretofore described, "Bethlehem Steel Corporation balance sheet, December 31, 1944," which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

(The balance sheet on pages 66 and 67 referred to was received in evidence and marked "Plaintiff's Exhibit 7.")

Mr. CRAIG. There has been marked as Plaintiff's Exhibit 8 an income statement appearing on page 68 of the registration statement heretofore described, headed "Bethlehem Steel Corporation Income Statement for years 1942, 1943, and 1944," which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

249 (The income statement on page 68 referred to was received in evidence and marked "Plaintiff's Exhibit 8.")

Mr. CRAIG. There has been marked as Plaintiff's Exhibit 9 a statement of surplus, found on page 69 of the same registration statement, headed "Bethlehem Steel Corporation Statement of Surplus," which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

(The statement of surplus on page 69 referred to was received in evidence and marked "Plaintiff's Exhibit 9.")

The COURT. How is that distinguished from Exhibit 6? You said 6 was the consolidated income statement of the surplus. How is it distinguished?

Mr. CRAIG. Exhibit 6 was the consolidated statement of the surplus of Bethlehem Steel Corporation and subsidiary companies. This is the statement of surplus of Bethlehem Steel Corporation.

The COURT. That is what I want to understand.

Mr. CRAIG. On the registration statement, part II, pages II-1——

The COURT. Is that part of Exhibit 4?

Mr. CRAIG. It is part of this registration statement. I

250 have not thought of marking this as a separate exhibit. There is some narrative here. It is not a financial statement.

The COURT. All right.

Mr. CRAIG. Beginning (a). "All subsidiaries of the registrant"—the rest of that page, except the footnote.

And on page II-2, the end of that paragraph which ends "Union Iron Works Dry Dock Company—California—100," which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

Mr. CRAIG. Your Honor, this contains a portion which, with your consent, I will not read, listing specifically the companies and the stock interest which is held by Bethlehem Steel Corporation respectively. But preceding that delineation there is a little material to be read:

"All subsidiaries of the registrant. Below is set forth a list of the subsidiaries of the registrant, Bethlehem Steel Corporation (hereinafter called the Corporation). Opposite the name of each

thereof is stated the State of the United States or the country under the laws of which it exists and, disregarding directors' shares, the percentage of voting power that is represented
251 by the securities owned by the immediately controlling corporation.

"An asterisk (*) before the name of a subsidiary indicates that its assets and liabilities are not included in the consolidated balance sheet which is set forth in this registration statement. A dagger before the name of the subsidiary indicates that it became a subsidiary subsequent to December 31, 1944."

Then follow the names of what I count to be 58 companies, with an indication as to the laws under which each is organized, and the percent of voting power which Bethlehem Steel Corporation owns in each respectively.

If agreeable, I am omitting the reading of that material, which, of course, I assume is agreeable to have included in the record. Is that agreeable, Mr. Bromley?

Mr. BROMLEY. Yes.

Mr. CRAIG. On page II-15, beginning with "36," the remainder of that page and page II-16, down to subparagraph b and ending with "and Mr. Brown $23,772," which plaintiff now offers in evidence.

Mr. BROMLEY. I object to it as immaterial. And I would
252 like to approach the Bench and show it to your Honor. All it is is a list of the compensation the officers get. And I do not think it properly ought to be a part of this record. It hasn't anything to do with the Railroad, has not any purpose, that I can see, in this controversy.

The COURT. What is your saying it is material based on?

Mr. CRAIG. We are contending that Bethlehem Steel Corporation and its officers and directors are concerned with the operation of all Bethlehem subsidiaries as a unit. It makes no difference to top officials, as I refer to them, whether or not subsidiary "a" makes or loses money, or subsidiary "b" makes or loses money. What they are interested in is an integration of the entire organization, because the profits that are made by those companies, subsidiaries, even if they are paid out of dividends, are reflected in the consolidated statements of the Corporation. And, based upon the money available for dividends, and I think perhaps paid in dividends, depends the amount of incentive compensation which these top officials get and as shown by this exhibit is quite substantial. Now, then, when it cames to South Buffalo Railway Company, we are contending that these top officials are not
253 concerned whether or not South Buffalo makes or loses money as an independent concern. We have seen what

happens when funds are needed by South Buffalo. What they are interested in is to see that this Steel Plant, which is a part of the entire Bethlehem organization, produces profitably. And, of course, a part and an important part of the operations of that plant down there is in connection with the transportation.

The COURT. Well, wouldn't they certainly be interested in the profits in the Railroad Company?

Mr. CRAIG. No, sir. That is our contention.

The COURT. If they all made a profit, it seems as if the officers would be interested, as against a situation where they did not make any profit.

Mr. CRAIG. I quite agree with your Honor when you said "if they all make a profit." And as far as I am concerned, I take the "all" to be in the sense of the unit.

The COURT. Does it appear the amount of stockholding of these various individuals? Some may not own stock. The amount already appears. Nothing to show yet the stock holdings of these various officers.

Mr. CRAIG. It is in this document. We had not planned
254 to present it. We are approaching it more from the incentive compensation, rather than their interest as stockholders, because your top officials are paid on two bases, the fixed compensation and the incentive compensation. But the incentive compensation is based upon, in effect, entitled to the dividends, of course.

The COURT. I will receive it. It may be received.

Mr. CRAIG. "Give the information required below in tabular form concerning the aggregate remuneration paid by the registrant and its subsidiaries, directly or indirectly, to the following persons in all of their capacities: (a) The name and aggregate remuneration of each director of the registrant."

Then there is a note in parenthesis.

The COURT. You spoke something about all the subsidiaries.

Mr. CRAIG. Well, yes; paid by the registrant and its subsidiaries, directly or indirectly, to the following persons in all of their capacities: "The name and aggregate remuneration of each director of the registrant." That is, the payments are limited to payments made to directors.

The COURT. Payments are made by the corporation?

Mr. CRAIG. I think that is set forth.

The COURT. That is the one that had the incentive compensation?

255 Mr. CRAIG. No. It appears that—in some instances I find a note here: "All or part of the total remuneration paid to each of these persons designated by certain number is paid by Bethlehem Steel Company of Pennsylvania." But the re-

quirement is the payments made by the registrant and its subsidiaries to each director of the registrant. It might come from one or more sources but it is only to one class of person, namely, the directors of Bethlehem Steel Corporation.

Mr. BROMLEY. I think the point is, Your Honor, some of these directors of Bethlehem Steel Corporation work for subsidiaries; and, therefore, are paid by subsidiaries. And, under the Securities and Exchange Act, wherever you have a director of a corporation that issues securities you have to show all of his compensation that he receives either from the issuing company or any of its subsidiaries.

The COURT. Then it is your contention with reference to this schedule of salaries here, it includes the salaries as officers of the parent company, of the owning company, as well as for the services for its subsidiaries?

Mr. BROMLEY. These men whom we are considering are directors.

The COURT. Yes; of the corporation.

256 Mr. BROMLEY. Of the corporation.

The COURT. All right.

Mr. BROMLEY. Some of them are employees of subsidiaries.

The COURT. All right.

Mr. BROMLEY. And their pay which must be shown because it is part of their compensation as a director received from the corporation of which they are a director, or a subsidiary. That is what the law says. So every time you have a director, if he works for a subsidiary, you have to disclose to the public what he gets from that subsidiary for working for it.

The COURT. All right. You claim these salaries do include the salaries to officers of the corporation, also certain officers who act as employees for subsidiaries?

Mr. BROMLEY. That is right. And that is a minority of the cases shown on this table.

The COURT. All right.

Mr. CRAIG. "Note: Under Article 10th of the amended certificate of incorporation of the Corporation (1) the executive officers of the Corporation, (2) the heads of departments having general control of matters affecting the Corporation and its subsidiary companies as a whole, and (3) the other persons, if any, who
257 shall be directors of the Corporation and in its employ or in the employ of one or more of its subsidiary companies, are eligible to receive special compensation out of the Special Incentive Compensation Fund of the Corporation as provided in said Article 10th—see subdivision 1 of the answer to Item 41. In accordance with the waivers of those who were entitled to participate in payments out of such Fund, $537,299 out of the total of

$1,193,998 which was paid out of such Fund in 1944 was paid to the Corporation."

Now, below the names of various individuals were their capacities and the aggregate remuneration during registrant's past fiscal year. Opposite the capacities there are numbers referring to footnotes. If agreeable, I will not read those numbers, but, of course, I will read the footnotes, but we will have included in the record the numbers.

The COURT. Yes.

Mr. CRAIG. "Quincy Bent, director, aggregate remuneration during registrant's past fiscal year, $149,760; Norborne Berkeley, director, $97,742; C. Austin Buck, director, none; John M.
258 Gross, director, $92,742; Charles R. Holton, director, $97,742; Arthur B. Homer, director, $149,760; Myrl L. Jacobs, director, $97,742; Archibald Johnston, director, $10,000; Joseph M. Larkin, director, $97,740; Paul Mackall, director, $149,760; Charles D. Marshall, director, $2,400; Eugene M. Grace, director and President, $221,645; Robert E. McMath, director, Vice President and Secretary, $119,760; Frederick A. Shick, Director and Comptroller, $119,760; William J. Brown, Director, Treasurer and Assistant Secretary, $47,772."

The footnotes: (1)—referring to these certain persons designated, would you like to have the names of those to whom reference is made by the specific footnote, your Honor, as I read them?

The COURT. You mean these specific footnotes, that you are proposing to read show the different capacities in which they are employed?

Mr. BROMLEY. Yes; it does.

Mr. CRAIG. Well, shows various information as to the source of certain compensation. And then the last note is the amount
259 of payments out of the Special Compensation Fund of the Corporation.

The COURT. Well, I think, in some way we ought to have it. So far there is nothing to show for what these salaries were paid to them as officials of the Corporation alone.

Mr. CRAIG. Yes. Well, I will, before reading of the notes, I will read the persons to whom the footnotes respectively apply, if that is agreeable.

The COURT. That applies to the same persons whom you referred to?

Mr. CRAIG. No; these footnotes do not refer to all the individuals whose names I have read. Footnote No. 1 refers to Quincy Bent, Norborne Berkeley, John M. Gross, Charles R. Holton, Arthur B. Homer, Myrl L. Jacobs, Archibald Johnston, Joseph M. Larkin, Paul Mackall, Eugene Grace, Robert E. McMath, Frederick A. Shick, William J. Brown.

"Also an officer and/or a director and/or an employee of one or more of the subsidiaries."

The REFEREE. Referring to those individuals you have just named, you mean?

Mr. CRAIG. Yes, sir.

The COURT. All right. Officers.

Mr. CRAIG. "No remuneration was paid to any of these
260 persons for services rendered by him as a director of the Corporation as distinguished from services rendered by him in any other capacity, and the aggregate remuneration shown is for services in all capacities."

Footnote No. (2) refers to Quincy Bent, Norborne Berkley, John M. Gross, Charles R. Holton, Myrl L. Jacobs, Archibald Johnston, Joseph M. Larkin, Eugene Grace, Robert E. McMath, and Frederick A. Shick. "All or part of the total remuneration paid to each of these persons was paid by Bethlehem Steel Corporation (Pa.)."

The COURT. Were paid, what?

Mr. CRAIG. "All or part of the total remuneration paid to each of these persons was paid by Bethlehem Steel Corporation (Pa.)"—I suppose Pennsylvania.

No. (3) refers to C. Austin Buck alone. "Mr. Buck did not receive any remuneration from the Corporation or any of its subsidiaries in 1944 but received in that year pension payments under the Pension Plan of the Corporation and its subsidiaries out of the Pension Trust Fund in the aggregate amount of $24,504."

Footnote No. (4) refers to Arthur B. Homer alone. "Parts of the total remuneration paid to Mr. Homer were paid by Bethlehem Steel Company (Pa.), Bethlehem-Alameda Shipyards,
261 Inc., Bethlehem-Fairfield Shipyards, Incorporated, and Bethlehem-Hingham Shipyards, Inc., respectively."

Footnote numbered (5) refers to Paul Mackall: "Part of the total remuneration paid to Mr. Mackall was paid by Bethlehem Steel Company (Del.)."

Footnote number (6) reads as follows: "Includes in the case of the following the following amounts paid to them, respectively, out of the Special Incentive Compensation Fund of the Corporation referred to above: Mr. Bent, $59,760; Br. Berkeley, $47,742; Mr. Gross, $47,742; Mr. Holton, $47,742; Mr. Homer, $59,760; Mr. Jacobs, $47,742; Mr. Larkin, $47,742; Mr. Machall, $59,760; Mr. Grace, $71,645; Mr. McMath, $59,760; Mr. Shick, $59,760, and Mr. Brown, $23,772."

The COURT. I did not understand. What did you say those were paid out of? Was that part of the Incentive compensation?

262 Mr. CRAIG. Payments made to these persons, respectively, out of the Special Incentive Compensation Fund of the Corporation referred to above.

The COURT. Well, paid out partly, you mean as employee for services in connection with the Company in distinction from the Corporation?

Mr. CRAIG. Well, it is paid out, as I get it, by virtue of this Special Compensation Plan, Special Incentive Plan.

The COURT. Where does it come from in the first instance? I mean, these amounts you speak of.

Mr. CRAIG. The amounts themselves come from the Corporation. Of course, it is based upon the earnings and the dividends as reflected by all the subsidiaries of the Corporation.

The COURT. What I want to find out is, how these last amounts that you have mentioned are arrived at. From what? You have got a total of what was paid to them as part of their compensation, extra compensation, incentive compensation. But now you have read a bunch of figures there, amounts paid to various of these same officers. Now, where does that come from?

Mr. CRAIG. It comes from the Corporation and it is based,
263 as I understand it, on this Incentive Compensation Plan, based on their amended certification.

The COURT. All right, but based on it—how is it? Yes, based on that, that is very true, but how do you take out particularly $9,000 from the $271,000 Mr. Grace seems to be allowed here, out of the two-hundred-and-twenty-odd-thousand dollars?

Mr. CRAIG. As I understand it, in Mr. Grace's case, the aggregate remuneration which he received from either the Corporation or any subsidiary was $221,645. Of that, as I understand it, $71,645 came as a result of payments from the Special Incentive Compensation Fund.

The COURT. All right. I understand that. All right.

Mr. CRAIG. That is my understanding.

The COURT. The other was salary, you say?

Mr. CRAIG. Well, as I understand it, the first included the salary; The first is the aggregate.

The COURT. Yes, two hundred and twenty-one; but I mean the balance of the salary?

Mr. CRAIG. So far as I know, yes, sir.

The COURT. Well, all these amounts you have just read represent the incentive payment amounts?

Mr. CRAIG. As I understand it.

The COURT. Part of the total paid the officers of the Corporation.

264 Mr. CRAIG. And it so appears, and I so understand it.

The COURT. I did not understand it.

Mr. CRAIG. Yes, sir.

The COURT. All right.

Mr. CRAIG. There has been marked as Plaintiff's Exhibit 10 what is styled "Schedule XVII–2, accounts of the Corporation," which is included in the registration statement heretofore referred to and is numbered F–14.

The COURT. Is there any page there?

Mr. CRAIG. No, sir. It is a schedule XVII; also at the left-hand side bears "F–14," which is headed "Income from dividends and equity in net profit and loss of affiliates for years 1942, 1943 and 1944," which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

(Schedule XVII–2, accounts of the Corporation referred to was received in evidence and marked "Plaintiff's Exhibit 10.")

Mr. CRAIG. There has been marked at Plaintiff's Exhibit 11, a schedule, which is included in the registration statement heretofore referred to, Schedule XVIII–2, accounts of the Corporation. It is headed "Excess of the net value of the assets of subsidiaries consolidated, as shown on their books over
265 the amount at which the investments in and advances to such subsidiaries were carried on the books of the Corporation as of December 31, 1941, with subsequent changes to December 31, 1944", which plaintiff now offers in evidence.

Mr. BROMLEY. No objection.

(Schedule XVIII–2, accounts of the Corporation, referred to was received in evidence and marked "Plaintiff's Exhibit 11.")

Mr. STRANGE. May it please the Court, plaintiff at this time wishes to offer or read that part of the deposition of John M. Gross, the direct examination. The Gross deposition being one of a series taken at Bethlehem, Pennsylvania, October 3d and October 4th, 1944. It is our understanding that, so far as the cross-examination is concerned, such objections as may have been made by defendants' Counsel will be read by him in the process of reading of this deposition, if he intends to. At this time I offer those parts of the deposition.

I will now read the deposition of John M. Gross:

John M. Gross

"Q. Will you please state your name and address?

A. John M. Gross, Bethlehem, Pennsylvania.

Q. And your connection with the Bethlehem Steel Company?
266 A. Vice president of Bethlehem Steel Company.

Q. And what are your duties as such vice president?

A. I am in charge of traffic.

Q. How long have you been vice president of the Company?

A. I was made vice president of the Bethlehem Steel Company on August 1st, 1927.

Q. Prior to that what position did you hold?

A. And I might state that since you are looking for the facts here, I was director of Bethlehem Steel Company since April 10, 1923, and of the Bethlehem Steel Corporation since January 25, 1940.

Q. You are now a director of both——

A. Both the Corporation and the Steel Company.

Q. Prior, what was your position?

A. Prior to being a director of the Corporation and of the Bethlehem Steel Company, I was General Traffic Manager of the Bethlehem Steel Company.

Q. For what period of time did you hold that office, approximately?

A. From October 1917 to 1927 when I became a vice president.

Q. And prior to 1917 were you connected with the Company?

A. No; I was in the employ of the Pennsylvania Railroad Company for a period of approximately 21 years.

Q. Now, in your work in connection with traffic, I believe
267 you said, for the Bethlehem Steel Company, can you tell us generally what modes of traffic, and, generally, what problems are yours?

A. It is what I would describe as a general direction of traffic, the handling of ore, the handling of coal, the handling of various raw materials; the general problem of consolidating outbound shipments, handling all outbound shipments of the Steel Company to destination.

Q. And that involves——

A. And also, I should add to that, a general review and study and research as to the rates applying over the various railroads which apply to these various items of traffic which, of course, means a very close association with all of the various railroad companies.

Q. Including the South Buffalo Railway Company?

A. Yes; we have to work with them for service—that road is not as important as some of the others, though.

Q. Is it part of your work to see that there is no failure in the furnishing of supplies—that is, the shipment—to the various plants of the Bethlehem Steel Company?

A. Yes.

Q. It is part of your job, is it not, to see that there is no delay in the shipping of the products of those plants?

A. Well, after they are ready for shipment—when they are once ready for shipment, then part of my work is to see
268 that they get to destination promptly.

Q. In connection with your duties, is it part of your job

to understand some of the operating problems of the railroad companies which service the Bethlehem Steel Company's plants?

A. Well, not to the extent that they would look to me for solution, but a failure in service is something that I would always have to question.

Q. Is it not true that you and the people in your department can do your job better if you have some understanding of difficulties which are encountered by the transportation people who serve you?

A. Yes.

Q. But you are interested in their problems not so much merely as railroad problems but as they affect the operations of the Bethlehem Steel Company plants, is that not correct?

A. Yes, and traffic and tonnage—I say that because it might affect the tonnage en route, but it might not affect the plant at all.

Q. Do you know Mr. Paul Trageser?

A. Yes.

Q. He is vice president of the South Buffalo Railway Company, is he not?

A. To the best of my knowledge, yes.

269 Q. How long do you know Mr. Trageser?

A. I have know Mr. Trageser since, I think, about 1918.

Q. Was he then with the Bethlehem Steel Company?

A. He was then connected with the vice president in charge of traffic of the Baltimore & Ohio Railroad when I first came to know him.

Q. Subsequently he came with the Steel Company?

A. Yes, subsequently he came with the Steel Company.

Q. In what capacity, do you recall?

A. He came as a sort—I don't know whether you would call him some sort of an associate or assistant—he did secretarial work.

Q. Assistant to whom?

A. To me.

Q. Do you recall about when that was?

A. I think it was about October 1st, 1917.

Q. When he came to the Steel Company, he came into the Bethlehem Office, did he, and worked under you?

A. Yes.

Q. And with you?

A. Yes, sir.

Q. And do you recall how long he continued to work with and under you in connection with the Steel Company's business?

A. I don't know that; I can't name the exact date, but it

270 was for a number of years.

Q. Do you know whether he continued in that capacity until he became president of South Buffalo Railway Company?

A. I should think so, approximately.

Q. Can you state generally what were Mr. Trageser's duties when he worked with you and under you in the Bethlehem Steel Company?

A. Well, he did almost everything; he had experience with railroads; he had been with them before; he knew the railroad language and the traffic language, and with us he was assigned to a great many duties.

Q. Did he deal with traffic problems in any of the plants of the Bethlehem Steel Company?

A. Yes; under my direction, and if I happened to be away he dealt with traffic problems in connection with the plants or with other railroads.

Q. How well would you say he understood the traffic problems confronting the various plants of the Bethlehem Steel Company?

A. Well, his whole life's experience had been traffic.

Q. How well would you say he understood the various problems confronting the various plants of the Bethlehem Steel Company?

A. From a traffic standpoint, he understood his traffic problems very well.

271 Q. What about the operating problems?

A. I don't think he understood the operating problems quite so well; he had never been in active operations.

Q. Did you discuss with Mr. Trageser the matter concerning his leaving the Bethlehem Steel Company and going with South Buffalo Railway Company as president?

A. Well, I have been in railroad business and traffic business for many years, and he came to me and asked my advice as a friend—I recall that.

Q. Did he follow that advice?

A. Well [indicating Mr. Trageser] there he is; I didn't direct him to do anything like that—I didn't have anything to do with that whatsoever.

Q. But I take it that he followed your advice?

A. I said if I was in his place I would do what he was asking me about.

Q. Do you know anything about the caliber of the work he did as president of the South Buffalo Railway Company?

A. Well, now, that would be rather hard for me to judge, except that I know that the service in the Lackawanna Plant, and as a friend when I took occasion to look at it—he did pretty well; we got the service we needed and had to have there.

Q. Did you have any conversations with Mr. Robert E. McMath, vice-president of both the Steel Company and the Steel Cor-

272 poration concerning Mr. Trageser's ceasing to be president of the South Buffalo Railway Company?

A. No; I did not; obviously, in my capacity, I heard a number of discussions—not too many at that—but I had nothing to do with any of the decisions.

Q. Who carried on those discussions which you heard?

A. Sometimes, if we gathered for lunch like today, somebody would speak of it, and there would be a general discussion, but there was no decision reached.

Q. Can you give us the names of some of those who participated in the discussions?

A. Well, Mr. McMath, and I think Mr. Grace one or two times, and as far as I can remember——

Q. Mr. Bent, perhaps?

A. Perhaps, and I think Mr. Schick—the discussions were very general.

Q. Do you recall what the concensus of opinion was regarding the discussions?

A. It was a question of getting a good railroad man.

Q. As president?

A. Well, in the organization, to see that the railroad was run properly.

Q. You didn't hear any dissatisfaction expressed relative to Mr. Trageser's work as president, did you?

A. Never; I don't think the discussion even went that
273 far, as I recall it.

Q. But so far as you know, and from your standpoint, the operations of South Buffalo Railway Company were satisfactory while Mr. Trageser was president, weren't they?

A. Yes, sir.

Q. Do you recall, Mr. Gross, that in 1922 Bethlehem Steel Company sold to the South Buffalo Railway Company considerable trackage on land west of the Hamburg Turnpike at Lackawanna, New York?

A. No; I wouldn't know anything about that.

Q. Was that before your time?

A. No, that was during my time; but I never entered into any negotiations of that kind.

Q. Do you know Mr. David M. Petty?

A. Yes, sir.

Q. How long have you known him, approximately?

A. Oh, approximately since 1917.

Q. Was he then connected with the Bethlehem Steel Company?

A. Well, now, I have an indistinct recollection about that; my recollection was that he was out in the plant, and subsequently, I think, he became superintendent of service.

Q. After you became acquainted with him, did he have occasion to work with you?

A. Well, occasionally; not much with me, personally;
274 more with my organization.

Q. In what connection did he have occasion to work with your organization?

A. I couldn't tell you in detail, Mr. Craig, to be frank; I could illustrate the character, I suppose—for instance, on one occasion we had a terrific storm during which our ore bridge blew down, and we had scheduled to move a lot of ore just about that time so that it could be used in the furnaces, and in his capacity as superintendent of service, he, at that time, would have been of great help in scheduling the shipments of ore.

Q. That would be a typical problem?

A. Yes; that would be a typical problem.

Q. From your standpoint in the Steel Company, will you state whether or not it makes the tasks which you and your associates have to carry out simpler if you have at the head of a railroad which has direct physical connection with a plant of yours, a man who knows something about your problems?

A. It is much more satisfactory if we have somebody who knows our requirements. For instance, again to illustrate, we go to great lengths to tell the Pennsylvania Railroad how we should have our ore handled and our coal handled, as well as the Reading Company and any other railroad.

275 Q. And it's easier, isn't it, if the Steel Company can work with the man who represents the railroad if he knows something of the Steel Company's problems?

A. Yes; the matter will be handled much more intelligently.

Q. And merely knowing the intricacies of railroading may not be enough to achieve those results?

A. That is the reason that we tell other railroads ad infinitum what our problems are, and that is when we hear theirs as well.

Q. You carry on an educational process, don't you?

A. Very frequently.

Q. Mr. Gross, did you know Mr. Kenneth A. Kemmerer?

A. Yes, sir.

Q. Did Mr. Kemmerer work with and under you in connection with Bethlehem Steel Company matters?

A. He worked with me, but not always under me.

Q. Generally, what were his duties?

A. Well, during the period you speak of, he was sort of interested in the running of the railroads.

Q. Which railroads?

A. Well, he ran the South Buffalo Railway.

Q. And the other subsidiary railroads?

A. Well, he took an interest in them, yes. I think he was president, wasn't he?

Q. I am speaking of the time when he was working with
276 you in the Bethlehem Steel Company, before he was president?

A. Well, generally speaking, I would say it was traffic work, and with a particular leaning to seeing that the plants got the right kind of service from South Buffalo; for instance, to illustrate—but, he did other work—he did Interstate Commerce Commission work, and all sorts of traffic problems—he was a sort of human dynamo.

Q. Do you know if Mr. Kemmerer prepared for your signature a number of communications addressed to officials of the South Buffalo Railway Company?

A. I don't remember them if he did—he was very largely independent in many things that I didn't know anything about; there wasn't any reason for it—it was detail.

He used my signature at times.

Q. He was authorized to sign your name?

A. Not always; when he was authorized he usually came to me to get authorization. As far as I know that didn't obtain, but he may have signed my name.

Mr. STRANGE. Now, then, the Counsel for plaintiff showed the witness a letter.

The COURT. Well, I think we had better adjourn now until 2 o'clock. Recess until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock p. m.)

277 After recess, 2 o'clock a. m.

Appearances: Same as before noted.

Mr. STRANGE. If Your Honor please, proceeding with the Gross deposition, I will go back one question:

"Q. He was authorized to sign your name?

"A. Not always; when he was authorized, he usually came to me to get authorization. As far as I know that didn't obtain, but he may have signed my name."

Then counsel for the plaintiff shows witness a letter.

(Mr. Bromley read, as follows):

"Mr. BROMLEY. (After examining letter shown to the witness by Plaintiff's counsel). He certainly should not have called you 'General Traffic Manager of South Buffalo Railway Company.'"

The COURT. Referring to whom as "he"?

Mr. BROMLEY. I have not got the letter. I think we ought to have the letter.

Mr. STRANGE. The letter was not introduced, may it please the Court, but at this time, I might say that the letters are here and that by stipulation of counsel it has been agreed, as I under-
278 stand it, that for the purposes of this suit or this action that these letters were signed on behalf of Mr. Gross.

The COURT. By Mr. Kemmerer?

Mr. STRANGE. That is right. Mr. Kemmerer's inititals appear on some or all of them in the left-hand corner, the dictator's corner.

The COURT. And that occasioned the statement by counsel?

Mr. BROMLEY. Yes.

Mr. STRANGE. As transcribed here this is in the form of a statement or an interjection made by Mr. Bromley, but I take it it is a question and any objection you might make would go to the form of the question, which has been waived, so that we are making no objection to it.

Mr. BROMLEY. Well, after I said "He certainly should not have called you 'General Traffic Manager of South Buffalo Railway Company'", the witness said "No; I never was that. Here is another letter signed 'Vice-President of South Buffalo Railway Company.'"

Mr. STRANGE (reading):

"Q. Was Mr. Kemmerer ever authorized to put your signature to any letters?

A. I can't answer that.

Q. He might have been?

279 A. He might have been—I can't answer that truthfully."

Those last two questions were addressed to the witness by counsel for the defendant.

The COURT. I understand.

Mr. BROMLEY. Then I said "I don't believe you understand the question."

"The WITNESS. I never gave him a definite authorization—do you mean a blanket authorization?

Mr. BROMLEY. That's what he means.

The WITNESS. No; no."

Mr. STRANGE (reading):

"Q. But did you ever give him a specific authorization?

A. I don't remember having done that.

Q. Mr. Gross, can you state approximately how many miles of track Bethlehem Steel Company owns at Lackawanna, west of the Hamburg Turnpike?

A. No.

Q. Relative to Mr. Kemmerer again, in connection with his duties while he worked with you when he was with the Bethlehem Steel Company, was he assigned to the job of seeing that

South Buffalo Railway Company and the other six subsidiary railroad companies of the Corporation rendered satisfactory service to the Steel Company at its various plants?

280 A. Not specifically.

"Q. Did he do that work?"

Mr. BROMLEY (reading):

"Mr. BROMLEY. Wait a minute—you mean as an employee of South Buffalo?"

Mr. STRANGE (reading):

"Q. (Question read to witness by the stenographer): Relative to Mr. Kemmerer again, in connection with his duties while he worked with you when he was with the Bethlehem Steel Company, was he assigned to the job of seeing that South Buffalo Railway Company and the other six subsidiary railroad companies of the Corporation rendered satisfactory service to the Steel Company at its various plants?"

Mr. BROMLEY (reading):

"Mr. Bromley. I was about to object to that question, but Mr. Gross spoke too quickly. You assume in that question that he was an employee of South Buffalo Railway Company and was in control; he was not, until he became president."

Mr. STRANGE. Now, then, on the deposition counsel for the plaintiff, Mr. Craig, says:

"By Mr. CRAIG. The question implies while he was an employee of the Bethlehem Steel Company."

281 There was no objection entered at that time, and the answer of the witness was "No."

(Reading:)

"Q. As a matter of fact, did he do that work?

A. The best way I can answer is this: Sometimes, he may have, but, then, everybody in the organization, if there was any trouble like, for instance, this ore-bridge break-down trouble—somebody had to see it was fixed up."

Mr. STRANGE. That ended the direct examination.

(Mr. Bromley read the cross-examination, as follows:)

"Cross-examination by Mr. BROMLEY:

Q. You just said, Mr. Gross, that everybody in the organization, if there was some trouble like the ore-bridge break-down, had to see it was fixed up. You didn't mean that that *that* employees of Bethlehem Steel Company had any right to fix up any troubles that were purely matters concerning the operation of the South Buffalo Railway Company?

A. No; I might explain that the ore-bridge I mentioned is owned by the Steel Company and it drops ore on the stock pile, and the incident I referred to was when that blew off its track.

Q. That was a matter which was a problem of the Bethle-
282 hem Steel Company, was it not?

A. Yes.

Q. And the solution of that problem, of course, had to be taken care of by employees of the Bethlehem Steel Company?

A. Yes, and at that time, since Mr. Petty was then the superintendent of service of the Steel Company, it was in his jurisdiction to get matters adjusted.

Q. But if a problem arose which was purely a problem of the South Buffalo Railway Company, that would, of course, be taken care of by their employees, would it not?

A. Yes, sir."

Mr. BROMLEY. That is all.

Mr. CRAIG. Now, at this time, if your Honor please, the Plaintiff offers to read into evidence the deposition of Paul A. Trageser, taken at Bethlehem, Pennsylvania, on October 4th, 1944. Perhaps I had better say that we offer to read part of it. The deposition is in two parts, and the second part I think fits into the case after another deposition.

Mr. BROMLEY. Do I understand, Mr. Craig, that you are going to split it in two parts and interject another deposition between the two parts? I have no objection. I just want to know.

283 Mr. CRAIG. Yes. Here is what happened: We took Mr. Trageser's deposition and then Mr. Petty took the stand, and then Mr. Trageser went back on. I propose to follow that order in the reading of the depositions as we took them.

The COURT. I imagine that the order does not make much difference.

Mr. CRAIG. Except that the second part of the deposition I think makes a little more sense if made in order.

284 The COURT. All right.

Mr. CRAIG (reading):

(*Paul A. Trageser*)

"Mr. PAUL A. TRAGESER, called by the Plaintiff, sworn, and testifies as follows:

Direct examination by Mr. CRAIG:

Q. Will you state your name and address, please?

A. Paul A. Trageser, Bethlehem, Pennsylvania.

Q. Will you state your connection with the South Buffalo Railway Company?

A. First vice president and director.

Q. How long have you been vice president?

A. Since December 1939.

Q. You were elected at that time, I believe?
A. Vice president?
Q. Yes?
A. Yes, sir.
Q. Did you take office at that time, or in 1940?
A. I took office as vice president in January of 1940.
Q. Prior to that time what was your connection, if any, with the South Buffalo Railway Company?
A. President.
Q. When did you become President?
A. In the later part of 1938—I think it was in November.
285 Q. And you continued as president, did you not, until you became vice president?
A. That's right, Mr. Craig.
Q. Will you state, prior to your becoming president,—that is, president of South Buffalo Company, whether or not you were connected with the Bethlehem Steel Company?
A. I was an employee of Bethlehem Steel Company.
Q. How long were you an employee of Bethlehem Steel Company?
A. Sixteen years.
Q. Will you state what were your duties and your work during that period with Bethlehem Steel Company?
A. My duties and work were very general; they were in the Traffic Department of Bethlehem Steel Company at Bethlehem.
Q. Will you give us, more in detail, the work you did?
A. I advised on and handled transportation matters—the handling of private cars—coal cars that the Bethlehem Steel Company owned at one time; my work, principally, was in connection with general transportation problems affecting the operations of Bethlehem Steel Company.
Q. When you came with Bethlehem Steel Company, were you given any special training by the Company?
286 A. No, sir.
Q. While with Bethlehem Steel Company, did you work with or under Mr. John M. Gross?
A. Yes, sir.
Q. And what was his position?
A. General Traffic Manager, and, later, vice president.
Q. Did you work with or under him during all the time of your—that is, all the time of which you spoke?
A. You mean up to my election as vice-president of the South Buffalo Railway in 1938?
Q. No, your election as president?
A. Yes, president I mean; my answer is "Yes."

Q. Who first spoke to you in connection with the possibility of your becoming president of the South Buffalo Railway Company?

A. I think it was a representative from Mr. McMath's office, or Mr. McMath himself.

Q. What did he say to you generally?

A. After this long period of time, I can't recall generally or exactly what he said. I knew that Kemmerer had died, and that the position was vacant; I don't recall what was said generally or specifically with respect to my taking the office of president of the South Buffalo Railway Company at this time.

287 Q. Who initiated the talks concerning the presidency of the railroad?

A. I wouldn't be surprised if I did.

Q. Well, did you or didn't you?

A. Well, I'll say I did.

Q. To whom did you speak?

A. Mr. McMath.

Q. What did you say to him?

A. That I would like to have the job.

Q. What did he say to you?

A. That, I think, he would consider it.

Q. Did you speak to anyone else in connection with your desire to become president of South Buffalo Railway Company?

A. Yes.

Q. With whom?

A. John M. Gross.

Q. Anyone else?

A. No.

Q. Did you ever talk to Mr. Eugene Grace in connection with your desire to become president of South Buffalo Railway Company?

A. No, sir.

Q. Did you become president of any of the other subsidiary railroad companies of the Bethlehem Steel Corporation?

288 A. At or about the same time I became president of all of the other subsidiary railroad companies of Bethlehem Steel Corporation.

Q. Mr. Kemmerer had been president of all of the subsidiary railroads?

A. I think so, but without refreshing my recollection, I can't testify that he was; I believe that he was.

Q. Did you seek the presidency of all of the subsidiary railroads?

A. I did.

Q. Did you speak to any of the directors of South Buffalo Railway Company in connection with your desire to become president?

A. Well, I can't recall that-I did.

Q. When you talked with Mr. McMath, was the matter of salary discussed?

A. No, I don't think it was at that time.

Q. Was it later discussed?

A. Yes, it was later discussed.

Q. What was that discussion?

A. As to what the salary would be.

Q. Well, can you give us any more details?

A. No, I can't.

Q. Was any agreement reached as to salary?

289 A. Only the agreement, if it can be called an 'agreement,' that there probably was some figure mentioned which had been put on the position.

Q. What was that figure?

A. I'm sorry, I can't recall—I'll be very glad to look it up and give it to you.

Q. Can you give us an approximation?

A. At that time—in 1933?

Q. Yes?

A. $10,000 a year for all of the—that is, in my position as president of all of the seven subsidiary railroads of the Bethlehem Steel Corporation.

Q. When you became president of the South Buffalo Railway Company, who was the manager of the Bethlehem Steel Company properties at Lackawanna?

A. Mr. T. Burns.

Q. And do you recall how long he continued to be the manager?

A. I do not.

Q. Mr. Burns is not living, is he?

A. No, sir.

Q. Had you known Mr. Burns prior to your becoming president of the South Buffalo Railway Company?

A. Yes.

Q. How long had you known him?

290 A. I had known Mr. Burns in the sense that I knew who he was and he knew who I was, and I think I may say that I knew who Mr. Burns was and he knew who I was; and that is as far as I'll go in saying that I knew him.

Q. You never met him personally?

A. Oh, yes; I met him personally, since 1917 when I came to Bethlehem.

Q. You had had personal contact with him?

A. Yes.

Q. And generally, of what did that personal contact consist?

A. Well, that personal contact—you mean "business contact"?

Mr. BROMLEY. Personal business contact.

Q. (Question repeated to witness by stenographer.) And, generally, of what did that personal contact consist?

A. When Mr. Burns was at Bethlehem he talked to me in my capacity in the Traffic Department of Bethlehem Steel Company occasionally with respect to matters affecting operations that he was responsible for at Bethlehem, and he asked my help—seeking my help and advice.

Q. During this time will you state whether or not you sought his help and advice in connection with any

291 of your problems?

A. No, sir.

Q. When you became president of the South Buffalo Railway Company, will you state whether or not you received any instructions to confer with Mr. Burns?

A. I did not.

Q. Did you receive any suggestions to confer with him?

A. I did not.

Q. As a matter of fact, did you confer with him?

A. I did not.

Q. On any subject or question affecting either your problems or your mutual problems?

A. I did not.

Q. Did you have any contact with him at all?

A. When I went to Lackawanna, I did see Mr. Burns; however, I didn't discuss any problems of the South Buffalo Railway Company with him.

Q. Did you discuss any problems of the Bethlehem Steel Company with him?

A. No. I might say that any such matters in connection with the railroad were left in charge of the railroad company's man at Lackawanna.

Q. Who was that?

A. Mr. F. M. Benning.

Q. Is Mr. Benning living?

292 A. No, he is not.

Q. Do you recall when he died?

A. I would say he died in January 1942, Mr. Craig—I believe it was about that time.

Q. Do you know of your own knowledge whether or not Mr. Benning had any communication with Mr. Burns in connection with problems of the South Buffalo Railway Company?

A. Yes.

Q. To what extent?

A. To the extent that it was necessary for Mr. Benning to give the service that the South Buffalo Railway Company, as a common carrier, was required to give in serving the Bethlehem Steel Company, one of its customers, at Lackawanna.

Q. Do you know whether Benning and Burns discussed any of the problems of the Bethlehem Steel Company?

A. I don't think Benning was qualified to discuss any of the problems of Bethlehem Steel Company with Mr. Burns, insofar as that may mean that he could give any opinions or advice with respect to the operations of the Bethlehem Steel Company.

Q. Do you know if, as a matter of fact, he did confer with
293 Mr. Burns concerning any of the problems of Bethlehem Steel Company?

A. I would say he did not, only insofar as those problems of the Bethleheni Steel Company may have involved service having been given by the South Buffalo Railway Company.

Q. Would you think that they would have had such discussions?

A. I hope so.

Q. Well, do you know?

A. Yes, I know.

Q. That they did?

A. Yes, sir; that is what Mr. Benning was supposed to do, and he did it.

Q. Could you give us, if you know of any, some examples of the problems of that nature which they discussed?

A. No, I wouldn't like to testify to that; I can't give you any examples of the problems they discussed. I would suppose that they discussed the supply of cars available for shipments, the matter of track lay-out at the new plants of Bethlehem Steel Company which were being constructed at Lackawanna at about that time, etc.

Q. Do you know if they discussed the matter of the assem-
294 bling af cars in any given order to supply the Bethlehem Steel Company blast furnaces?

A. I don't know that that was discussed, but I wouldn't be surprised if it were; that is regular railroad practice, and it certainly is a matter that I should think would be discussed between Benning as representing the South Buffalo Railway Company and, not necessarily Mr. Burns personally, but his operating superintendents at Lackawanna.

Q. Would the purpose of such discussions be to arrange the order of delivery of supplies to the Steel Company?

A. They certainly would.

Q. And would that order be determined by the Steel Company?

A. As a receiver and shipper of freight on the South Buffalo Railway Company, the order in which they wanted to take cars would be determined by them as the railroad rules provide, and I may say also, as would be and has been and is determined by other shippers and receivers of freight on the South Buffalo Railway.

Q. So that if the desires of the Steel Company in this matter in which we are discussing, would not coincide with the convenience of the South Buffalo Railway Company, is it true
295 that the South Buffalo Railway Company yielded to the request of the Steel Company?

A. It is not true.

Q. And would communications be had between Mr. Benning, or somebne for the South Buffalo Railway Company, and Mr. Burns, or someone representing the Steel Company, in connection with the transporting of ladles of molten metal from the blast furnaces to the open hearth?

A. There would be such communication between Mr. Burns and/or his representatives and Mr. Benning of the South Buffalo Railway Company.

Q. And, generally, of what would those communications con-

A. With respect to the movement of the cars at times at which the Steel Company would have the traffic available for the South Buffalo Railway to move, the capacity of the Steel Company at the unloading point to take the cars; if Mr. Benning was unfortunate enough to have a derailment of one of his trains hauling the cars, he would get in touch with his superintendents and would tell them that he had an upset with a couple of the cars or was delayed in the traffic, and would give him some idea as to
296 how long the delay would last, and things of that kind.

Q. In connection with the transporting of the ladles of molten metal, can you give us some details about that—the arrangements between the Bethlehem Steel Company and the South Buffalo Railway Company?

A. Well, that's an awfully broad question—are you talking about the present or about the time when Benning was there?

Q. When Mr. Benning was there?

A. I can't answer that question; I can't give you any details as to the transporting of that traffic during Benning's incumbency.

Q. Wh at subsequent to his incumbency?

A. Well, the commodity is loaded in molten form at the blast furnace plants of the Bethlehem Steel Company, and it has been loaded in molten form at other plants served by the South Buffalo Railway Company, in cars provided by the shipper——.

Q. Pardon me, Mr. [illegible]geser—I am interested only in the matter of the communications between representatives of the Steel Company and of the South Buffalo Railway Company in connection with that transportation?

297 A. Well, the communications with respect to the transportation of that commodity, because of the nature of the commodity, the volume in which it moved, were probably a little more in detail than would be the case with the ordinary commodities, but I can't tell you, Mr. Craig, as to just what those communications were between the Steel Company's representatives and Mr. Benning or any other representatives of the South Buffalo Railway Company with respect to the movement.

Q. In connection with that movement, wouldn't the representatives of the Steel Company tell the representatives of the Railway Company when the material should be moved?

A. My conception of what they told the Railway Company and do tell the Railway Company, is the time at which the traffic which is, as I say, in molten form, would be ready for movement.

Q. It's rather important, isn't it, to move that commodity with promptness?

A. The records do not indicate the degree of importance which some people attach to the movement of that traffic exists.

Q. As a matter of fact, it has to be moved promptly?

A. It's moved promptly; yes, sir.

Q. And it is moved, is it not, at the time specified by the
298 Steel Company, or as near thereto as is possible?

A. No.

Q. Did you ever have any difficulty or friction with the Bethlehem Steel Company by reason of your failure to move that commodity promptly?

A. Yes.

Q. Has that condition existed during the time that you have been connected with the South Buffalo Railway Company?

A. Yes, sir.

Q. Is it any worse now than it was ten years ago?

A. Only insofar as the volume of traffic being handled by the railroad under war conditions may affect it.

Q. But, giving allowance to that, the situation is about the same, I take it?

A. And also giving allowance to the labor situation which prevails on the South Buffalo Railway Company.

Q. Would you say that as far as that condition is concerned that conditions were comparable in 1934 and 1938?

Mr. BROMLEY. I object to that question as being incompetent; that calls for a conclusion.

Q. If you know?

299 A. I am not prepared to answer that question.

Q. You don't know?

A. No, I don't know.

Q. In connection with the transportation of other commodities to and from the Bethlehem Steel Company, or between plants of the company, or between units of the company, was there any communication between representatives of the Steel Company and of the Railway Company?

A. Yes.

Q. And, generally, of what have they consisted?

A. The answer I made with respect to the commodity moving in liquid form—metal—will apply also as an answer to this question—the times at which cars are required, when the traffic is to be moved, and the ability of the consignee to take it, the failure of the railway company to move it expeditiously, and matters of that kind.

Q. Those communications, are they frequent or infrequent?

A. Frequent.

Q. Daily communications?

A. Yes, sir.

Q. Are there a number of communications per day?

A. That's right—the volume of traffic moving via South
300 Buffalo Railway Company for the Bethlehem Steel Company requires such communications to be frequent.

Q. Mr. Trageser, have you known Mr. J. D. DeWitt?

A. I don't know him; I know who he is, but I don't think I have ever met him, Mr. Craig.

Q. When you became president of South Buffalo, did you have an employment manager?

A. No.

Q. How did you handle the matter of employment for the Railway?

A. Not having any set-up of our own at Lackawanna with respect to physical examinations, the services of certain people of the organization of the Bethlehem Steel Company were availed of by South Buffalo Railway to the extent that Mr. Benning thought was necessary. Mr. Benning did the hiring and firing of the employees of South Buffalo—Mr. Benning or his assistant.

Q. Who was his assistant?

A. Well, his assistant was J. W. St. Clair, and also the man that did the hiring and firing of the train service employees was the General Yard Master, W. L. Grobe.

Q. Mr. St. Clair isn't living, is he?

A. Unfortunately, he isn't.

301 Q. Can you state the services of the Bethlehem Steel Company of which South Buffalo Railway Company availed itself?

A. Making up certain forms—physical examination of the employees or prospective employees, and the preparation of forms in that connection, and things of that kind.

Q. Anything else that you can think of?

A. No.

Q. Will you state, if you know, if J. D. DeWitt does or has done any work for South Buffalo Railway Company?

A. I will answer that question by saying that you have read my testimony in a proceeding before the Interstate Commerce Commission at Buffalo, New York, in 1940, and I stand now on the answers that I made to the questions on that particular subject at that time.

Q. What is your answer in this proceeding?

A. That he did do, but has not done for some time any work for the South Buffalo Railway Company.

Q. What work did he do?

A. He kept certain records and, as I testified a few moments ago, he arranged for physical examinations of prospective employees of South Buffalo Railway; he took their applica-

302 tions, I presume, for membership in the Relief Plan, and——

Q. Relief Plan of what?

A. Of the subsidiary companies of the Bethlehem Steel Corporation.

Q. Anything else?

A. No, nothing that I can recall.

Q. Will you state whether or not Mr. DeWitt had access to the employment records of South Buffalo Railway Company?

A. As I testified in 1940, as you have read it to me, he may have had a copy of the employment records of the South Buffalo Railway Company.

Q. Did he have access to the employment records of the South Buffalo Railway Company?

A. He did.

Q. But you don't know if he had a copy of the records in his own possession?

A. No, I can't testify now any more than I could in 1940 as to whether he did or did not.

Q. How was Mr. DeWitt compensated for the work which he did for South Buffalo Railway?

A. Bethlehem Steel Company rendered a bill against the South Buffalo Railway Company for services such as he gave to the Railway at its request—monthly.

303 Q. Do you know Mr. W. A. James?
A. I did know Mr. W. A. James.
Q. Is he not living?
A. He is dead."
Mr. BROMLEY (reading):
"Mr. BROMLEY. Will you object to having the witness testify that the South Buffalo Railway Company paid the bill that Bethlehem Steel Company rendered in connection with Mr. DeWitt's services?
Mr. CRAIG. If that's a fact, I have no objection.
Mr. BROMLEY. It is a fact, is it not, Mr. Trageser?
The WITNESS. Yes."
Mr. CRAIG (reading):
"Q. Was Mr. James connected with the South Buffalo Railway Company when you became president?
A. He was Chief Engineer.
Q. And he continued as such to about what time?
A. Well, subject to correction, I'll testify that he continued as Chief Engineer of the South Buffalo Railway Company until June 30th, 1940.
Q. Was it a part of his duties to approve or disapprove the payment of South Buffalo's bills to the Steel Company for any track improvements made by the Railway for the Steel Company?
A. I do not know.
304 Q. Who did that?
A. I do not know.
Q. Did Mr. James pass on any bills to be rendered by the South Buffalo Railway Company to the Steel Company?
A. No.
Q. Who did that?
A. Mr. F. M. Benning.
Q. Did he pass on the payment of any bills owing by, or alleged to be owing by South Buffalo Railway to the Steel Company?
A. I can't testify as to that; he may have in his capacity as Chief Engineer of the South Buffalo Railway Company.
Q. Don't you know that he did?
A. No; I don't know that he did.
Q. You believe that he may have?
A. He may have.
Q. Was Mr. James paid direct by the South Buffalo Railway Company for the services which he rendered to it?
A. No.
Q. How was he paid for such services rendered?
A. By a bill received by the South Buffalo Railway Com-

305 pany from the Bethlehem Steel Company, monthly, and paid by the South Buffalo Railway Company to the Bethlehem Steel Company.

Q. Was that an agreed amount per month?

A. Yes.

Q. What was that; do you recall?

A. No.

Q. Do you recall approximately what it was?

A. No.

Q. Mr. James did other work, did he not, while—that is, he did work for someone else while he was Chief Engineer for the South Buffalo Railway Company?

A. I can't answer that—I don't know.

Q. Did he spend all of his time in his work for the South Buffalo Railway Company?

A. Do you mean, did he do work for someone else other than South Buffalo Railway Company?

Q. During this period?

A. Yes.

Q. For whom did he work?

A. Bethlehem Steel Company, and he may have worked for others.

Q. Do you know if he worked for anyone else other than for the Bethlehem Steel Company?

A. Not of my own personal knowledge, I don't—you mean
306 other than for South Buffalo and the Steel Company?

Q. Yes.

A. Not of my own personal knowledge, I do not.

Q. Do you know how his time was divided between working for the South Buffalo Railway Company and the Steel Company?

A. No, sir.

Q. Could you give us an approximation?

A. No, sir.

Q. Do you think he gave as much as one-half of his time to the South Buffalo Railway Company?

A. No, sir.

Q. You mean that he did not?

A. He did not give as much as one-half of his time to the South Buffalo Railway Company.

Q. Did he give as much as one-fourth?

A. No, sir.

Q. As much as one-tenth of his time?

A. Well, you are getting me down to an approximation now—let's say you have eight hours in a day—and one-tenth of that would be eight-tenths of an hour—he gave as much as that, if

that's eight-tenths of an hour. He may have given an hour a day, and he may not have given any time for two or three days or a week. To tell you the truth, as far as I was concerned,
307 I don't know how much Benning was calling on him for services, but I had an idea.

Q. At any rate, he spent the bulk of his time on work other than the work of the South Buffalo Railway Company?

A. Yes; I testified that that's true.

Q. Do you know Mr. Hugh Dalziel?

A. Yes, sir.

Q. He is connected with the South Buffalo Railway, is he not?

A. He is Chief Engineer of the South Buffalo Railway.

Q. Isn't it true he succeeded Mr. James as Chief Engineer?

A. It is true.

Q. And has been acting as such since on or about June 30th, 1940, hasn't he?

A. Yes.

Q. He is also Chief Engineer for the other six subsidiary railroads of the Steel Corporation?

A. With the approval of the Interstate Commerce Commission, he is; yes, sir.

Q. While you were president of South Buffalo, will you state whether any houses belonging to the Steel Company or any other subsidiary of the Steel Corporation were rented to South
308 Buffalo Railway Company employees?

A. I do not recall.

Q. Do you recall that they were not rented?

A. No; I neither recall whether they were or were not.

Q. Do you recall if the employees had the privilege of renting such houses?

A. Yes, I would say that they did.

Q. That is, if they cared to, they were available?

A. Yes, sir, Mr. Craig.

Q. South Buffalo Railway Company had no ownership of those houses, did it?

A. No, sir.

Q. Isn't it true, Mr. Trageser, while you were president that from time to time South Buffalo Railway Company did not have cash available to meet its current accounts?

A. I think that it's true that during the time that I was president of South Buffalo Railway Company it may have been necessary to borrow money.

Q. The bulk of its current accounts were payable to the Bethlehem Steel Corporation, were they not?

Mr. BROMLEY. Of its current accounts?

Q. Well, I'll call them "Loans and Bills Payable."

A. To Bethlehem Steel Corporation? Well, I don't know whether that was true or not.

309 Q. Well, now, the figures from the annual report of the Railway Company to the Interstate Commerce Commission for the year ended December 31, 1934, shows Loans and Bills Payable, Audited Accounts and Wages Payable, Miscellaneous Accounts Payable in the amount of $2,173,551. Do you recall to whom the bulk of that sum was due and owing?

A. Now, that was December 31, 1934, and my answer to your question is that I do not recall to whom the bulk of that sum was due and owing.

Q. Do you recall what, if any, was due and owing to the Bethlehem Steel Corporation?

A. I do not recall what, if any, was due and owing to the Bethlehem Steel Corporation, but I will say that I wouldn't be surprised if some of it was.

Q. Do you recall whether any of it was due and owing to the Bethlehem Steel Company?

A. I make the same answer—I don't know, but I wouldn't be surprised but that some of it was owing to the Bethlehem Steel Company.

Q. Did the South Buffalo Railway Company make any attempts to seek funds with which to reduce or pay off such accounts owing?

A. No.

Q. Now, the report for the year ended December 31, 1935,
310 by South Buffalo Railway Company to the Interstate Commerce Commission showed a sum owing for the items which I have previously stated of $2,036,193. Do you recall if any of that sum was owing to Bethlehem Steel Corporation or to Steel Company?

A. I would like to make the same answer with respect to the status of that account at the end of 1935 as I made to the status of the account at the end of 1934. I don't recall, but I wouldn't be surprised but that some of it was due and owing to Bethlehem Steel Corporation or to Bethlehem Steel Company. It was at about that time, I think, that South Buffalo Railway Company went into the purchase of Diesel Electric Locomotives, and required funds for that purpose.

Q. That is, are you indicating now that it is your recollection that the indebtedness went up in those years?

A. If that's the time that South Buffalo went into the purchase of Diesel Electrical Locomotives, I would so indicate; yes, sir.

Q. Do you recall if in the years 1934 and 1935 there was any substantial pressure exerted on South Buffalo Railway Company by its creditors for the payment of its accounts?

311 A. There wasn't any pressure exerted on South Buffalo Railway by its creditors for the payment of its accounts.

Q. Do you recall, Mr. Trageser, that in 1936 Bethlehem Steel Corporation made two contributions to the South Buffalo Railway Company?

A. Yes, sir.

Q. Will you state whether or not, up to the time of those contributions, there was any pressure exerted on South Buffalo Railway for the payment of its accounts?

A. There wasn't, as I testified a moment ago, any pressure exerted on South Buffalo Railway for the payment of its accounts.

Q. What can you tell us concerning the circumstances surrounding the making of those contributions to South Buffalo Railway by the Bethlehem Steel Corporation?

A. Only that I was advised that there was a tax problem, and a problem concerning undistributed profits, and that with respect to those problems it was thought advisable for the South Buffalo Railway Company to liquidate its indebtedness to Bethlehem Steel Corporation, and that the Corporation was agreeable

312 to making an additional investment in the capital stock of the Railway, and there were discussions with regard to the issuance of that stock and the liquidation of the indebtedness in that way.

Q. Who advised you about the matter about which you have just spoken?

A. Representatives of the Comptroller of the Bethlehem Steel Corporation.

Q. Who were they—do you recall?

A. Mr. R. H. Schlottman and Mr. A. A. Jenkins.

Q. Was the South Buffalo Railway agreeable to the issuance of stock?

A. Yes.

Q. Was that done?

A. No, it was not.

Q. Why not?

A. Because the matter ran along until into December, and I was advised that it was necessary to conclude it before the end of 1936, and the proposition of issuing stock was abandoned and the liquidation took the form of a contribution—as a gift—from the stockholder, Bethlehem Steel Corporation, to its subsidiary, South Buffalo Railway Company.

Q. Who advised you of the matters you have just referred to?

A. Mr. R. H. Schlottman and Mr. A. A. Jenkins.

313 Q. Of the Comptroller's Office of Bethlehem Steel Corporation?

A. That's right.

Q. Do you recall that the first contribution made was in the sum of $211,616?

A. I only recall it because the matter has been so much in the limelight in the past three or four years.

Q. But you do recall it?

A. Oh, I recall it; yes, sir.

Q. Do you recall the purpose of that contribution?

A. It had the same general purpose, Mr. Craig, as I understood it, that I testified to a few moments ago, to liquidate the indebtedness of South Buffalo Railway Company to the Bethlehem Steel Corporation.

Q. Was it the purpose of the contribution of $211,616 to eliminate the deficit of the South Buffalo Railway Company?

A. Well, that was what I understood the whole purpose was, to eliminate the deficit so that the tax matter which was involved and the undistributed profits tax matter, which was part of the whole picture as I understood it, could be worked out.

Q. Your understanding was that the contribution was to eliminate the deficit and to pay off all, or at least a substantial
314 part, of the obligations owing to the Steel Corporation?

A. That's right, Mr. Craig.

Q. To enable the liquidation or payment of current earnings of South Buffalo Railway, isn't that right?

A. That was my general understanding.

Q. Do you recall that in the report of the South Buffalo Railway Company to the Interstate Commerce Commission for the year ended December 31, 1935, in the Surplus Account, a deficit was shown of $46,163?

A. I do not so recall.

Q. You simply don't recall it, but you don't dispute it, do you?

A. I don't know, but if you say the report to the Interstate Commerce Commission for the year ended December 31, 1935 shows that, I'll say that was true.

Q. Well; I will so state?

A. Yes.

Q. Do you recall, Mr. Trageser, in the year 1936, from its operations, South Buffalo had a net income of something over $500,000?

A. I want you to understand that I am not quibbling with you, but I don't know. If you say that is what the report to the Interstate Commerce Commission for that year shows, that is what I'll say.

315 Q. Well, I will so state?

A. All right."

Mr. CRAIG. At this point, for the record, upon agreement of counsel in behalf of both sides, the following stipulation is placed

on the record, and this is dictated by one of the counsel for defendants:

"We are prepared to stipulate that the annual report of the South Buffalo Railway Company to the Interstate Commerce Commission for the year ended December 31, 1936, shows a net income from operations of approximately $500,000, and that that statement is correct."

Mr. CRAIG (reading):

"Q. What, if any understanding, to your knowledge, existed between the Steel Corporation and the South Buffalo Railway Company as to the use to be made of these contributions about which we have been talking?

A. That they would be used to liquidate the indebtedness of the South Buffalo Railway Company to the Bethlehem Steel Corporation.

Q. And for that purpose alone?

A. It was never tied down to that, but that was the understanding I had, and it was certainly what I expected would be done.

Q. And that's what was done?

316 A. That is what was done, yes, sir.

Q. Did you talk with anyone connected with the Steel Corporation about the cancelling of the original plant to issue stock to the Corporation, other than the persons whom you have mentioned?

A. Connected with the Steel Corporation?

Q. Yes?

A. No.

Q. You didn't talk with any attorney for the Steel Corporation?

A. I talked to the attorney for the South Buffalo Railway Company.

Q. Who was he?

A. Hoyt A. Moore.

Q. You heard Mr. McMath testify here yesterday, didn't you?

A. Yes, sir.

Q. And you heard him refer to Mr. Hoyt A. Moore in his testimony, did you not?

A. Yes, sir.

Q. Do you know if the Hoyt A. Moore to whom you refer and the Hoyt A. Moore to whom he referred are the same person?

A. I do know they are the same person.

Q. What did Mr. Moore say to you?

317 A. I don't recall at this late date; I had a telephone conversation with Mr. Moore and told him what had been suggested and asked him if he knew about it, and did he think it was all right so far as the South Buffalo Railway Company was concerned; and he said, "Yes."

Q. Mr. Trageser, at Lackawanna, can you tell us the location of what is known as the "Pocahontas Yard"?

A. The Pocahontas Yard is a series of tracks located south of Smoke's Creek and east of Lake Erie at the southern end of the line of the South Buffalo Railway Company and west of the Hamburg Turnpike.

Q. Who owns these tracks?

A. There are four or five tracks in what the local operating people came to know as the Pocahontas Yard that are owned by the South Buffalo Railway Company.

Q. Who owns the rest of them?

A. Well, there are tracks adjoining the tracks that the operating people of South Buffalo call the Pocahontas Yard, that are owned by the Bethlehem Steel Company.

Q. Did you just refer to tracks in what is known as the Pocahontas Yard or adjoining the Pocahontas Yard?

A. I do not refer to the tracks owned by the Bethlehem
318 Steel Company as part of what the operating people call the Pocahontas Yard of the South Buffalo Railway Company, but I ought not speculate on what you have in your mind, but I will say the tracks I am referring to are immediately adjoining what is known as the Pocahontas Yard of the South Buffalo Railway Company.

Q. In the past, and while you have been connected with the South Buffalo Railway Company, has the South Buffalo Railway Company owned more tracks in that Yard than at present?

A. Yes.

Q. When was that, and to what extent were they owned?

A. I can't testify as to when it was, but the Pocahontas Yard, as it was known, consisted at one time of more tracks owned by the South Buffalo Railway Company than it now consists of.

Q. Was that the situation when you became president of the South Buffalo Railway Company?

A. I can't—I don't recall; I don't know when the Pocahontas Yard was built—I don't recall when it was built.

Q. I am just speaking of when you became president.

A. I do not believe the Pocahontas Yard was there when I became president.

Q. When did it come into existence?

319 A. I can't tell that exactly when it came into existence, but my best recollection is that it came into existence after November 1933.

Q. And, originally, will you state how much of the tracks of that Yard were owned by South Buffalo Railway Company?

A. Well, I'll state that there were more tracks in the Yard at that time that were owned by the South Buffalo Railway than there are at the present time.

Q. Weren't they practically all owned by the South Buffalo Railway Company?

A. Yes.

Q. Now, after the Yard was built, was it enlarged?

A. I'm sorry, Mr. Craig, I can't testify that it was or was not enlarged—I don't recall; I wouldn't think so.

Q. Would you recall that additions were made to it in 1936 or 1937, or both?

A. No; I don't recall. As a matter of fact, if I were pressed, I would say that's about the time the Yard was built originally—about that time.

Q. Do you recall any work in connection with the Yard, either in its enlargement or extension, entailing a cost of about $117,000?

A. No; I don't recall that.

320 Q. Your recollection is that the Yard was created after you went with South Buffalo Railway Company?

A. That's my best recollection.

Q. Why was it created?

A. To take care of traffic that was offered to the South Buffalo Railway Company for handling.

Q. Offered by whom?

A. By anybody on the South Buffalo Railway Company.

Q. Isn't it a fact that it was created largely because of the traffic offered by the Bethlehem Steel Corporation?

A. The Bethlehem Steel Company is the largest shipper and receiver of freight on the South Buffalo Railway Company, and——

321 Q. Can you give us a more specific answer to that question?

A. I can't give you a more specific answer. The Yards were to be used for any kind of traffic offered to the South Buffalo. The Bethlehem Steel Company is the largest shipper and receiver of freight on the South Buffalo Railway Company, but there never was any understanding that the Pocahontas Yard was built by the South Buffalo Railway Company and that it was to be used exclusively for the purpose of handling the traffic of the Bethlehem Steel Company.

Q. As a matter of fact, hasn't it been used largely for traffic connected with the Steel Company?

A. Only insofar as the volume of traffic in connection with the Steel Company is larger than the volume of freight offered by any of the other shippers and receivers of freight on the South Buffalo Railway Company.

Q. Isn't it a fact that it has been used largely for the Steel Company traffic?

A. I would say that's a fact; yes, sir.

Q. Isn't it true that the Steel Company traffic makes up the large bulk of the use to which the Yard is put?

A. Yes, I would say that the greater part of the tonnage handled in that Yard is traffic offered to the South Buffalo by the Bethlehem Steel Company.

Q. Will you state whether or not the Yard is used in connection with the shipment of coal to the Steel Company?

322 A. I will so state.

Q. And where does that coal come from, relative to carriers, I mean?

A. You mean today?

Q. Well, at the time the Yard was created—at about that time?

A. At the time the Yard was created, the coal was coal that was received ex lake at Lackawanna, New York, and given to the South Buffalo Railway Company for handling.

Q. What do you mean by "ex lake"?

A. Discharged from vessels that brought the traffic across the Great Lakes.

Q. And that coal was taken from the vessels and put into railroad cars, was it not?

A. Yes.

Q. And those cars were taken to the Pocahontas Yard?

A. They may have been—some of them.

Q. Weren't a good many of them taken to that Yard?

A. Yes.

Q. Then what was done with them?

A. They were taken to the point of unloading.

Q. At whose direction?

A. The directions on the shipping papers giving to the South Buffalo Railway Company the shipping instructions by the shipper of the coal.

323 Q. As a matter of fact, would not those coal cars, upon the instructions of the shipper of the coal, be held there for a considerable length of time?

A. They might be.

Q. Weren't they?

A. No.

Q. Well, what do you mean, "they might be"?

A. It was perfectly possible and permissible, under the rules, to hold the coal there for a considerable length of time.

By Mr. BROMLEY:

Under what rules?

A. The demurrage rules governing railroad operations.

By Mr. CRAIG:

Q. And that was done, wasn't it?

A. Yes. I conceived that Yard to be, Mr. Craig, I may say, the same as a yard serving any other ex lake dock at Buffalo or at any other Great Lakes port.

By Mr. BROMLEY:

Q. Did you mean to say that all the traffic handled there at that time was ex lake?

A. No.

Q. And you did not mean to say that all of the traffic handled through the Yard at that time was held for a considerable length of time?

324 A. No, sir; I thought I made that clear—I didn't mean to so state.

Q. Mr. Trageser, will you tell us what is known as the 'Dock Property'?

A. Well, I think I know what you mean, Mr. Craig, but I wish you would be a little more specific in your question, if you can; but I think you mean, if I may be permitted to speculate as to what you mean, the dock property along the Union Canal in the City of Buffalo that was formerly owned by the South Buffalo Railway Company.

Q. I think that's the property I have in mind.

A. What do you want to know about it?

Q. The Dock Property was sold, was it not, by the South Buffalo Railway Company to the Steel Company?

A. Yes, sir.

Q. About when?

A. My best recollection is that the Dock Property was sold to the Bethlehem Steel Company in the summer of 1940.

Q. Will you just describe, generally, the location of that property and of what it consisted?

A. The Dock Property consisted of a dock along the Union Canal in the City of Buffalo on the line of the South Buffalo Railway Company at the northern end of its line in the territory west of the Hamburg Turnpike.

Q. When you became president of this South Buffalo
325 Railway Company, was this property leased by South Buffalo?

A. Well, I don't think you mean that when I became president was it then leased; I found when I became president that it was leased.

Q. The lease had been executed prior to your becoming the president?

A. Yes, Mr. Craig.

Q. Leased to whom?

A. I believe it was leased to the Bethlehem Steel Company.

Q. Do you recall the rental of that lease?

A. I do not.

Q. Do you recall whether it was $4,500?

A. If you say that exhibit there shows $4,500, then I'll say it was $4,500.

Q. Well, I don't want to testify.

A. Well, I don't recall.

Q. Do you recall whether or not the lease was profitable or unprofitable to South Buffalo Railway Company?

A. I think the lease was, as far as figures on a sheet of paper were concerned, it showed that it was not profitable to the South Buffalo Railway Company, but my conception of that always was that it was better for the South Buffalo Railway Company to get something out of it than to get nothing.

Q. You mean something in the way of income?

326 A. Yes—so that from that standpoint I would consider that it was profitable.

Q. Did you make any effort to sell the property, either subject to or not subject to the lease, to any person or corporation while you were president of the South Buffalo Railway?

A. No, sir; I did not.

Q. You were content?

A. I was content.

Q. Do you recall that while you were president of South Buffalo Railway Company that there was, or had grown up, a practice between the South Buffalo Railway Company and various connecting carriers—that is, the trunk-line roads—of postdating the date of interchange of various cars both coming from the connecting carriers to the South Buffalo and from the South Buffalo to connecting carriers?"

Mr. BROMLEY. I object to this as immaterial. I cannot see, for the life of me, what that has to do with this case.

The COURT. Well, what the question, postdating the cars?

Mr. CRAIG. Your Honor, the testimony in this case will develop that between carriers a charge is made for the use of cars. A car coming in from a line-haul carrier to South Buffalo carries a charge of a dollar or $1.15 a day. Now, there are a number

327 of roads, as has been detailed here, with which South Buffalo has connections. This practice of postdating, as I recall the testimony, involved only two of these connecting carriers, not the others. The result of postdating is this——

The COURT. Demurrage, of course.

Mr. CRAIG. No. It is different, a little different, from that. Demurrage is in a different category. This is known as per diem.

The COURT. Well, it would affect demurrage, would it not?

Mr. CRAIG. Well, it is a payment for use of cars, I suppose the same general idea, except this is a transaction between two carriers. Demurrage, I think, is between a carrier and a shipper.

The COURT. Well, I mean the result is the same. I mean, the effect would be to escape the payment of demurrage.

Mr. CRAIG. Right, to escape the payment. That is, by postdating, the way it was handled, South Buffalo would not have to pay for the use of the car if they had it. Now, that meant, of course, that South Buffalo was profiting at the expense of these line-haul carriers. Any profit would go into its operations. And, of course, the general profit of South Buffalo, in turn, flows
328 up to the Holding Company. Now, that involves—I have to state this in order to try to tie it in—that involves a further matter which will come out in this case, at least we will offer it, relative to payment made by line-haul carriers to South Buffalo for transporting freight to and from interchange in which the Bethlehem Steel Company is concerned. And we propose to establish or offer proof that one of the elements in setting the amount of charge by South Buffalo in transporting that freight is the point of delivery by South Buffalo to Bethlehem Steel Company. Now, that will tend to explain, I think, why these corporations go to this great extent to maintain the form of separation, although we contend the substance of separation does not exist. And Bethlehem Steel Company routes its own shipments. It can pick and choose any one of the main-line carriers.

The COURT. All right.

Mr. CRAIG. Now, it puts, as we view it, it puts Bethlehem Steel Company and the corporation all tied in there together in a position to bear down pretty hard on these line-haul carriers.

The COURT. Suppose they did? Suppose that is true. What has that to do with the question at issue here?

329 Mr. CRAIG. If it is true and they bear down on the——

The COURT. If you were able to tie in the question of any postdating, any income from that, that is transferred to the Corporation, that would be a different thing. But here the mere fact that the Railway, that certain railways did postdate certain shipments to the South Buffalo Railway, it would seem to me entirely foreign to any questions here, standing alone.

Mr. CRAIG. Yes. Our position is that anything that accrues to the benefit of the South Buffalo accrues to the benefit of the Corporation, Bethlehem Steel Corporation.

Mr. BROMLEY. Suppose we rob a bank, Mr. Craig? You would not claim that evidence was material, would you? We might have got money that way and it might have gone to our parent.

Mr. CRAIG. I don't know.

The COURT. As I point out, if you show that the South Buffalo Railroad did receive benefits from postdated cars and that that benefit was transferred to the Corporation, that would be competent.

Mr. CRAIG. Yes.

The COURT. Although its materiality might seem small.

Mr. CRAIG. Your Honor, we do not claim that we can show
330 that there was a transfer of that money which was saved, if it ever could have been identified, to the Corporation.

The COURT. How do you connect up with the Corporation?

Mr. CRAIG. Our position is that, due to this accounting system in which we have gone here, and to which Mr. McMath testified, that the operations of the South Buffalo themselves, regardless of the payment of any dividends, are consolidated with the operations of all other subsidiaries, in which the reports of the Corporation, the matter of dividends, is not controlling. It is a matter of the operations in a subsidiary. And if they can save money in any way it inures to the benefit of the Steel Corporation.

Mr. BROMLEY. Just as I said in the opening, that comes down to the contention on Mr. Craig's part that it is wrong for the Corporation to own the stock.

The COURT. Well, of course, that is a broader question here. The contention is this is part of the total fund, moneys received by the South Buffalo Railway Company.

Mr. CRAIG. In fact, as I say further, with this tied in with the other matter to which I referred, the other relations between South Buffalo and the connecting carriers, and between Bethlehem
331 Steel Company and the connecting carriers on this matter of charge back and forth for hauling——

The COURT. Do you propose to show any particular instances that appeared at the time, covered by these postdatings?

Mr. CRAIG. Well, we had in here—I think I have to say so in order to answer the question—we have the admission in here of an officer of the Railway Company that that postdating was indulged in between the Railway and these two companies.

Mr. BROMLEY. Yes; and you also have the admission that it was a perfectly proper procedure as between the trunk-line carrier and us, but whether or not it was wrong——

Mr. CRAIG. No; it was not.

Mr. BROMLEY. There is no charge that Bethlehem Steel Corporation made us do it. We did it because our Railway operating people thought it was a good thing to do.

The COURT. Well, is there anything you propose to show as to the extent to which that practice was followed?

Mr. CRAIG. Yes.

The COURT. The simple statement that these two railroads did postdate their cars——

Mr. CRAIG. I think the testimony is that when Mr.
332 Trageser became President of South Buffalo in late 1933 or very shortly thereafter he found out about the practice and it was not until the year 1939 that he ordered it stopped. So it would seem that it continued during all that period.

The COURT. That does not answer the question whether it might be called mere—you mean by that it was a continuous practice by the two railroads?

Mr. CRAIG. As I understand it from the testimony, it was a practice which was continued during that period; yes, sir.

Mr. BROMLEY. You do not contend our parent made us do it or we were dominated into doing it, do you?

The COURT. Well, this is all involved in the connection outside of that. I think I will receive it, subject to being stricken out later on. It would not have any great bearing relating to certain instances or short periods of time. Depends upon what the testimony further on might be, but I will receive it anyway subject to being stricken out later on, subject to a motion to strike.

(Mr. Craig continues reading deposition as follows:)

Mr. CRAIG. I will reread that question:

"Q. Do you recall that while you were president of South
333 Buffalo Railway Company that there was, or had grown up, a practice between the South Buffalo Railway Company and various connecting carriers—that is, the trunk-line roads—of postdating the date of interchange of various cars both coming from the connecting carriers to the South Buffalo and from the South Buffalo to connecting carriers?

A. No; I don't so recall that there was any such practice with respect to postdating cars delivered by South Buffalo, which is embraced in your question, to its connections.

Q. What about the other way around—from the connecting carriers to the South Buffalo Railway?

A. I was aware of the fact that Mr. Benning and Mr. St. Clair had arrangements with the connections which were contemplated within the per diem rules for accepting cars from the connections of the South Buffalo Railway Company at a date when its connections found it convenient to deliver those cars, and to interchange them at a later time.

Q. You mean to record them as interchanged at a later time?

A. Yes.

Q. Actually, the cars would be interchanged, but the time of interchange would be recorded at a time later than the time when they were actually interchanged?

334 A. That's right.

Q. What would be the effect of that practice upon the amount owing by the South Buffalo Railway Company to a connecting carrier for the pier diem?

A. The effect of that practice either—well, that was put into effect at the request of some of the South Buffalo Railway Company's connections in order that they might be in as good a competitive position as the other connections, and as to your operating at Lackawanna, under the rules, the effect was to reduce the amount of the per diem payable by South Buffalo to the connections with which the arrangement was in effect.

Q. Do you recall if that practice had been developed, or was it used in connection with all of the connecting carriers?

A. I know it was specifically in effect with the D. L. & W. Railroad and the Lehigh Valley Railroad, at their request, and I don't recall whether it was in effect with the other connections of the South Buffalo or not, but I wouldn't be surprised that it was. It was a regular practice in effect anywhere in the United States, and contemplated by the rules——

Q. Contemplated by what rules?

A. The per diem rules of the Association of American Railroads.

Q. Postdating was contemplated by those rules?

A. That could have been done, or it could have been han-

335 dled in the manner of having the cars interchanged at the time they were actually, physically, interchanged, and then having the South Buffalo present a reclaim to the carriers affected for the number of days necessary.

Q. When did you find out about this practice of postdating?

A. I can't testify exactly when I found out about that, but I would say I knew about it for some period of time—how long a time, I can't say.

Q. Some period of time in relation to what—after you became president?

A. Yes.

Q. That is, could you state approximately how long?

A. Maybe a year or two after I became president—maybe a longer period than that."

The Court. How long could they hold these cars without demurrage? How many days?

Mr. Craig. We do not have any testimony on specific instances. I think the best we have is the continued practice over a period of time.

The COURT. I know that. But, of course, the practice might be strictly legal. To postdate them might be wrong, but as an actual result it might not affect the money question at all.

Mr. BROMLEY. There is no proof that it does.

The COURT. It shortens the period of demurrage, it is true.

336 Mr. CRAIG. Mr. Trageser answered, he said the effect was to reduce the amount of the per diem payable by South Buffalo to the connections with which the arrangement was in effect.

The COURT. Yes; if they had to pay the demurrage, that would be so.

Mr. CRAIG. Yes, sir.

(Mr. Craig continues reading deposition as follows:)

"Q. Was that all right with you, that practice?

A. It was—I saw nothing wrong with it. I knew from my railroad experience that it was a practice that was in effect between connecting carriers and it was either handled by postdating or handled on a reclaim basis.

Q. Now, as a matter of fact, when you found out this practice was being carried on, didn't you order the practice to be discontinued?

A. No; it isn't a matter of fact that when I found out about the practice that I ordered it discontinued.

Q. Well, what did you do?

A. I didn't order the practice discontinued after I found out about it. It went on for a long period of time after I knew about it; it didn't startle me; there was nothing startling about it so far as I was concerned.

Q. Do you recall that in September 1940, you testified at Buffalo, New York, in the matter of the investigation of

337 the South Buffalo Railway Company before the Interstate Commerce Commission, Ex Parte No. 128—do you recall that you testified then and there?

A. Oh, yes.

Q. I will ask you if you recall whether this question was put to you and if you gave the following answer: Question: 'With reference to the instances that have been referred to in this proceeding in which empty cars received from connecting lines were removed from interchange in advance of the date as of which they were recorded as interchanged, state what you as president of the South Buffalo Railway Company did with respect to this matter when it came to your attention? Answer: 'I instructed that it be discontinued.' Do you recall that testimony?

A. Yes.

Q. Do you recall this question and answer: Question: 'When did you give such directions?' Answer: 'February 1939.' Do you recall that testimony?

A. Yes, sir.

Q. And this question and answer: Question: 'According to reports made to you and according to your best information and belief, are all cars delivered to or received from connecting carriers now recorded as interchanged at the time of the actual interchange?' Answer: 'They are.' Do you remember that?

338 A. Yes, sir.

Q. Now, do you know if the time of interchange is recorded as of the time of the actual interchange?

A. According to my best information, they are.

Q. Do you desire to make any correction in the questions and answers which I have just read to you?

A. Only this: In answer to your question a few moments ago, that question as you now read it to me would seem to indicate that as soon as I found out about it, I gave instructions that it be discontinued. As a matter of fact, Mr. Benning, Mr. St. Clair, and I carried on a discussion and an argument about that matter extending over a long period of time which, finally, culminated in my giving specific direct instructions that the matter be handled on the basis of reclaim on the cars that might be involved, and not postdating the interchange reports. I want to say, also, if I may, that the cars that were involved were cars that were used by the South Buffalo Railway Company for handling the shipments of any shipper on the South Buffalo Railway Company, and as a matter of fact, the specific request came from the Lehigh Valley Railroad and the D. L. & W. Railroad to the South Buffalo Railway Company that they permit this arrangement; the request was made by them in order that they might be put in

339 as good a competitive position to handle the business of the Maritime Milling Company as the other lines of the South Buffalo connections, and whose connections were closer to the plant of the Maritime Milling Company than were either the Lehigh Valley or the D. L. & W. Railroad."

Mr. BROMLEY. In view of that last answer, I move to strike out all testimony so far given by the witness Trageser with respect to postdating.

The COURT. I will let it stand.

(Mr. Craig continues reading deposition as follows:)

"Q. Mr. Trageser, counsel for the South Buffalo Railway Company and the other defendants have furnished to attorneys for the plaintiff a booklet entitled 'South Buffalo Railway Company List of Sidings—Revised September 1st, 1939,'

A. When did they give you that?

Q. Well, sir, my recollection is that it was December 22nd, 1943.

A. I just wanted to determine whether that was the last one. I understand that is the last one.

Q. Are you familiar with that booklet?

A. Yes, sir."

Mr. CRAIG. Your Honor, I want to interrupt at this time. I had proposed to offer this booklet in evidence at the con-
340 clusion of this part of Mr. Trageser's testimony, but if it will be of any assistance to you, I would be glad to offer it at this time, because there are references to it.

The COURT. Is that concerned with the question of the introduction of new tracks, so on?

Mr. CRAIG. No. It is this list of sidings of the South Buffalo.

The COURT. Do you have any objection to my seeing it?

Mr. BROMLEY. No.

The COURT. All right [examines booklet].

Mr. CRAIG. I will offer it now, your Honor.

The COURT. You propose to show that the Corporation had any knowledge of this postdating by the Railroad?

Mr. CRAIG. No.

The COURT. Offered simply as bearing on the return of the Railroad to the Corporation?

Mr. CRAIG. Yes.

Mr. BROMLEY. No objection.

Mr. CRAIG. Plaintiff offers it in evidence.

(The booklet referred to was received in evidence and marked "Plaintiff's Exhibit No. 12.")

(Mr. Craig continues reading deposition as follows:)

"Q. On Page No. 1 of the booklet, under the general heading, 'List of Sidings', are the words, 'Blast Furnaces and
341 Ore Dock,' and beneath that various track numbers and location or use. To whose blast furnaces and ore dock is reference made?

A. On Page 1?

Q. Yes.

A. The blast furnaces and ore dock of the Bethlehem Steel Company.

Q. On page 5, I find 'Nos. 1 and 2, Open Hearth Shops and North Mills,' and below that various track numbers with location or use. To whose open hearth shops and north mills is reference made?

A. Bethlehem Steel Company's.

Q. On Page 13 I find, at the top of the page, the words, 'South Mills,' followed by various track numbers and location or use. To whose South Mills is reference made?

A. On that page there are references made to the track numbers to the South Mills of the Bethlehem Steel Company, and there are also references made to the tracks of the South Buffalo Railway Company.

Q. I was referring my question not to the tracks, but to the words 'South Mills.' To whose South Mills does that refer?

A. The term 'South Mills' is a general designation and it includes eleven tracks in the South Mills Territory of the Bethlehem Steel Company.

342 Q. Does 'South Mills' refer to a territory rather than building or plants?

A. For the purpose of this booklet; yes.

Q. On Page 18, I find at the top of the page, the words, 'Ship Canal and Coke Ovens,' followed by various track numbers and location or use. To whose Ship Canal and Coke Ovens is reference made?

A. That's a general designation covering tracks in——

Q. I'm not interested in the tracks, Mr. Trageser. If you know, to whose Ship Canal and Coke Ovens is reference made?

A. The Ship Canal would be the Union Ship Canal, and the Coke Ovens would be the Coke Ovens of the Bethlehem Steel Company.

Q. To whom, if you know, does the Ship Canal belong?

A. Well, I think—I don't know whether or not it belongs to the Bethlehem Steel Company.

Q. Isn't it a fact that so far as you know, it does?

A. Well, there are a couple of ship canals, and I just want to be sure the ship canal designated at the top of page 18 is the ship canal extending south from Lake Erie—I think that it's owned by the Bethlehem Steel Company.

Q. On page 20, at the top, I find the words, 'Car Dumper Yard,' followed by various track numbers and location or use. To what does that term refer?

343 A. The Car Dumper Yard as shown on top of page 20 is the Car Dumper Yard of the Bethlehem Steel Company.

Q. Toward the bottom of page 20 I find the words, 'Boat Yard,' which various track numbers and location or use—to what does that refer?

A. To the Boat Yard of the South Buffalo Railway Company.

Q. On page 21, I find 'Coke Screen, Scrap Reclaim, and Pig Cast Plant Territory,' followed by various track numbers and location or use. To what do those words refer?

A. To the Coke Screen, Scrap Reclaim, and Pig Cast Plants of the Bethlehem Steel Company.

Q. On page 23, at the top, I find the words, 'No. 3 Open-Hearth Territory,' followed by various track numbers and location or use. To what does that language refer?

A. The territory in and about the No. 3 Open Hearth Plant of the Bethlehem Steel Company.

Q. About the middle of that page I find the words, 'Covered Stock Yard,' followed by various track numbers and location or use—to what does that refer?

A. The Covered Stock Yard is the designation for the Stock Yard of the Bethlehem Steel Company at its No. 3 Open Hearth Plant.

Q. On page 24 I find the words, 'West of Covered Stock Yard,' followed by various track numbers and location or use—to what does that refer?

344 A. That's a territorial designation for tracks west of the Covered Stock Yard which was just referred to as shown on page 23.

Q. The Covered Stock Yard of the Bethlehem Steel Company?

A. That's right.

Q. About the middle of page 24 I find the words, 'Storage and Classification Yard South of No. 3 O. H.,' followed by various track numbers and location or use—to what does that language refer?

A. That's the territorial designation for the tracks south of the No. 3 Open Hearth Plant of the Bethlehem Steel Company.

Q. On page 26, at the top, I find the words, 'South of Smoke's Creek,' followed by various track numbers and location or use—to what does that refer?

A. That's the territorial designation for the tracks south of Smoke's Creek.

Q. On the same page I find the words, 'Wye Yard' followed by various track numbers, location or use—to what does that refer?

A. That refers to the Wye Yard of the South Buffalo Railway Company.

Q. On page 26 I find the words, 'Pig Iron Storage Yard,' followed by eleven track numbers, the first of which is designated, in parentheses, 'East Track,' and after No. 11, 'Connecting With East Coke Yard Bridge'—to what does that refer?

345 A. That's a designation of a series of tracks——

Q. If I may interrupt—what is meant by the words 'Pig Iron Storage Yard'?

A. It would be an area in which pig iron might be stored.

Q. By whom?

A. It might be stored by the Bethlehem Steel Company or by others.

Q. Whose storage yard is it?

A. I think it's the—I don't know—there's No. 1, 2, 3, 4 in the tracks down to No. 11—whether those are South Buffalo Railway tracks or whether they are tracks of the Bethlehem Steel Company without looking it up.

Q. Are you able to state whether or not the storage yard referred to is the storage yard of the Bethlehem Steel Company?

A. If it refers to an area of ground designated by the description as a 'Pig Iron Storage' area, it is the Pig Iron Storage Area or Yard of the Bethlehem Steel Company.

Q. Does the South Buffalo Railway Company have a Pig Iron Storage Yard?

A. No, sir.

Q. On page 27 I find the words, 'Coke Yard,' followed by
346 various track numbers and location or use—to what is reference made there?

A. The Coke Yard of the South Buffalo Railway Company at the south end of its line south of Smoke's Creek.

Q. On page 28 I find the words, 'Coal or Whirley Yard,' followed by track numbers and location or use—to what does that refer?

A. A series of tracks that the local people know as the 'Coal or Whirley Yard Area,' and that, again, comes under the general principal heading that you referred to on page 26 of the book, south of Smoke's Creek.

Q. Whose Coal or Whirley Yard is it?

A. I don't know—I think those tracks, Mr. Craig, might be the tracks of the South Buffalo Railway Company—I don't know.

Q. Do you think they are the tracks of the Bethlehem Steel Company?

A. That might be—some of them—but I don't think so.

Q. On page 29, at the top, we have, 'Pocahontas Yard,' followed by various track numbers and location or use. To what is reference made by the word 'Pocahontas Yard'?

A. 'Pocahontas Yard,' that I have been testifying about this morning, but I would like to say this in connection with this book at this point, if I may——

Q. May we finish the Pocahontas Yard first, Mr. Trageser?

A. That is the Pocahontas Yard—I think it is the desig-
347 nation of the operating people of the Railway—that is the Pocahontas Yard to which I have been testifying this morning.

Q. Whose Yard is it?

A. As shown on page 29? I'm not prepared to testify to that because those tracks shown there and continuing on page 30 and

31, are the tracks of the South Buffalo Railway Company or of the Bethlehem Steel Company—I don't know.

Q. On page 32 we find the words, 'Strip Sheet Mills,' followed by various track numbers and location or use. To whose Strip Sheet Mills is reference made?

A. The Strip Sheet Mills is a territorial designation of the territory east of the Hamburg Turnpike and north of the South Buffalo Railway Company, and the Strip Sheet Mills in that territory are the mills of the Bethlehem Steel Company.

Q. And on that same page 32 I find the words, 'Hot Mill,' followed by various track numbers and location or use—to whose Hot Mill does that refer?

A. That's one of the units in the Strip Sheet Mills of the Bethlehem Steel Company.

Q. On page 34 I find the words, 'Cold Mill,' followed by various track numbers and location or use. To whose Cold Mill is reference made?

A. The Cold Mill Unit of the Strip Sheet Mills of the
348 Bethlehem Steel Company.

Q. On page 35 I find the words, 'Seneca Division,' followed by the words, 'East Plant,' together with various track numbers and location or use. To what is reference made there?

A. The Seneca Plant of the Bethlehem Steel Company. I am testifying in answer to your question that that is what the principal heading on that page means—that it means these tracks under that heading. I am not testifying that they are tracks of the Bethlehem Steel Company.

Q. No—I am simply asking you as to what reference is made as to the yards?

A. Yes.

Q. Is the same thing true of page 36 of this booklet where the heading is 'West Plant'?

A. That's the Seneca Unit of the Bethlehem Steel Company.

Q. On page 36 I find the words, 'B. & H. Specialty Shop—Blasdell,' followed by various track numbers and location or use. To what is reference made there?

A. That's a territorial designation for the tracks in that territory, and B. & H. Specialty Shop is a shop or plant of the Bethlehem Steel Company.

Q. On Page 37 I find the words 'Railroad Classification Yards,' and below that the words, 'North Yard,' followed by various
349 track numbers and descriptions and location or use. To what is reference made there?

A. Railroad Classification Yards.

Q. Yes?

A. That would be the railroad or railway classification yards of the South Buffalo Railway Company.

Q. And 'North Yard' is a part thereof?

A. Yes.

Q. On the following page reference is made to 'South Yard.' Is that also a part thereof?

A. Yes.

Q. And 'Marilla Street Yard—Station M,' is that part of the same classification yards?

A. That's a yard of the South Buffalo Railway Company on the east side of the Hamburg Turnpike on the northern end of the line.

Q. I also find the words, 'Borrow Pit,' with one track number and location or use. Is that also a part of the classification yards of the South Buffalo Railway Company?

A. I don't know what 'Borrow Pit' means.

Q. On page 39 I find the heading, 'Miscellaneous Industries,' with various track numbers and location or use. To what is reference made there?

A. Well, to the tracks listed below of the various industries served by the South Buffalo Railway Company.

Q. Other than Bethlehem Steel Company?

350 A. As far as I can see there are no tracks of the Bethlehem Steel Company listed on page 39.

Q. On page 41 I find the heading, 'Interchange Yards.' To what is reference made there?

A. The Interchange Yards of the South Buffalo Railway Company with its connections.

Q. Now, earlier in your testimony you wanted to make some explanation about this book, I believe.

A. What I wanted to say about that, relative to the questions of Mr. Craig and my answers, is something like this: That is a list of sidings that was prepared so that the people operating the South Buffalo Railway Company wouldn't be running around like a chicken with its head cut off, trying to find out what one employee of the Railway might mean when he referred to this track or that track, or to the other track; and some other employee of the Railway when he was referring to those same tracks might be calling them something else. It was, therefore, found that in connection with the keeping of the records and the operation of the Railway that it was necessary to have some sort of a standard in the hands of all of the employees, or as many of the employees as are interested, so that they would know that they were all talking about the same thing. Now, on a railroad like the

351 South Buffalo, lying as it does in a constricted territory, I know that it was found to be difficult to adopt designa-

tions that, as far as the territories were concerned, they would be understood and acceptable, and that was the purpose of this book of sidings and, as a matter of fact, its conception was—well, it was conceived somewhat after the list of sidings that trunk line railroads have, which, of course, are very much more extensive and contain a lot more information.

Q. Is there anything more?

A. No; I think that's all I care to state in connection with that.

Q. Mr. Trageser, in the years you were president of South Buffalo Railway Company, generally speaking, from the years 1934 or 1935, the company, from its operations, made money every year, did it not?

A. 1934 and 1935 are the years you referred to?

Q. Do you recall that during all the years that you were president that the company made money from its operations?"

Mr. CRAIG. Then one of the Counsel for the defendant said, "Do you want us to stipulate that the report to the Interstate Commerce Commission shows a net income from operations from a certain year to another certain year? How much do you want?"

352 And I said, "I was interested in the years from 1934 to 1939."

Then defendant's counsel said: "It is stipulated upon the record that the annual report of the South Buffalo Railway Company to the Interstate Commerce Commission shows some net income earned each year from 1933 to 1939, inclusive."

Then I said: "I would prefer to make that from 1934 to 1939, inclusive."

And defendant's counsel said, "All right—that's agreeable."

And I said: "So it is stipulated that for the years 1934 to 1939 inclusive, the reports of the South Buffalo Railway Company to the Interstate Commerce Commission show some net income for each year. Is that from operations, Mr. Adkins?"—one of defendant's counsel.

To which Mr. Adkins stated: "That I don't know."

(Mr. Craig continues reading deposition as follows:)

"Q. Except for 1936, do you know of any income which was derived from sources other than from operations?

A. I don't know of any net income derived from any sources other than operations—well, I'll limit it to 1936; I don't recall if we collected any rents—that's under 'Net Income.'

353 Q. I'll ask you to state whether or not in 1939 any officer or employee of the Bethlehem Steel Corporation talked with you in connection with your ceasing to be president of South Buffalo Railway Company?

A. Mr. McMath talked to me.

Q. When was that, if you recall?

A. I think, Mr. Craig, he first talked to me about July.

Q. Of 1939?

A. Yes.

Q. Do you recall what he said—the substance of it—rather, the substance of your conversation is what I want?

A. I think the substance of the conversation was that the Bethlehem Steel Corporation, the stockholder, had been considering the matter of the organization of the South Buffalo Railway Company, and that in that consideration there was involved the question of my ceasing to be president.

Q. That is what was brought up by Mr. McMath—he brought that up?

A. Yes.

Q. And what did he have to say about it?

A. Well, he said, as I recall it, that it had been considered advisable to make a change in the organization and to have the Railway Company take over entirely any services that the
354 Bethlehem Steel Company or any other subsidiary of the Corporation had been making available to the Railway Company, and that the Railway Company should set itself up to operate freely of any possible question of domination by the Bethlehem Steel Corporation.

Q. Did he express any dissatisfaction with your services as president of the Railway Company?

A. No?

Q. Did he express approval of your services as such?

A. I don't think, in terms, that he expressed approval.

Q. What, if anything, did he request you to do in connection with the presidency of the railroad?

A. At that time?

Q. Yes.

A. I don't think at that time that he requested me to do anything.

Q. Did he later?

A. We had several conversations, and I think it was about October that he told me the Bethlehem Steel Corporation felt that in the furtherance of the plans which we had earlier talked about that it would be desirable for me to resign.

Q. You think that was in October?

A. Yes.

Q. Did he speak of it after that?

A. Yes. I think it was a little later than that that he
355 spoke to me again.

Q. What was said on that occasion and when was it, to the best of your recollection?

A. Oh, in October or November.

Q. Or November?

A. Yes.

Q. Do you recall what he said then?

A. I think it was at that time that he told me that the Corporation thought that they would suggest that Mr. Petty be elected president.

Q. What did he say, if anything, in connection with your ceasing to be president?

A. That it was no reflection on me.

Q. Specifically, did he ask you to submit your resignation?

A. No, I don't think he ever put it to me that way.

Q. He just suggested that it be done?

A. Yes.

Q. Was it stated in the conversation between you and Mr. McMath that you should become vice president of South Buffalo Railway Company?

A. He said he thought that would be the set-up; that the Corporation would suggest—I think he said then that that matter had been discussed.

Q. Did he say with whom?

A. With Mr. Petty.

356 Q. Was anything said in connection with your compensation if you should become vice president?

A. No, sir.

Q. Nothing whatever?

A. No, sir; that matter was never discussed.

Q. Was the question of the duties of your new position discussed with him?

A. In somewhat of a general way, yes.

Q. What can you tell us about that?

A. That under the direction of Mr. Petty and the Board of Directors he thought that my duties would be general, and that there would be an opportunity for me to serve there to the advantage of the Railway Company.

Q. Did he indicate that there would be a change in your duties?

A. No.

Q. During the summer of 1939, as I understand it—in July, I think you said—you testified concerning your first talk with Mr. McMath?

A. Yes.

Q. At that time, isn't it correct that South Buffalo Railway Company had nine directors, as now?

A. Yes.

Q. And were not all nine of those directors at that time employees of the South Buffalo Railway Company?

357 A. Yes, they were, Mr. Craig.

Q. Did Mr. McMath speak to you at that time or any other time concerning a change in the personnel of the directors of the Railway Company?

A. I think during the summer of 1939 he mentioned that that was part of the plan.

Q. What did he indicate as to what the changes would be?

A. He indicated that the Steel Corporation felt in the furtherance of the plan they had in mind that it would be a good thing for the majority of the Board of Directors to be composed of individuals who were not connected either with the South Buffalo Railway Company, the Bethlehem Steel Corporation, the Bethlehem Steel Company, or any other subsidiary of the Steel Corporation.

Q. You were a director at that time, were you?

A. Yes.

Q. And you are a director now?

A. Yes.

Q. And you have continued to be such in the intervening period?

A. Yes.

Q. You know as a matter of fact that five of the men who were directors in July of 1939 resigned as such?

A. Yes, I do know that—not in July 1939, however.

Q. No, they resigned subsequently. Do you know when they did resign? Was it on or about December 6, 1939?

358 A. I think it was at a meeting held December 5, 1939.

Q. At that time were five new directors chosen, and did they take office at that time?

A. They were chosen—I don't recall whether they took office at that time or not.

Q. Mr. Trageser, when did you resign? Or, did you resign as president of the Railway Company?

A. Yes, I did.

Q. When?

A. At the meeting of December 5, 1939, I presented my resignation.

Q. What was done at that meeting in connection with the filling of the office of president of the Railway Company?

A. Mr. Petty was elected a director at that meeting to fill a vacancy, and he was elected president of the South Buffalo Railway Company, subject to the approval of the Interstate Commerce Commission.

Q. Do you recall—was anyone present at that meeting other than directors of the company?

A. I don't recall whether there were or not—I think so.

Q. Do you recall whether any person connected with the Bethlehem Steel Corporation was present?

A. There wasn't anybody connected with the Steel Corporation present.

Q. Was there anybody connected with the Bethlehem
359 Steel Company present?

A. There wasn't anybody connected with the Steel Company present.

Q. Who was there?

A. Mr. W. W. Robison.

Q. Who is he?

A. He was of counsel for the South Buffalo Railway Company.

Q. And he is of counsel here?

A. Yes.

Q. He is from New York City?

A. Yes.

Q. And was connected with the firm there?

A. Yes.

Q. What firm?

A. Well, the firm is Cravath, Swaine & Moore.

Q. And the Moore in that firm is Mr. Hoyt A. Moore?

A. That's right.

Q. Did Mr. Robison at that meeting say anything about the filling of the vacancy of the office of president?

A. No, I do not think he said anything about it.

Q. Do you recall whether he said anything at that meeting?

A. No.

Q. Do you recall who brought up the matter of the filling of the vacancy?

A. I did.

360 Q. Were you chairman of the meeting?

A. Yes.

Q. What did you state to the directors, in substance?

A. I stated to the directors that I was presenting my resignation as president, and that I suggested Mr. Petty be elected president.

Q. Did you say anything about the conversation you had had with Mr. McMath?

A. No.

Q. Do you know if Mr. Petty had been acquainted with these directors of South Buffalo Railway Company prior to the time of this meeting?

A. Which directors?

Q. (Question repeated by the stenographer.) Do you know if Mr. Petty had been acquainted with these directors of South

Buffalo Railway Company prior to the time of this meeting? (Further question by Mr. Craig:) The men who were directors at that time and present at that meeting?

A. Yes.

Q. He was?

A. Yes; he was acquainted with some of them.

Q. And Mr. Petty was then elected president, wasn't he?

A. Yes, that's right—subject to the approval of the Interstate Commerce Commission.

Q. Oh, yes—but he was elected?

361 A. That's right.

Q. At that time there was no vice president of the road, was there?

A. Yes.

Q. Who was he?

A. Mr. F. M. Benning.

Q. Did he continue to be vice president?

A. Yes.

Q. And up to that time had he been the only vice president?

A. Well, now, 'up to that time,' is rather a broad statement of time, and I think there had been other vice presidents of the South Buffalo Railway Company in times gone by, in addition to the men who held the chief operating posts of the railroad.

Q. What was done in connection with you after you had resigned as president?

A. I was elected first vice president subject to the approval of the Interstate Commerce Commission.

Q. Who brought up that matter?

A. I did.

Q. What did you have to say about that to the directors?

A. I want you to understand that before that meeting I had talked to some of the directors, Mr. Benning, Mr. St. Clair, and others.

Q. What did you tell them?

362 A. I told them at that meeting I was going to present my resignation as president and offer myself as a candidate for first vice president.

Q. Did you tell them anything about your talk with Mr. McMath?

A. I told them that was the plan that had been suggested by representatives of the Bethlehem Steel Corporation, the stockholder.

Q. Did you tell them who the representatives were?

A. No; I didn't.

Q. Now, what change, if any, was made in the matter of your compensation when you became vice president? Was it more or less than it was as president, or was it the same?

A. You mean at that time?

Q. Yes.

A. I do not think any change was made in my compensation at that time, Mr. Craig. Having heard Mr. McMath testify, and I heard—that is, I testified a few minutes ago that that matter was never discussed by him or by me as to whether I would continue at the same rate of compensation that I was receiving as president.

Q. I was simply asking what change, if any, was made?

A. No change.

Q. Was any change made later?

A. Yes; we discussed that after I began serving as vice
363 president of the South Buffalo Railway Company, and we arrived at an understanding.

Q. Was your compensation increased or decreased?

A. It was increased by the Board of Directors.

Q. I will ask you, Mr. Trageser, if the relationship existing between the Bethlehem Steel Company and the South Buffalo Railway Company is the same, or approximately the same at present as it was in June of 1943?"

Mr. Bromley. I object to that as being incompetent, calling for a conclusion, and entirely too general.

Mr. Craig. Now, your Honor, that is a preliminary question. There was investigation made that has been referred to here, which covered periods in 1943, and the months of June, July, August, September, and October, as I recall, we go on here and take up those other periods of time; and what we want to do here, if we are able to develop anything about operations in 1943 that are helpful to the plaintiff's case, we simply want to find out the situation when investigation was made was the same or about the same as the time the witness is testifying.

The Court. Read the question.

Mr. Craig (reading): "I will ask you, Mr. Trageser, if the relationship existing between the Bethlehem Steel Com-
364 pany and the South Buffalo Railway Company is the same, or approximately the same at present as it was in June of 1943?"

I am asking that of the vice-president of the Railroad.

Mr. Bromley. It is still a conclusion.

The Court. The relationship in what respect do you mean? In all respects claimed in the pleadings?

Mr. Craig. Well, sir, I did not get the last part of your question.

The Court. In what respect are the relations the same? That is a pretty broad question.

Mr. Craig. Yes; it is a broad question. The investigation is pretty broad in its scope, of course.

The COURT. Well, we are dealing with the question submitted here.

Mr. CRAIG. That is right.

The COURT. There is further examination. If it is preliminary proceed to something else.

Mr. CRAIG. Yes.

The COURT. I sustain the objection, for the present anyway. Proceed.

Mr. CRAIG. You will sustain the objection?

Mr. CRAIG. There is nothing before the next question. I
365 said: "Yes—I am asking whether the relationship existing between the Bethlehem Steel Company and the South Buffalo Railway Company is the same, or approximately the same, at present as it was in June of 1943?"

Mr. BROMLEY. Same objection.

The COURT. Same ruling.

Mr. CRAIG. Page 143, just to keep the record straight, if the witness were permitted to answer he would answer: "In June 1943—that was just about a year ago."

Now, following another question, which is a "Yes" with a question mark, but the import is the same as the preceding question.

The COURT. That may be developed in another way by other testimony. I suppose the testimony will be directed to show what the relations were during that time.

Mr. CRAIG. That is right, later on. Mr. Bromley, you make an objection to my question "Yes"? I take it the Court will sustain that objection?

The COURT. Yes. I think the situation should be shown in another way.

Mr. CRAIG. If permitted, the witness would answer, the last answer on page 143, "And then, whatever the relationships were between the Bethlehem Steel Company and the South Buf-
366 falo Railway Company in 1943, as a shipper and receiver of freight on the South Buffalo Railway, there has been no change but there have been numerous changes made in our methods of doing business since a year ago, and are being made continually. I don't understand just what the question means, and further than the answer I have given, I can't go."

(Mr. Craig continues reading deposition as follows:)

"Q. Would your answer be the same regarding the months of July, August, and September, and October of 1943?"

Mr. BROMLEY. Same objection.

The COURT. Same ruling.

Mr. CRAIG. If permitted, the witness would answer the first question on page 144: "Yes, my answer would be the same."

(Mr. Craig continues reading deposition as follows:)

"Q. Do you recall, Mr. Trageser, whether at that meeting of December 5, 1939, five of the South Buffalo Railway Company directors did resign?

A. Yes; they did.

Q. That is, after Mr. Petty was elected president?

A. Yes.

Q. And you were elected vice president?

A. Yes.

367 Q. That was the end of the meeting?

A. Yes.

Q. Do you recall that five new directors were elected?

A. Yes.

Q. They were elected by the remaining members of the Board of Directors?

A. Yes.

Q. Do you recall when those new directors took office?

A. I don't know when they took office, Mr. Craig, but I think they acted as directors, first, in a meeting that was held in January, 1940.

That's all, Mr. Trageser."

(Mr. Bromley reads the cross-examination as follows:)

"Q. In answer to one of the recent questions asked you, it seemed to imply, at least, that some one or more of the newly-elected directors who were elected at the meeting of December 5th, 1939, were elected by four directors after five of the total of nine directors had resigned. Can you recall, as a matter of fact, whether that was the case or not?

A. If that is what I implied in my answer, I didn't mean that. I can't—well, obviously, all of the actions that were taken, were taken by a majority of the Board of Directors; I don't re-

368 call—I think all of these actions were taken—I don't know just how to express it—the new directors were elected to fill vacancies caused by the resignation of five other members.

Q. Do you recall that the resignations were accepted to take effect as of the end of the meeting?

A. That probably was true.

Q. Have you a recollection as to that?

A. Yes.

That's all.

Cross-examination by Mr. Adkins:

Q. Mr. Craig asked you about discussions between Mr. Benning and Mr. Burns on the problems and service needed by the Bethlehem Steel Company from the South Buffalo Railway Company. Were those discussions any different, so far as you know, from discussions which Mr. Benning had with other shippers and receivers of freight as to their needs for service?"

Mr. CRAIG. I object to that question, your Honor.

Mr. BROMLEY. But no objection was made at the time.

Mr. CRAIG. Well, I am not objecting to the form. It am objecting to the relevancy of this. We are not trying any other shippers in this case. We did not refer, we did not bring in the matter of consulting with other shippers. We are concerned about
369 Bethlehem Steel Company and we are not concerned about any other shippers.

The COURT. That would not be competent just because it is cross-examination, is all. Overruled.

(Mr. Bromley continues reading deposition as follows:)

"A. I wouldn't think so.

Q. Mr. Craig asked you questions about certain cars recorded as interchanged at a time later than the time they were actually delivered by the trunk line carriers to South Buffalo Railway Company. Were the cars referred to in that testimony all empty cars?

A. Yes, I think they were.

Q. Why was it advantageous to the Lehigh Valley Railroad or other trunk lines to make the arrangement which you described in regard to recording interchanges?"

Mr. CRAIG. I object to that question. We are concerned as to whether or not the practice of postdating was followed. That is the important thing. Whether or not it was an advantage to the connecting carrier I think has no bearing on this situation.

The COURT. I will receive it. Go ahead.

(Mr. Bromley continues reading deposition as follows:)

"A. Well, that saved switching, and, as far as"——

370 The COURT. Did it appear on direct examination that these railroads were benefited or put on a more equal footing with those other railroads serving the milling company? There was some testimony to that effect.

Mr. BROMLEY. That is right, sir.

(Mr. Bromley continues reading deposition as follows:)

"A. Well, that saved switching, and, as far as the Lehigh Valley Railroad was concerned, that enabled them to have available cars for placing at the mills of the Maritime Milling Company when the Maritime Milling Company wanted them, rather than have the South Buffalo Railway Company tell the Maritime Milling Company that they couldn't give them Lehigh Valley cars, and then Maritime would have to use other cars—but I think the whole objective of the arrangement was to save switching on the part of the trunk lines."

Mr. CRAIG. Omit that next and proceed.

(Mr. Bromley continues reading deposition as follows:)

"Q. Are you familiar with the practices as between the trunk lines and the South Buffalo Railway Company in regard to interchanging cars?

A. Yes; I think I am familiar with them.

Q. Is South Buffalo Railway required to accept empty cars from trunk lines whenever they are offered to them?

371 A. No, they are not required to accept empty cars from trunk lines whenever offered.

Q. Suppose the Lehigh Valley Railroad had empty cars which it had received from the South Buffalo Railway Company, and which the South Buffalo Railway did not again need for loading, what would it have to do with those cars if South Buffalo gave them back to the Lehigh Valley?

A. The Lehigh Valley Railroad has no facilities at the interchange with the South Buffalo to hold any cars, and they would have to haul them to their Tifft Street Yard which is a matter of a mile or a mile and a half from the interchange point between the Lehigh Valley Railroad and the South Buffalo Railway.

Q. Is it not true that the effect of the arrangement was to permit the Lehigh Valley Railroad to leave the cars on the South Buffalo interchange track instead of hauling them to their Tifft Street Yard?

A. That's a fact, and that is what was testified to by the Lehigh Valley Railroad.

Q. When they testified at the hearing before the Interstate Commerce Commission?

A. Yes.

Q. It was your understanding, was it not, that the cars were to be recorded as interchanged at the time when the South Buffalo was ready to use the cars?

A. That's right.

372 That's all."

Mr. BROMLEY. Now, in view of that testimony, I renew my motion to strike out all of the direct testimony with respect to postdating.

Mr. CRAIG. Your Honor, on the redirect there is more testimony concerning this postdating problem. It is not all in yet.

The COURT. Proceed, then.

(Mr. Bromley continues reading deposition as follows):

"Q. Early in your testimony, Mr. Trageser, you recited a conversation that you had with Mr. McMath prior to the time that the Board of Directors of South Buffalo made you president. Isn't it a fact that in that conversation all that Mr. McMath said to you was that he would recommend to the Board of Directors

of the South Buffalo Railway Company that you be considered by them for the office of president?

A. That was the substance of the conversation.

Q. You knew that was a matter to be decided finally by the Board of Directors of the Railway Company?

A. I certainly did.

Q. During the time that you have served as a director of the South Buffalo Railway Company, has any control or supervision been exercised over your actions by anybody connected with
373 the Bethlehem Steel Corporation or any other organization?

A. That has not.

Q. Since you have been first vice president of the South Buffalo Railway, has the performance of your duties ever been called into question by any representative of the Bethlehem Steel Corporation or any of its subsidiaries?

A. No, sir.

Q. It is a fact, isn't it, that as first vice president, you report to the president and the Board of Directors of the South Buffalo Railway Company?

A. It is a fact.

Q. And you report to no one else; isn't that true?

A. That's true.

Q. Has there ever been an occasion when someone from Bethlehem Steel Corporation or any of its subsidiaries has attempted to direct you as to what you should do or should not do as first vice president of the South Buffalo Railway Company?

A. No, sir.

Q. Do you report any of your actions, either as a director or first vice president of the South Buffalo Railway Company, to anyone connected with the Bethlehem Steel Corporation or any of its subsidiaries?

A. I do not.

374 Q. Are you free to exercise your own best judgment in the performance of your duties, both as a director and as an officer of the South Buffalo Railway Company?

A. I am.

Q. At the time your compensation as first vice president was increased, did you have any discussion about that matter with anyone outside the South Buffalo Railway Company organization?

A. I didn't have any discussion with anybody except Mr. D. M. Petty.

Q. The president of the Railway?

A. Yes.

Q. You referred to the Dock Property of the South Buffalo Railway Company as having been leased at some time to the

Bethlehem Steel Company. That document regarding that matter was in reality a license to the Bethlehem Steel Company to use the property rather than a lease, wasn't it?

A. It may have been that—that's correct; I am not a lawyer and I don't recall whether the document in question was a license—it may have taken that form—at any rate, that is what it amounted to, that they could use the property.

Q. It is a fact, isn't it, that in that document the South Buffalo Railway Company also reserved the right to use
375 that property?

A. That's a fact.

Q. The arrangement in connection with the Dock Property between the two companies was reduced to writing and duly executed by representatives of both companies?

A. Yes."

The COURT. Does that mean that title to the Dock Property was in the Railroad Company or in the Corporation?

Mr. BROMLEY. In the Railroad Company, yes, at that time.

The COURT. I take it from that statement, I assume that to be true.

Mr. BROMLEY. Yes, sir.

(Mr. Bromley continues reading deposition as follows:)

"Q. And the original of it, or an exact copy of it, is somewhere available in the files of the Railway Company?

A. Yes.

Q. It is a fact, isn't it, that this Dock Property to which you testified was acquired by the Railway Company originally in the hope and expectation that it could develop a general business from shippers other than Bethlehem Steel Company through the use of that facility for the reception and shipment of cargoes from and to Lake ships?

A. That's right.

Q. And the property was held and owned by the Railway
376 Company and continued to be held and owned by the Company while you were president because you still had some hope that an independent business could be developed?

A. That's right.

Q. When it was sold, it was sold because you as one of the officers of South Buffalo Railway Company, together with the other officers and directors of South Buffalo, had concluded there was no possibility of developing an independent business from any shippers?

A. That's right.

Q. Therefore, it was thought advisable to accept an offer from the Bethlehem Steel Company for its purchase?

A. That's right.

That's all."

Mr. CRAIG. Re-direct examination:

(Mr. Craig continues reading deposition as follows:)

"Q. Mr. Trageser, as I understood your answer in response to one of Mr. Adkins' questions, where South Buffalo Railway would deliver an empty car to the Lehigh Valley Railroad at interchange, if the car were taken out of interchange there, the Lehigh Valley Railroad would have to move the car some distance?

A. That's right.

Q. And the car, under the arrangement, was permitted to stay at interchange?

377 A. Well, yes; I think that was the way it worked out.

Q. As I understand, the effect of the arrangement was that the Lehigh Valley Railroad would leave the car there instead of taking it to their Tifft Street Station?

A. That's right.

Q. And it, thereby, avoided the expense of moving the car?

A. Yes.

Q. And the South Buffalo, in turn, was not charged any per diem on that car until South Buffalo had use for it?

A. That's right.

Q. Do you say that that was a result simply of an arrangement between the Lehigh Valley Railroad and the South Buffalo Railway, or was that something provided for by the per diem rules?

A. That was the result of an arrangement between the Lehigh Valley Railroad and the South Buffalo Railway contemplated within the per diem rules.

Q. That is, you saw nothing irregular about postdating the time of interchange?

A. No; I didn't see anything irregular about it; it could have been done in another way, that is, South Buffalo could have continued paying the per diem on the car and then made a reclaim against the connection—whichever connection was involved—and have received its money back through the reclaim channels.

378 Q. Isn't that the method provided for at that time under the rules?

A. There is also a provision that local arrangements may be entered into, and the suggestion that it be handled this way to save paper work was made by the connections—they first suggested it to the South Buffalo Railway Company.

Q. I believe, however, you ordered the practice be discontinued of postdating interchange?

A. I did so order that it contemplated—that if it was necessary to continue it, we would handle it on a reclaim basis.

Q. Why did you want it discontinued?

A. I thought it could be better handled under the reclaim basis, regardless of the suggestion of the trunk line carriers.

Q. Well, why did you think it could be better handled that way?

A. That was my judgment.

Q. On what was your judgment based?

A. My judgment was based on the fact that I thought it would avoid any question, and would put it on a better and a sounder basis than it had been on theretofore.

Q. Would avoid any question of what?

A. Any question of a possible violation of any rules or practices, or anything of that kind.

379 Q. I believe you were not connected with the South Buffalo Railway Company at the time it acquired the Dock Property, were you?

A. No; I wasn't.

Q. You don't know of your own knowledge, then, what the purpose of the purchase was at that time, do you?

A. Only do I know that of my own knowledge as I learned it from the files of the South Buffalo Railway Company and from my talks with Mr. F. M. Benning regarding the matter.

Q. You, however, were not connected with the South Buffalo Railway Company when the property was acquired, were you?

A. No, I was not; but I was familiar with the efforts that Mr. Benning was making in trying to get business to handle over the Dock, and out of that there arose discussions between him and myself as to what the Dock Property was purchased for and how it was acquired and why it was acquired."

Mr. BROMLEY. Now I move again, may it please your Honor, to strike out all testimony with respect to the practice of post-dating empty cars.

The COURT. Well, I do not see that it has much material bearing, Mr. Craig, on the issue here. Your argument is, in substance, that the income from it, the excess income or income to

380 to which the Railway Company was not entitled, went for the benefit of the Corporation. Nothing here to show how much they received, how many cars they were handling this way. The testimony is that it was over a number of years, this practice was, by the Railroad. Do you think it is material here or has any bearing?

Mr. CRAIG. Of course, we expect to tie it in further with the relationship between the Bethlehem Steel Company and the line haul carriers. That is, it is only a part of what we expect to prove. I do not know whether I have anything further to add on that side of it. We did finally get Mr. Trageser to admit that possibly there was an infraction of the rules, which we think clearly it was.

The COURT. Presuming this is true.

Mr. CRAIG. Yes; presuming this is true.

The COURT. What is there in that?

Mr. CRAIG. On the question you are raising, it has none. I want to get that cleared up because he was defending it for quite a while as a legal practice and I wanted to mention that in connection with the other discussion. But I do say that this matter of postdating of interchange is simply a part in connection with the other steps to show the relationship existing between the
381 over-all existing Bethlehem organization, which we contend includes the South Buffalo and the line haul carriers. And that whole situation tends to explan why there is this attempt to keep up the appearance of a complete separation between Bethlehem and South Buffalo, which, of course, we contend does not exist. It is all tied in with that matter of the relationship between the Bethlehem organization and these line haul carriers.

The COURT. Of course, if you were able to show the officials of the Corporation had knowledge of and some participation in it. Of course, if you claim there is other testimony to be given, as you say, in connection with the long haul lines, that relates to the issue here, the Court might defer action on it.

Mr. CRAIG. Well, the further evidence, I think, will be largely documentary, based on a tariff, as explained by South Buffalo people.

The COURT. I am speaking about other activities or actions aside from the tariff, perhaps the relations of the long haul roads and the Corporation. Is there anything further to be given, testimony further than you have stated here with reference to the tariff rates in that respect?

Mr. CRAIG. Mr. Strange would like to address the Court
382 on the subject, if the Court is willing.

The COURT. Surely.

Mr. STRANGE. Not address, may it please the Court, but it has been mentioned several times here that financial ownership is not the real question involved. Reference has been made to the Elgin, Joliet & Eastern case as having determined that because a holding corporation owns 100% of the stock of a railroad company, on the one hand, and 100% of the stock of a manufacturing concern, on the other hand, whose products are carried by the railroad, that that does not constitute a violation of the commodities clause, nor does it create a prima facie case of violation of the commodities clause. And whereas we certainly at this time do not want to take issue with that position, nevertheless, it cannot be denied that financial ownership is an element to be taken into consideration in determining whether or not there is a violation of the clause, of the commodities clause.

Now, then, it seems to us that certain advantages that redound to the Holding Company, through its ownership, on the one hand, of the Railroad Company, and, on the other hand, of the industrial company, certain advantages that redound to the manufacturing company and to the holding corporation, as a result of that situation, is relevant; that is, evidence relating to that situation would be relevant, if for no other reason than to determine what the remedy should be in the event that the Court were to determine that there was a violation of the Act by this interrelationship, among other things.

The Court. How would that affect the remedy? I mean, how would that affect any calculation in dollars and cents, in figures?

Mr. Strange. Now, for instance, the per diem that we are speaking of, that is a charge made by a railroad company to another railroad company for the use of the cars of one by the other. That, as we expect to show from the per diem rules, which I do not think there will be any issue, was at that time a dollar a day, less certain reclaim charges.

Now, the benefit of the Bethlehem Steel Company as the result of this situation is that, in the last analysis, it pays—that is, the Corporation, through the Railroad Company, pays one dollar a day for these cars, whereas an independent shipper, having no connection with the Railroad, would have to pay a demurrage on those cars, which amounts to a great deal more than a dollar a day.

As a matter of fact, something around $2.20 a day after your free time has been allowed, something about $2.20 a day for four days and $5 or something like that thereafter.

I do not mean to say that the Bethlehem Steel Company does not go through the motions of paying to the South Buffalo Railway Company demurrage. They do. How they pay it, whether the records are kept, the method and manner in which the records are kept, is another question that will probably be reached later on in this case. But in the last analysis the amount paid by this trio is it goes out of the pockets of each and all of the three companies, is a dollar a day less a reclaim charge. That is an advantage redounding to the Holding Corporation by virtue of its holdings. That is very true. But, as I have said, I think that it is a matter that the Court should take into consideration.

And the same thing holds through all amounts which the Railroad Company receives from the line haul carriers for its portion per ton for the haul it gets for its switching service, and so forth. It gets a certain percentage per ton, a certain dollars and cents per ton from the line haul carrier.

Now, in the last analysis, that goes to the corporate set-up there, and, as has been shown to the Court, the accounts,

integrated as they are in the Bethlehem Steel Corporation's account, we just think that those matters, among other things, are things which the Court might entertain.

The COURT. Nothing here to show any amount received. Of course, the income from the Railway Company is a matter pertinent to the decision, the examination of the issues here is, of course, parallel, except that no amount is shown. We do not know whether it is one day or a hundred days.

Mr. STRANGE. So far as the per diem charge is concerned, according to Mr. Trageser's deposition, during a period of time—I forget how long it was—that there was that.

The COURT. Setting up a period of time, but I do not know how many cars there were or how much overtime was allowed; nothing here to show.

Mr. CRAIG. Of course, we can put Mr. Trageser on the stand.

The COURT. I will leave the testimony in for the present, anyway. I do not think it has very much bearing.

Mr. STRANGE. May it please the Court, it is just one other thing we thought possibly the Court should consider.

386 The COURT. So far as I can see now, it has not much bearing.

Mr. STRANGE. May it please the Court, the Plaintiff wishes next to offer that part of the deposition of David M. Petty, composed of the direct examination; the Petty deposition being one of a series of depositions taken at Bethlehem, Pennsylvania, on October 3rd and 4th, 1944.

(The deposition was read as follows:)

David M. Petty

"Q. Will you give us your name and address?

A. David M. Petty, Bethlehem, Pennsylvania.

Q. You are president of the South Buffalo Railway Company?

A. Yes, sir.

Q. When were you elected as such?

A. In December 1939.

Q. When did you assume office?

A. January 18th, I think, is the correct date.

Q. Of 1940?

A. 1940—that was the date the Commission's approval was obtained.

Q. Where is your office?

A. 1275 Daly Avenue, Bethlehem.

Q. Here in Pennsylvania?

A. In Pennsylvania.

Q. What are your duties as president of the Railway Company?

387 A. That's a pretty big order—they consist of almost everything in connection with the operation of the railroad; naturally, I don't do all of the work.

Q. Before becoming president of the railroad, you were connected with Bethlehem Steel Company, were you not?

A. Yes.

Q. When did you first become connected with the Steel Company?

A. 1909.

Q. Was that following your graduation from college?

A. Yes.

Q. What did you do in connection with the Steel Company when you first became connected with it?

A. I was in the electrical department.

Q. Were you given any sort of training course at first?

A. No; in those days we just started to work.

Q. How long were you in the electrical department?

A. Until 1919.

Q. Did you continue with the Steel Company?

A. Yes; I continued with the Steel Company as Superintendent of the Service Division of the Bethlehem Plant.

Q. What did that work consist of?

A. The Service Division was made up of many of the service departments, the electrical department being one, the

388 mechanical department, construction work, handling of raw materials, storehouses, trucking, and all of that type of thing.

Q. Is there anything else in particular that you can mention?

A. Well, among the other service departments was the department in which repairs were made to the locomotives of the P. B. & N. E. Railroad, and car repair shops in charge of the repairing of cars owned by the Bethlehem Steel Company but operated by the P. B. & N. E. Railroad; there they were repaired and rebuilt and, in some cases, built new.

Q. How long did you continue in the Service Division?

A. Until I became president of the South Buffalo Railway Company.

Q. In the Service Division, who was your superior?

A. Mr. R. A. Lewis, General Manager of the Bethlehem Plant.

Q. Did you have any other superior?

A. No.

Q. While you were with the Bethlehem Steel Company were you acquainted with Mr. Quincy Bent?

A. Yes.

Q. Did you know him in connection with your work?

A. Yes.

Q. Did you have any dealings with him?

389 A. Yes.

Q. To what extent?

A. Well I served as Chairman of the Electrical Committee for the Corporation, and in that connection I had a great deal of contact with Mr. Bent.

Q. How frequently would you say you were in contact with him?

A. Two or three times a year, depending upon the problem in hand.

Q. You discussed those problems with him?

A. Yes—and with his staff.

Q. Over how long a period did that relationship extend?

A. From 1919 until 1940.

Q. You were president not only of South Buffalo but of the other six subsidiary railroads of the Steel Corporation—that is, you are president of them now, aren't you?

A. Yes.

Q. How did the matter of your becoming president of the South Buffalo Railway Company come up?

A. Mr. Grace talked to me about it and about the possibility of whether I was willing to undertake that kind of work.

Q. Mr. Eugene Grace, president of the Steel Company and of the Corporation?

390 A. Yes.

Q. Do you recall when that was?

A. That was some time in the Fall of 1939; I couldn't say about exactly when that was.

Q. Did he request you to come to his office—request you to meet him?

A. Yes.

Q. Did you—rather, where did you meet him?

A. I don't recall exactly where it was—it was in this building.

Q. Was it in his office?

A. Yes.

Q. What did he say to you at that meeting, or what was the conversation?

A. The general trend of the conversation was that they felt that a man with my background and experience would be helpful in the operation of the railroads, and he would like to put my name before the directors of the various railroads if I was willing.

Q. What did you say?

A. I said I would think it over first, and I did think it over and then I said, 'Yes,' I was willing.

Q. How long after the meeting to which you referred did you give him your answer?

A. I suppose it was a week or ten days.

391 Q. Did you and Mr. Grace talk about the matter of your salary?

A. He indicated to me that it would be a figure that would be satisfactory to me, in round figures, and that it would be paid by all the different railroads.

Q. Did he mention the figure?

A. Yes.

Q. What was it?

A. A round figure on the order of $25,000; no specific figures or methods of compensation were discussed; that was worked out later by the various boards of directors.

Q. Of the various subsidiaries?

A. Yes.

Q. The $25,000 was to cover your services to all seven railroads?

A. That's right.

Q. What, if anything, did Mr. Grace say to you in connection with your prospective work as president of the railroads?

A. There was nothing much of anything said, except that he felt my past experience and background would be helpful.

Q. Had you had any experience up to that time in connection with the operation of a railroad?

392 A. My background as Superintendent of the Service Division, of course, covered all kinds of activities, especially many of those involved in the moving and handling of raw materials, particularly with reference to motive power as used on the P. B. & N. E. Railroad, for instance, and I was also quite familiar with the Diesel locomotive.

Q. You were interested in those problems in connection with your employment, your work, with the Bethlehem Steel Company, is that right?

A. They were, at least a byproduct, a corollary to all of that work.

Q. In connection with that work, is that right?

A. Yes.

Q. But your primary interest with the Steel Company was in connection with the Steel Company problems?

A. Yes.

Q. Any railroad problems were secondary?

A. Yes; except inasmuch as they affected the Steel Company. My contacts with railroads, in general, were with all the connect-

ing roads around here and their equipment, as well as with the P. B. & N. E. Railroad.

Q. In your discussions with Mr. Grace was any reference made to an investigation pending before the Interstate Commerce Commission involving the South Buffalo Railway Company?

393

A. No.

Q. Up to the time that you talked to Mr. Grace had you had any connection with the South Buffalo Railway Company?

A. No; not directly.

Q. Had you indirectly?

A. I knew there was such a railroad, and I had been in the Lackawanna Plant of the Bethlehem Steel Company and seen it in operation; I knew Mr. Benning and a good many of the other men who were operating the South Buffalo Railway Company.

Q. Had you worked in the Lackawanna Plant?

A. My work there was only in connection with general engineering problems.

Q. In connection with the Steel Company problems?

A. Yes; that's right.

Q. After you talked to Mr. Grace in connection with your becoming president, what, if anything, did you make in the way of investigation of the South Buffalo Railway Company?

A. Well, I didn't make any particular investigation of the South Buffalo Railway Company; I found out considerably more about what it was all about, and decided that I would like to undertake it.

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Q. When you talked to Mr. Grace did the question come up of your taking up the presidency of all of the seven subsidiary railroads?

A. Oh, yes.

Q. Prior to the directors' meeting of December 5, 1939, at which you were elected president, how many of the directors of South Buffalo Railway Company had you known or did you know?

A. I don't know that I can state that specifically; I had known Mr. Benning and I knew Mr. Trageser, and Mr. Nichols—he was a director at that time, also, I think.

Q. Did you know any others?

A. I think I knew those three better, and I probably knew some of the others, but I don't think I knew them all.

Q. But, at least, you knew the other six in a rather perfunctory way?

A. I just knew them as people connected with the South Buffalo Railway Company.

Q. You had no business dealings with them?

A. No.

Q. Can you state whether or not, generally speaking, the
395 six railroads, other than the South Buffalo Railway Company, are run in about the same manner as the South Buffalo Railway is run so far as the relationship between them respectively and the Steel Company is concerned?

A. Yes—I don't know that I quite know just what you are talking about—about 'relationship'—but whatever it is, it is about the same in all cases.

Q. Is the traffic connected with the Steel Company the chief source of revenue in the case of each of those railroads?

A. It is one of the principal sources of revenue—at least, I think you can say it is the chief source of revenue.

Q. Each of these subsidiaries is located in the vicinity of a plant or plants or property of the Steel Company, isn't that correct?

A. Yes.

Q. Now, in your transfer from the Steel Company to the presidency of these seven subsidiaries of the Steel Corporation, you didn't suffer any financial loss, did you?"

Mr. BROMLEY (reading): "I object to that question on the ground that it assumes some fact which is not in evidence here,
396 and it is incompetent because it has not been shown that there was any transfer here. On the contrary, it has been shown that he quit one job and was hired by somebody else."

And with that statement I am willing to have the answer read in.

The COURT. We can take that to be the fact, that he did resign one position and took another.

Mr. STRANGE. He gave the answer: "I was just about to add that as to a transfer. I didn't consider it as a transfer, because I wrote a formal letter of resignation in connection with my position with the Bethlehem Steel Company."

(Mr. Strange continues reading deposition as follows:)

"By Mr. Craig:

Q. You ceased to be employed by the Bethlehem Steel Company and you became employed by the South Buffalo Railway Company and the other subsidiaries, as president?

A. Yes."

The COURT. I think we will suspend at this time.

(Whereupon a recess was taken until Thursday, January 24, 1946, at 10 o'clock A. M.)

397 United States District Court, Western District of New York

Civil Action, File No. 1464

UNITED STATES OF AMERICA, PLAINTIFF
vs.
SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY, AND BETHLEHEM STEEL CORPORATION, DEFENDANTS

Trial before Honorable JOHN KNIGHT, United States District Court Judge for the Western District of New York, presiding, without a jury, at the U. S. Court House, Buffalo, New York, commencing Tuesday, January 22, 1946, at 10 o'clock A. M.

Appearances: Honorable George L. Grobe, United States Attorney, for the Western District of New York, by David S. Craig, Esq., and Robert W. Strange, Esq., Special Assistants to the Attorney General, in behalf of the Plaintiff. Kenefick, Cooke, Mitchell, Bass & Letchworth, Esqs., Marine Trust Building, Buffalo, New York, by Lyman M. Bass, Esq., of Counsel. Cravath, Swaine and Moore, Esqs., 15 Broad Street, New York City, by Bruce Bromley, Esq., and William R. Robison, Esq., George M. Billings, Esq., and Frank M. McGarry, Esq., for the Defendants.

398 Thursday, January 24, 1946, 10 o'clock A. M.

PROCEEDINGS

The COURT. You are continuing with the Petty deposition?

Mr. STRANGE. Yes, your Honor.

The COURT. Very well.

Mr. STRANGE. We had just concluded the question with regard to Mr. Petty's becoming an employee or an officer of the South Buffalo Railway Company, and Mr. Bromley had objected to the question, in which it was asked if he had transferred, and the witness had pointed out that there had been no transfer.

(Mr. Strange continues reading deposition as follows):

"Q. You ceased to be employed by the Bethlehem Steel Company and you became employed by the South Buffalo Railway Company and the other subsidiaries, as president?

A. Yes.

Q. After you left the Steel Company and joined the seven subsidiary railroad companies can you state whether your compensation for services rendered, received from the railroad companies, was more or less than the compensation you had received from the Steel Company?

A. It was more.

Q. Do you know Edward F. Entwisle?

A. Yes—I presume you mean the General Manager of the
399 Lackawanna Plant of the Bethlehem Steel Company.

Q. Well, at least of the Bethlehem Steel properties located at Lackawanna?

A. Yes.

Q. How long have you known him, approximately?

A. I knew him, individually and personally, when he lived here in Bethlehem—I think since around 1921 or '22, somewhere in that neighborhood.

Q. Well, in what way did you know him—in a business way?

A. Yes; and socially and personally.

Q. That is, both of you were working for the Steel Company at that time?

A. Yes.

Q. What were your business connections with him?

A. Mr. Entwisle, when he was here at Bethlehem and when I was working at Bethlehem Steel Company, was also superintendent of one of the Bethlehem plants here at Bethlehem.

Q. And what business connections did you have with him?

A. The same kind of connection or dealings you would have with any man, that you would have with a man when you are in charge of service problems covering power, water, electricity, or that kind of thing.

Q. Were you in frequent contact with him concerning those problems?

400 A. Well, as frequently as was necessary to do the business in hand; some months it would be frequent, and other months it would not be as frequent.

Q. But, together, you worked out the problems involved?

A. Yes; whatever they were.

Q. Mr. Petty, you knew when you talked to Mr. Grace concerning the prospect of your becoming president of these seven railroad companies, that Mr. Paul A Trageser was then president of all the railroad companies, didn't you?

A. Yes; I was aware of that fact.

Q. Did Mr. Grace say anything to you with reference to Mr. Trageser's services as president of the railroads?

A. I don't recall that he did.

Q. Did you talk with any other person connected with the Steel Corporation in connection with your becoming president of the railroads—railroad companies?

A. I talked to counsel.

Q. Who was that?

A. Mr. Moore.

Q. Mr. Hoyt A. Moore?

A. Yes.

Q. Did he say anything as to Mr. Trageser's services as President of the railroads?

A. I don't believe he did—I don't recall that he did.

401 Q. Will you give us the substance of the conversations had between yourself and Mr. Moore?

A. I was seeking information as to something about what was involved in reference to acting as president of such railroads, and, having been trained as an engineer and not as a lawyer, I realized there were many legal matters involved, and I didn't want to step in over my head.

Q. Can you give us something more of the conversation?

A. The subject of the conversation—well, it boiled down to this: That he would give me all the assistance I might require after that.

Q. Did you talk with anyone else connected with the Steel Corporation concerning your becoming president of these railroad companies?

A. I don't recall that I did.

Q. Did you talk with anyone connected with the Steel Company concerning your becoming president of these railroad companies?

A. No.

Q. Did you talk to anyone connected with the South Buffalo Railway Company in connection with your becoming president of the South Buffalo Railway?

A. Yes; I talked to Mr. Trageser; I very definitely wanted him to remain in the organization and so told him.

402 Q. Did anyone connected with the Steel Corporation tell you that orders had been given or would be given to Mr. Entwisle or anyone else at Lackawanna, connected with the Steel Company there, to keep hands off the South Buffalo Railway Company affairs?

A. I don't recall having been told that before becoming president; I found it out after assuming the job.

Q. What were the circumstances in connection with that?

A. That any and all operations on the South Buffalo Railway Company were my responsibility.

Q. Who told you that?

A. I don't remember just exactly where I did get hold of that information, except to the general effect that it was the general understanding that that was what was to happen in the running of the railroads; in other words, that is one of the reasons——

Q. Did Mr. Bent tell you that?

A. No; I don't recall that Mr. Bent said anything; I am just trying to remember where I did pick up the information.

Q. You don't recall?

A. No.

Q. Do you recall whether it was in the nature of a general talk or in the nature of instructions?

A. To what are you referring now?

403 Q. Well, I'll put it this way: Were you given instructions to see that the affairs of the Steel Company and the affairs of the Railway Company were kept separate and distinct?

A. No, I was not given any such instructions whatever.

Q. It was just a general understanding on your part to keep them separate?

A. Well, I was given the general understanding that I was to run the railroad.

Q. That you were to run them, and not somebody else?

A. Yes, that's right.

Q. Now, are the officers of these seven subsidiary railroads here in Bethlehem, Pennsylvania?

A. Yes; our principal office is at 1275 Daly Avenue.

Q. Are the offices of all of these railroads in the same building?

A. Yes; the general offices.

Q. And that is where your office is?

A. Yes.

Q. And also Mr. Trageser's office?

A. Yes.

Q. Who owns that building?

A. The Philadelphia, Bethlehem & New England Railroad.

Q. Do the other roads pay rent for the occupancy of that building?

404 A. Yes; part of the building devoted to the common officers is prorated among all seven railroads; that is, that part of the expense—of course, the P. B. & N. E. carry their own load as far as the building is concerned; the part that they occupy.

Q. What is included in the prorated expense?

A. All miscellaneous expenses, telephone, telegraph, etc.

Q. Heat and light?

A. Heat and light, that part of it that can be reasonably allocated to the general offices.

Q. Office supplies?

A. Yes.

Q. Do you have bookkeepers common to all roads?

A. Our auditors' organization and bookkeeping organization is all carried on one pay roll and distributed. The compensation of the common officers is paid directly by each road.

Q. Is there an agreement as to how that is to be divided among the roads?

A. Yes, there is a general set-up covering that apportionment—covering that expense which, however, would be changed whenever actual conditions change.

Q. What is that apportionment at present?

A. I can't give it to you off-hand.

Q. Would it be a case of six roads paying 16% each and
405 one road pay 4%?

A. I don't believe that's the exact apportionment—it might be something on that order.

Q. Do you recall whether or not in the past, since you have been president, that that has been the proportion?

A. That could very well be the proportion at certain times—whether it is now I can't answer.

Q. Now, about your own salary—by the way, did that remain the same, or has it been increased?

A. So far as a fixed salary is concerned, it has remained the same.

Q. Are you on a fixed salary?

A. Plus an incentive.

Q. How is that apportioned—the fixed salary?

A. I think that's six of them at 16% and one at 4%.

Q. Is the South Buffalo Railway Company one of the six paying 16% each?

A. Yes—I wouldn't swear that was correct; I should probably know where my money came from—however, I think that's the way it would add up.

Q. Isn't that the percentage?

A. I think so; I'm not giving it as an absolute fact; however, it can be checked up very easily.

Q. But as far as you know, that's it?

406 A. Yes.

Q. Hasn't South Buffalo Railway Company paid 16% of your fixed salary since you became president?

A. I think so.

Q. Do you know on what basis that's determined, as to what percentage each road shall pay of your salary?

A. I would say that was determined as an estimated apportionment—as to the possible effort and time put forth.

Q. So your total effort and time put forth—by the way, you don't spend exactly 16% of your time and effort in behalf of the South Buffalo Railway, do you?

A. No; the probabilities are that the South Buffalo, as far as time and effort is concerned since 1940, is a great deal more than 16%, and then during some other year it may be less.

Q. And in a year when you spend more than 16% of your time and effort on South Buffalo, you spend less than——

A. I considered that as an average—a fair over-all average apportionment.

Q. Over the years?

A. Yes; over the years.

Q. Do you know if there is any bargaining among the respective board of directors of the subsidiary railroads as to how much or how little of your salary each shall pay?

407 A. In the various boards of directors' meetings since I have been president a great many of those things have been discussed and decided upon.

Q. Do you know whether this particular item has been up for discussion?

A. I don't believe that I can recall that that has been a particular subject, but we have had similar apportionments to make which were made on that or on some other basis; but whatever basis, it was then explained by me to the board and met with their approval.

Q. Since you have been president of the railroads, has each railroad paid your salary direct to you?

A. Yes.

Q. If you know, what was the practice prior to that time?

A. I don't know.

Q. It is true, is it not, that traffic and business connected with the Steel Company is the principal source of revenue for South Buffalo Railway Company?

A. I believe that to be true.

Q. In the year 1940—the year ended December 31, 1940—according to reports filed by the South Buffalo Railway Company with the Interstate Commerce Commission showed a total operat-

408 ing revenue of $2,941,233. Could you give us an estimate as to how much of that operating revenue is attributable to business in connection with the Steel Company?

A. I wouldn't want to make a guess on that; it would be a very wild guess; I couldn't make an accurate estimate.

Q. Would you say more than half?

A. If you are going to keep on dividing it down, yes, I think it would be more than half.

Q. Can you come any closer to the actual figure than that?

A. No; I don't think I would want to come any closer than one-half.

Q. Would you say it was as high as 80%?

A. I wouldn't want to come any closer than the estimate I gave—not on a guess.

Q. Well, let's take the year 1943; according to the reports of the South Buffalo Railway Company to the Interstate Commerce Commission for the year ended December 31, 1943, the total operating revenue was $3,614,907. Can you give us an estimate of that operating revenue as to how much of it was derived from business in connection with the Steel Company?

A. The best I could do would be the same figures as I used with reference to the year 1940.

409 Q. Can't you come any closer than 50%?

A. I'll say more than 50%, but how much more I wouldn't want to estimate; I don't carry those figures in my head that way.

Q. It is true, isn't it, that the Steel Company is the chief customer of the railroad company?

A. They provide more than half of the revenue.

Q. For the year ended December 31, 1942, the report to the Interstate Commerce Commission by the South Buffalo Railway Company showed operating revenues of $3,489,764. Would you give us an estimate on that year's revenues as to how much came from operations connected with business of the Bethlehem Steel Company?

A. My answer would have to be the same.

Q. That's the best you can do on that year, also?

A. Yes.

Q. For the year ended December 31, 1941, the total operating revenue, according to report filed by the South Buffalo Railway Company with the Interstate Commerce Commission, was $3,344,232. Can you tell us approximately how much of that total operating revenue came from activities connected with the Steel Company?

A. My answer would be the same—a little more than

410 one-half.

Q. You can't do any better for that year?

A. No.

Q. Mr. Petty, do you recall that the bylaws of the South Buffalo Railway Company, prior to September 13, 1943, contained the following: Article V: 'There shall be an Executive Committee appointed by the Board of Directors, consisting of three Directors in addition to the President, who shall be ex officio a member of all committees. This Committee, or a majority of them, shall have and possess all the authority, and in the interim between the meetings of the Board may do and perform, or cause to be performed all acts that the Board of Directors might legally do or perform'?

A. There was such a provision in the bylaws which has, however, been changed. Just the exact date of the change, or what was changed, what part was revised, I don't recall.

Q. Would you say that change was made about a year ago?

A. Yes, at least a year ago.

Q. Pursuant to the provision of that part of the bylaws was there such a committee in existence?

A. I don't think we ever operated on that; I know that I didn't.

411 Q. In your time you didn't have one?

A. No; so we removed it from the bylaws.

Q. In the shipments from the Steel Company which occurred over the South Buffalo Railway to the connecting carriers, who routes those shipments?

A. I presume the Steel Company's Traffic Department routes them, or somebody does. I know the South Buffalo doesn't do anything except do what they are told to do in delivering the shipments to the connecting carriers.

Q. Do you know by whom they are ordered?

A. By whoever writes out the shipping papers.

Q. For the Steel Company?

A. Yes.

Q. The Steel Company routes the shipments—the South Buffalo Railway does not?

A. That's right.

Q. Since you have been connected with the Railway Company has South Buffalo Railway had occasion to seek funds by borrowing or contribution?

A. No.

Q. Do you know whether or not South Buffalo Railway in its operations from time to time has occasion to purchase rails or other steel products?

A. Oh, yes.

412 Q. Do you know what method is adopted in making such purchases?

A. Well, since the War Production Board has been functioning in those things, they more or less tell you where you must buy those things, and you normally buy rails in the mill closest to home which, in this case, happens to be the rail plant of the Lackawanna Plant of the Bethlehem Steel Company.

Q. If permitted by law or Government regulation, do you make the purchase of those rails from the Steel Company?

A. Yes.

Q. And is the same true of other steel products available from the Steel Company?

A. We buy them from whatever source that we can make the best buy.

Q. Does it generally turn out to be the Steel Company from whom those purchases are made?

A. I don't know if I can agree with that, but since freight is a big item in the cost of steel products, I expect so, especially insofar as it relates to things manufactured right there at Buffalo.

Q. You are familiar with what is known as the 'Dock Property', which we discussed during Mr. Trageser's testimony?

A. Yes; I have been familiar with in a very general way.

413 Q. When you became president of the Railway Company do you know what rights the Steel Company had in the use of that property?

A. I don't recall—I don't think I could recall what rights there were in connection with that lease or license to use—whatever it was.

Q. Do you recall what revenue the Railway Company got from the Steel Company in that connection?

A. I don't recall the exact figures. I testified on that, I think, in one of the Ex Parte No. 128 hearings, at which time I had some notes which I don't have before me now.

Q. Do you recall whether it was $4,500 a year?

A. I don't recall what it was, but that may be the figure.

Q. Do you recall that that property was sold by the South Buffalo Railway Company to the Steel Company in August of 1940?

A. Well, it was sold that year I know.

Q. Do you recall whether or not the property had been carried on the books of the South Buffalo Railway Company at a figure of $391,000?

A. No; I wouldn't remember the figure without looking at the record.

Q. Do you recall what the sales price was?

A. No; I don't recall exactly what the price was.

414 Q. Do you recall a sales price of $391,000?

A. No; I had memoranda in connection with my testimony in the hearings in Ex Parte No. 128 with those figures, but I wouldn't attempt to remember those figures now.

Q. Mr. Petty, you made a study of the Dock Property before it was decided it should be sold to the Bethlehem Steel Company, didn't you?

A. I prefer to say 'we' made a study.

Q. And who are 'we'?

A. Myself and all the officers of the railroad.

Q. But you, in the sense that you have defined the term just now, did make a study—you and the other persons in charge of the railroad?

A. Yes; that's right.

Q. What was the reason for changing from a lease or license of the property to the Steel Company to selling the property to the Steel Company?

A. Well, the whole story, as I recall it, was very thoroughly discussed at one of our Board meetings, and the final conclusion was that the value to the railroad of that property in the future would not be very high and that we should try to sell it.

Q. Didn't you consider the rent you were receiving for it from the Steel Company to be adequate?

415 A. Not remembering all of the figures, I would say that if we felt it was entirely adequate we wouldn't have decided to sell it.

Q. You found that it was inadequate?

A. Yes; that's the natural conclusion.

Q. And that's a fact, isn't it?

A. That's a fact of what?

Q. That it was considered?

A. Yes; sure.

Q. You, of the Railway, much preferred to have a cash consideration for the property than the property itself as it was handled before the sale, isn't that correct?

A. You are now stating that we preferred to sell it for the price at which we did sell it, rather than continue to rent it at the price at which we had rented it?

Q. Yes?

A. The answer is 'yes'.

Q. The Railway Company received payment in cash for the property?

A. Yes.

Q. After our discussion here, is your recollection any better as to whether what was paid for that property was $391,000?

A. No; I don't remember if that was the sales price

416 or not.

Q. Do you recall that you testified on September 19, 1940, in the matter of the investigation of the South Buffalo Railway Company before the Interstate Commerce Commission under Ex Parte No. 128?

A. Yes.

Q. And, in connection with the Dock Property, I will ask you whether you recall this question was put to you and whether you gave the following answer thereto: Question: 'In other words, you considered the rent you were receiving inadequate, is that correct?' Answer: 'It wasn't a good return on $391,000.' Do you remember that?

A. I recall the testimony, but I don't remember the figures; I do recall that I had a memorandum in front of me at that time.

Q. Do you recall this testimony which I just read to you?

A. Yes.

Q. Continuing: Question: 'It didn't even cover taxes, did it?' Answer: 'Not on the whole property; we were leasing a part of the dock; it wasn't the entire dock; it was only a portion.' Do you recall that as a question and an answer in your testimony?

A. No, I don't recall that as an incident; it's not in my
417 memory that way, but, of course, if it's recorded, no doubt it happened.

Q. You don't deny that that's your testimony?

A. No.

Q. Further; Question: 'Wouldn't you consider the designation "not a very good return," as putting it rather mildly?' Answer: 'I think I would a whole lot rather have the $391,000.' Do you recall that?

A. I don't recall just those words, but that is almost what I have already said here today."

The COURT. Why spend so much time? Is there any question about these figures, $391,000?

Mr. BROMLEY. No.

Mr. CRAIG. There is no question about that sales price.

The COURT. Why spend a lot of time with interrogatories in the depositions? It looks to me it is repetitious.

Mr. CRAIG. This is just about the end of it, your Honor.

Mr. STRANGE. This is about the end of that part of the testimony.

May it please the Court, I think it will be noted that as we read along that Mr. Petty's recollection was dim as to other things. Just taking it to refresh his recollection as to matters which Counsel probably thought he should not have remembered.

418 The COURT. He could not tell the exact figures as to dollars and cents. Probably sold hundreds of those things several years before, as he refers in his testimony. This is for the purpose of discrediting his testimony?

Mr. STRANGE. Not necessarily so, but to refresh his recollection.

The COURT. I thought it was unnecessarily long.

(Mr. Strange continues reading deposition as follows:)

"Q. You don't deny that that's your testimony?

A. No.

Q. Further: Question: 'Wouldn't you consider the designation "not a very good return" as putting it rather mildly?' Answer: 'I think I would a whole lot rather have the $391,000.' Do you recall that?

A. I don't recall just those words, but that is almost what I have already said here today.

Q. You don't deny that testimony?

A. No.

Q. At any rate you considered the sale as being advantageous to the South Buffalo Railway Company?

A. If I hadn't so thought I wouldn't have recommended it to the Board that we sell it.

Q. Was any appraisal of the property made to your
419 knowledge before the sale?

A. I don't recall that we did have an appraisal made, although we may have done so; that may have been a part of our study, but I don't remember whether we did or not.

Q. In 1943, did not the South Buffalo Railway Company sell to the Steel Company part of the 450-foot strip of land west of what then, at least, was known as Track No. 7 of the South Buffalo Railway Company?

A. We sold a considerable portion of what was known as the '450-foot strip' to the Bethlehem Steel Company.

Q. Do you recall whether you had an independent appraisal made of that?

A. Yes.

Q. By whom?

A. I don't recall the name of the appraiser.

Q. Was it a reputable appraiser in Buffalo?

A. It was a reputable appraiser—in that district—whether or not he came from Buffalo, I don't remember.

Q. Do you recall the value he put on the property which was sold?

A. No; I don't remember the figure.

420 Q. Do you recall what the property was sold for?

A. No, I don't—the records would disclose that.

Q. Was it sold for $16,000?

A. I couldn't remember figures of that kind for this long—I wouldn't try to.

Q. Do you know whether that property was sold for more than its book value?

A. I wouldn't even try to definitely make that statement, but it wouldn't surprise me to know that.

Q. Do you know why the appraisal was had in connection with the sale of part of that 450-foot strip?

A. Well, in presenting it to our Board of Directors, we didn't want to go to them without some—at least, I didn't want to go to them without some efforts having been made to determine the value of it, and I didn't know of any better way to arrive at a figure, a fair figure, than to get an appraisal on it.

Q. You took the matter of the sale of the Dock Property before your Board of Directors?

A. Yes, I have so stated.

Q. Do you know, or do you now recall whether or not you were prepared—armed—with an independent appraisal on that Dock Property?

A. I don't recall.

421 Q. Don't you think you would recall if that had been done?

A. I would have to answer "No" to that question.

Q. You don't remember that—you wouldn't remember?

A. No, I don't boast about my memory.

Q. Do you recall the purchase of any tracks by the Steel Company belonging to the Northern Operating Company?

A. The Steel Company did buy right-of-way and some tracks from the Northern Operating Company."

By the COURT. What do you mean by the Northern Operating Company? I don't recall reference to that.

Mr. CRAIG. He is just about to locate where those tracks are.

By the COURT. That is a separate company, you mean, Northern Operating Company?

Mr. CRAIG. Yes. That is the first time this company has, I think, entered into this case.

Mr. BROMLEY. His Honor wants to know what it is, Mr. Craig.

Mr. CRAIG. What does the Court want to know, please?

The COURT. I have not heard reference to the Northern Operating Company. My confusion was whether it was part of

422 the set-up already shown here or whether it was a separate company. You are speaking about a sale to the Northern Operating Company.

Mr. CRAIG. Yes, it is a separate company and this is the first time, I think, it has been mentioned so far in the case.

Mr. BROMLEY. It was a land owning company belonging to the Nickel Plate Railroad.

The COURT. All right.

Mr. CRAIG. Would the Court at this time like to have delineated on the map that part of the track being here referred to?

The COURT. The Nickel Plate, where does that come in, at the top?

Mr. CRAIG. It might clarify it if Mr. Trageser would point out to the Court the general location of the track to which we are referring. Would that be agreeable?

The COURT. Yes. I forgot just which line the Nickel Plate came in there on.

Mr. CRAIG. Mr. Trageser, would you be good enough to come forward and point out the location of the Northern Operating Company track which we are discussing and will discuss in this case?

Mr. TRAGESER. The old Wellsville and Buffalo Railroad, your Honor, came in——

423 The COURT. B. & S., Buffalo and Susquehanna?

Mr. TRAGESER. Well, it was part of that set-up years ago. And the Wellsville & Buffalo, which afterwards became the Buffalo and Susquehanna, had a right-of-way crossing the New York Central Railroad at about north of the Mile Strip Road which is at the southern end of the South Buffalo Railway and used to connect with the South Buffalo Railway near the present New York Central interchange. But the line was abandoned years ago and the right-of-way, through various stages, that, of course, I don't know anything about, came into the possession of the Nickel Plate Railroad. And at one time they contemplated a connection with the South Buffalo Railway Company over that right-of-way, but, as I understood it, when it came into the Erie Railroad family, the Erie, having an interest in the Buffalo Creek, that was abandoned and they came into a connection with the South Buffalo on the north. That property was turned over by the Nickel Plate to what I have always been told was their land holding company.

The COURT. Theirs?

Mr. TRAGESER. Nickel Plate Railroad's land owning company, the Northern Operating Company. And about three-

424 quarters of a mile of the track which still remained on the old Wellsville & Buffalo right-of-way was used by the South Buffalo as a connection between two disjoined portions of its railroad, instead of building a new line down there, which was covered by a regular trackage agreement for which the South Buffalo paid the Nickel Plate 50 cents a loaded car.

Mr. CRAIG. That Northern Operating Company which you described was the sole connection between your two otherwise disconnected portions of track, was it not?

Mr. TRAGESER. It was; yes, sir.

The COURT. How long was that?

Mr. TRAGESER. Three-quarters of a mile.

The COURT. How much land was there altogether? Just the north of the railroad right-of-way?

Mr. TRAGESER. Well, all we had the right to use was the track. Their right-of-way, I suppose, was about 16 feet wide, something like that. I don't know how much property they owned.

The COURT. What did the South Buffalo Railway buy?

Mr. TRAGESER. What did they buy? They never bought it, your Honor.

The COURT. The Buffalo & Susquehanna was farther to
425 the east, was it not? Did they have a switch that run down in there?

Mr. TRAGESER. Yes, sir; they came in there years and years ago.

The COURT. That is further up across the Turnpike, away up there to the east?

Mr. TRAGESER. That is right. I am east of the Turnpike over here [indicating], of course.

The COURT. I know you are.

Mr. TRAGESER. And the Wellsville & Buffalo came in this way [indicating] and across the New York Central Railroad on a bridge. The bridge is still there, I believe, unless it has been taken down and scrapped.

The COURT. The main line of the B. & S.?

Mr. TRAGESER. Yes, sir.

The COURT. All right.

(Mr. Strange repeating the last question:)

"Q. Do you recall the purchase of any tracks by the Steel Company belonging to the Northern Operating Company?

A. The Steel Company did buy right-of-way and some tracks from the Northern Operating Company.

Q. Can you tell us, generally, where those tracks were located?

A. They were east of the Hamburg Turnpike and connected with the South Buffalo Railway Company main line,
426 and ran over towards the Seneca Branch, and we operated over a section of that track through an operating track agreement.

Q. That is, those tracks of the Northern Operating Company furnished a link——

A. Yes.

Q. Between your Seneca Division and your main line?

A. Yes.

Q. Do you recall approximately when that purchase was made?

A. No, I don't believe I do remember when it was made.

Q. It was after you became president?

A. Yes.

Q. Do you know whether or not after you became president, the South Buffalo Railway Company ever attempted to purchase the tracks of the Northern Operating Company to which you referred?

A. No; I don't think we ever did.

Q. Did the Railway Company, as far as you know——

A. I was going to say, we were able to get the same operating agreement from the Bethlehem Steel Company, after they owned it, that we had with the Northern Operating Company, so we saw no reason for buying it.

Q. You got that operating agreement, however, after
427 the Bethlehem Steel Company had bought the tracks, didn't you?

A. Yes—whether or not that agreement was a part of the purchase arrangement by the Bethlehem Steel Company, I don't remember; I don't know whether it was bought subject to that track agreement or not.

Q. At any rate you entered into an agreement with the Steel Company for the use of the track after the Steel Company had made the purchase?

A. Yes.

Q. Before the Steel Company made the purchase, did you talk with any of the Steel Company people about an agreement with the Steel Company, after the purchase should have been completed?

A. I don't recall that we did.

Q. Did you know negotiations were pending for the purchase of the track?

A. Yes; I knew that was a piece of ground that was likely to be bumped into in the expansions the Steel Company were making to some of their tracks and which would affect our tracks.

Q. Weren't you concerned as to what might happen to your South Buffalo Tracks in the Seneca Division?

A. Yes; that's the reason we made an agreement with the Bethlehem Steel Company.

428 Q. After the purchase, as I understand it?

A. The agreement was made after the purchase; if any agreement was gone into before the purchase was consummated, I don't recall.

Q. You would know, wouldn't you?

A. Maybe you had better say 'I should know,' but I don't recall.

Q. Did the South Buffalo Railway Company—rather, has it made any attempt, or did it before this purchase by the Steel Company, to sell its Seneca Division track to the Northern Operating Company?

A. No; I don't know that we did want to sell it.

Q. Was any attempt made to sell it to the Steel Company?

A. No.

Q. Do you know what form this arrangement with the Steel Company took after the purchase of the track by the Steel Company?

A. It took the form of a trackage agreement, substantially the same as it was before, I think.

Q. Counsel for the Defendants have furnished attorneys for the Plaintiff with a copy of a letter dated September 1, 1942, from Paul A. Trageser, first vice president, South Buffalo Railway Company, to Mr. P. J. Ganey, Manager, Real Estate Department, Bethlehem Steel Company, Bethlehem, Pennsylvania,
429 and I will ask you whether that is the trackage agreement to which you referred between the railroad company and the Steel Company in connection with the matter we have been discussing?

A. I presume it is. You know Mr. Trageser is the man who handled this and he would know more of the details.

Q. Do you know of any other agreement?

A. No; that, in effect, as I understand it, continues in effect the old agreement we had before, which was my recollection.

Q. Is this the same arrangement—similar arrangement to that—which the South Buffalo Railway Company had with the Northern Operating Company?

A. Yes.

Q. Of your own knowledge, do you know where the offices of the South Buffalo Railway Company were at Lackawanna prior to 1940?

A. Yes; I know where they were.

Q. Where?

A. They were located along its main line, west of the Hamburg Turnpike in a building which, I think, was owned by the South Buffalo Railway Company, and which we tore down when we moved into our pesent office building on the east side of the Hamburg Turnpike.

430 Q. You think that the South Buffalo Railway Company owned that building?

A. On the west side of the Hamburg Turnpike?

Q. Yes.

A. Yes—that's my recollection.

Q. Was that building torn down?

A. Yes; when we moved into the present building.

Q. And did the South Buffalo own the land on which that building was situated?

A. I can't answer that, but off-hand I would say it did. I am just wondering, didn't I testify on this before?

Q. I don't recall that. At any rate, South Buffalo Railway ceased to have its offices in the building on the west of the Hamburg Turnpike?

A. Yes.

Q. And where were the offices moved?

A. We built a new building on the east side of the Hamburg Turnpike and moved into that.

Q. When was that done?

A. We moved into that building in 1940 sometime—I have forgotten exactly when.

Q. Prior to the time the offices of the South Buffalo Railway Company were moved into the new building east of the
431 Hamburg Turnpike, were all of the offices of the South Buffalo Railway Company at Lackawanna in the building west of the Hamburg Turnpike?

A. No; I think we rented some office space in the office building of the Bethlehem Steel Company for part of our Accounting Department.

Q. In their office at Lackawanna?

A. Yes. The reason we built a new office building was because the old building was no longer adequate.

Q. In the new building you were able to house all your offices at Lackawanna?

A. Yes.

Q. After you became president of the South Buffalo Railway Company, five new directors took office, didn't they?

A. Yes; that's right.

Q. Four of those men are still members of your Board of Directors?

A. Yes.

Q. And who was the fifth one?

A. Mr. Flershem.

Q. Who took his place?

A. Mr. Francis Smith.

Q. Had you known any of these men before they became directors?

432 A. No.

Q. Did you meet them for the first time at the meeting at which they became directors?

A. Well, I think I called on some of them before, but, at any rate, I met them at about the same time.

Q. Do you have occasion in your directors' meetings to make recommendations to the Board of Directors?

A. Yes.

Q. And would your directors generally concur with you?

A. Well, in principle, yes; in detail, not always; there have been differences of opinion, and I think there have been occasions upon which the opinions of the Board of Directors prevailed.

Q. Can you give any instance?

A. It seems to me, if I remember correctly, there was a great deal of discussion about the last dividend we declared at the end of 1942 in which the directors felt the figure I suggested was probably high, and a lower dividend was then declared.

Q. What did you suggest? Do you recall?

A. I don't recall now.

Q. How much did they vote—do you remember that?

A. I think it was $75,000, if I'm not mistaken. I don't remember for sure. Does your record show that?

Q. Yes, it shows $75,000—your memory is improving.

433 Was Harry B. Royer connected with the South Buffalo Railway in your time?

A. Yes, he was elected superintendent and a director in September 1941.

Q. Do you recall if before he came to South Buffalo he had been employed by another subsidiary railroad of the Bethlehem Steel Corporation?

A. Yes.

Q. Which one was that?

A. The Cornwall Railroad.

Q. In what capacity, do you know?

A. As superintendent.

Q. He ceased to be superintendent on August 31, 1943—that it, superintendent of the South Buffalo Railway?

A. Yes.

Q. Do you know what happened to him after that? Where he worked, if any place?

A. Yes, he went back to the Cornwall Railroad.

Q. Can you tell us anything about the circumstances of his ceasing to be superintendent of the South Buffalo Railway?

A. Yes; I think I can.

Q. Will you, please?

A. The job was a little too big for him, and he felt it

434 advisable to resign.

Q. You talked over the matter with him, did you not?

A. Yes; at considerable length.

Q. You and he were in agreement that he should resign?

A. Yes, sir.

Q. Do you know whether the job with Cornwall Railroad was less taxing than the job with South Buffalo?

A. Yes.

Q. Did you talk over his ceasing to be general superintendent of the South Buffalo Railway with any Bethlehem Steel Company person?

A. No.

Q. Or with any person connected with the Bethlehem Steel Corporation?

A. No.

Q. Or with anybody connected with the Cornwall Railroad?

A. When he went back to the Cornwall Railroad, I recommended that he be reelected or elected to the Cornwall—to the Board of Directors, otherwise, he wouldn't have become superintendent.

Q. Did you take that matter up with any officers of the Cornwall Railroads?

A. Yes.

Q. Before he resigned from South Buffalo?

A. Those things were all done simultaneously; he
435 resigned at a meeting of the South Buffalo Board of Directors before assuming the office at Cornwall Railroad.

Q. Did the Cornwall people agree to take him back?

A. Yes; he had done a good job in the Cornwall Railroad on his previous tenure of duty there.

Q. Mr. Petty, does the South Buffalo Railway own any cars?

A. A few—only for their own service, for their own use; they own no cars in actual interchange service.

Q. They own service cars?

A. Yes, cars for their own use in the handling of car equipment—railroad equipment—ties, and miscellaneous equipment around the road.

Q. Where does it get its cars for the purpose of serving its customers?

A. From the trunk line railroads.

Q. Does the South Buffalo Railway own any locomotives?

A. Yes.

Q. How many, approximately?

A. I should know that figure exactly, but I don't; I don't recall it exactly; I think about thirty.

Q. It might be more than thirty?

A. Yes.

Q. It might be close to forty?

436 A. Well, I don't know how close to forty.

Q. Mr. Petty, I will ask you to state, if you can, whether or not the relationship between the Steel Company and the South Buffalo Railway Company is the same, or approximately the same now, as it was in June of 1943?"

Mr. BROMLEY. I object to that question as incompetent, calling for a conclusion, and too general.

Mr. STRANGE. May it please the Court, this is a question very closely associated with the question that the Court had under consideration yesterday; and insofar as the question may have called for a conclusion, Mr. Petty was the president of the South Buffalo Railway Company, and he, better than anyone else, we submit, was in position to state a conclusion about a matter that.

certainly could not be said to be within the realm of ordinary common knowledge.

The COURT. The question, it is so broad: his relations in what respect?

Mr. STRANGE. Insofar as it broadens the scope, we submit that it had to do with those matters which Mr. Petty had already testified to.

The COURT. Well, it does not say so.

Mr. STRANGE. The question, may I repeat the question:

"Q. Mr. Petty, I will ask you to state, if you can,
437 whether or not the relationship between the Steel Company and the South Buffalo Railway Company is the same, or approximately the same now, as it was in June of 1943?"

We submit that that, taken in connection with the prior questions limited its meaning to those things touched and covered by the testimony, specifically the directorate had changed.

The COURT. You could ask him if there were any changes. Of course, it does appear that there was a change in directors, and when the change was made. The question itself goes to the very essence of the issue here, the question of whether there was a change in their relations. Well, I think the objection to that is sustained, the question in that form. As I said before, the answer sought may be found in later examination.

Mr. STRANGE. In this case, may it please, the Court, the deposition discloses certain answers that the Court may desire to hear before ruling on the question, just immediately succeeding.

The COURT. I will be glad to hear anything further.

Mr. STRANGE. Of course, subject to the Court's ruling on it, now I am reading——

The COURT. I will withhold any action until you are
438 ready to put in the addition.

Mr. STRANGE. Upon suggestion, may it please the Court, we just ask that the record disclose what the answers would have been to the succeeding question, and we will pass on from that point.

Mr. BROMLEY. I do not understand that suggestion.

The COURT. No, I do not.

Mr. BROMLEY. Put the answers in, in spite of the fact I object to them and his Honor has ruled them out?

Mr. STRANGE. Just want to make an offer to indicate what the answers would have been had they not been ruled out.

Mr. CRAIG. We do not want to read the answers; simply want to make a proffer in the record.

The COURT. You want to offer to show that the witness testified so and so?

Mr. STRANGE. That is right.

The COURT. That is just the point they had in mind.

Mr. BROMLEY. That is an ingenious way to get around a ruling, I submit, to put the answer in the record.

Mr. STRANGE. Oh, no, the answer will not be in the record as testimony of the deponent.

The COURT. Well, I suppose you can submit your offer. I do not know as I have any control over that.

Mr. BROMLEY. Well, he did not submit an offer at the
439 time I made this objection on the record. I called his attention to this matter, about the impropriety in the form of the question, gave him an opportunity to ask proper questions or to make an offer. He did neither. He stood on it. I think in connection with the deposition it is now too late to make an offer.

The COURT. That is something outside of the deposition there. No, I will let the record stand as made. I decline to receive the offer testified to there.

Mr. STRANGE. Well that is as far as my suggestion went, may it please the Court.

The COURT. All right.

Mr. STRANGE. That was at page 185——

Mr. BROMLEY. I did not understand your Honor's ruling. Is he putting it in the record?

Mr. STRANGE. Objection was made thereto. To and after "In every respect. I don't think they are the same" on page 186.

Now, may it please the Court, the further questions along this line were not objected to by Mr. Bromley. But in taking them up and beginning the reading at the point where the objections were made at the time of taking the deposition, there is no con-
440 tinuity, there is no connection. The question is: "What are the differences?" and the answer: "Well, we have a different superintendent."

The COURT. You are referring now to the change in relationship from the question of change in the relationship during these different years?

Mr. STRANGE. Exactly, your Honor.

The COURT. I think that is proper to show that. That is just the point I had in mind, so that the answers should be confined to specific facts.

Mr. STRANGE. Well, that is what was done in this particular case.

The COURT. Whether he answered your question, that may show whether there was a change in the relations during these two years or not. I do not think it is competent for the witness to testify generally as to relations between these two corporations, whether they were the same one year as they were another. The

relationship, of course, applies to many different things: financial relations, business relations, or relations pointed out in the questions you just asked. Go ahead.

(Mr. Strange continues reading deposition.)

"Q. What are the differences?

A. Well, we have a different superintendent.

Q. Does that affect the relationship existing between
441 the Steel Company and the Railway Company?

A. Well, I don't know what 'relationship' means.

Q. I just wondered, Mr. Petty, if you had any better recollection at this time than you did a short time ago in the examination as to whether or not an independent appraisal was made of that Dock Property before the sale of it by the South Buffalo Railway to the Steel Company?

A. No; I haven't any different recollection.

Q. That is, you don't have a recollection on it, do you?

A. No."

Mr. STRANGE. That ends the direct examination.

Mr. BROMLEY. May it please, your Honor, the cross-examination:

"Cross-examination by Mr. BROMLEY:

Q. You are by profession an electrical engineer, are you not?

A. I prefer to say that I was, and still am to the best of my ability, I assume.

Q. Were you a graduate of any higher institution of learning?

A. I graduated from Lehigh University as an electrical engineer.

Q. What degree, if any, do you hold?
442 A. The degree of Electrical Engineer.

Q. And you practiced that profession in your work for the Bethlehem Steel Company, did you not?

A. Yes.

Q. Have you had or do you now have connections with professional associations of engineers or electrical engineers?

A. Yes; I am associated with an Electrical Engineering Society.

Q. For how long have you been a member of that Society?

A. I have been a member of the American Institute of Electrical Engineers for, let's say, since about 1907—even before I graduated from college.

Q. In response to a question asked you by Mr. Craig, you said that, as I recall it, Bethlehem Steel Company routes its shipments over South Buffalo Railway—do you recall that?

A. Yes; I recall the question—the thing that I wanted to say there is that the Bethlehem Steel Company routes its shipments in

whatever way it wants to ship them; all we do is carry out their shipping instructions.

Q. In that respect do they do anything that differs to any degree whatsoever from what is done by any shipper other than the Steel Company?"

443 Mr. CRAIG. I am going to object to that question, your Honor. Again we are bringing in the matter of other industries and their practice, which I think does not apply to this case.

Mr. BROMLEY. He did not object to the form of the question at the time, your Honor; therefore waived that objection.

Mr. CRAIG. I have no objection to the form but I do not think it is relevant.

Mr. BROMLEY. I should think it went to the very heart of the controversy.

The COURT. I think it is competent. Objection overruled.

(Mr. Bromley continues reading deposition.)

"A. No; all shippers route their own shipments as they see fit; that's not any of our prerogative."

The COURT. I assume he is referring to the other shipping from this plant, the other long haul loads, referring to the others that take the cars.

Mr. BROMLEY. Yes. And the other shippers on his own line, other than Bethlehem.

The COURT. That is what I mean, these long haul other than Bethlehem, the railroads, the shippers outside of the line.

Mr. BROMLEY. Yes; and on his lines too, as well.

The COURT. Yes.

444 (Mr. Bromley continues reading deposition as follows:)

"Q. That's the prerogative of any shipper, is it not?"

Mr. CRAIG. Same objection, your Honor.

The COURT. Cross-examination. Overruled.

(Mr. Bromley continues reading deposition as follows:)

"A. Yes.

Q. When you say 'a shipper routes his own shipments over the line of the South Buffalo Railway Company,' you mean that when he makes out the shipping papers or documents, he notifies your company of the destination and the trunk line carrier to which you are to deliver the shipment?

A. Yes.

Q. That's all there is to routing a shipment?

A. Yes.

Q. If Bethlehem Steel Company has a shipment of steel for New York City, its Shipping Department informs you that it is going to make that shipment over a certain trunk line—the Le-

high Valley Railroad, for instance—and you will be instructed by the Shipping Department as well as the shipping papers that the shipment is to be routed over your lines in such a fashion
445 and as you see fit as long as you deliver it to the proper trunk line carrier, isn't that true?

A. Yes.

Q. Now, the instructions which any shipper gives you would be controlling as to how you should transport the things over your line, is that right?

A. That's right—that's our business.

Q. All you have to do in order to carry out the shipping instructions of the shipper is to get the shipment to the trunk line carrier named in the shipping papers?

A. Yes.

Q. Isn't it a fact, Mr. Petty, that the boards of directors of each of the seven railway companies of which you are president elected you as president and fixed the amount of compensation which each should pay you?

A. Yes.

Q. And each railway has since paid that compensation so fixed by each board of directors, in the form of a separate check from each railroad to you each month, is that right?

A. That's right.

Q. How many directors are there of South Buffalo Railway Company at the present time?

446 A. Nine.

Q. Does any one of them have any connection with the Bethlehem Steel Company or the Bethlehem Steel Corporation or any subsidiary of the Bethlehem Steel Corporation except the other railroads?

A. No.

Q. Who are they?

A. Well, there is Mr. Fiske.

Q. Tell us who he is?

A. Mr. Fiske is Secretary of the Retail Merchants Association—Raymond T. Fiske."

447 Mr. CRAIG (reading):

"By Mr. CRAIG. I'll enter an objection to this line of testimony on the ground that Mr. Fiske himself would be able to furnish the best evidence as to who he is, and the Plaintiff reserves and demands the right to cross-examine any and all directors concerning whose qualifications, positions, or experience this witness may testify. In order not to encumber the record, I want to state that the same objection may be made in the case of each director concerning which inquiry is made. Can it be so stipulated, Mr. Bromley?"

Mr. BROMLEY (reading):

"By Mr. BROMLEY. It is so stipulated. In answer to counsel's objection, I wish to state that my position is that this is proper cross-examination of this witness because counsel for the plaintiff has opened up that phase on his side of the examination."

The COURT. Objection overruled, and an exception to the Government.

Mr. BROMLEY (reading):

"By Mr. BROMLEY:

Q. Of what city is Mr. Fiske a resident?

A. Buffalo, New York.

448 Q. And the Retail Merchants Association which you mentioned is a Buffalo organization, is it not?

A. Yes.

Q. Who is the next director?

A. Mr. Burton Gale, Jr.

Q. Who is he and where does he live?

A. He is vice president of the M. & T. Trust Company, Buffalo, New York, and he lives in Buffalo, New York.

Q. When you say 'M & T Trust Company' you mean the Manufacturers' & Traders' Trust Company?

A. Yes.

Q. Will you give us the name of another director?

A. Mr. Edward S. Gram.

Q. Who is he?

A. He was formerly connected with the William H. Crosby Company, and has since retired from business, and he lives in Buffalo, New York.

Q. Who is another director?

A. Mr. Benjamin J. Klopp—he lives at Derby, New York.

Q. Name another director.

A. Mr. Francis A. Smith.

Q. Who is he?

A. He is vice president of the Marine Trust Company, Buffalo, New York.

Q. Name another director.

449 A. Those are the five directors who were not connected with the Railway Company.

Q. Who are the remaining directors?

A. Mr. George E. Seller, as secretary and treasurer of the South Buffalo Railway Company; Mr. Paul A. Trageser, who is first vice president of the South Buffalo Railway Company; Mr. C. F. Dullenkopf, who is superintendent and vice president.

Q. And, finally, yourself?

A. Finally, myself.

Q. That makes nine directors?

A. Yes.

Q. Is any one of those gentlemen, so far as you know, subject to any control or supervision of his duties, so far as it concerns the South Buffalo Railway Company, except by the Board of Directors of the Railway Company?

A. No.

Q. Do you report your actions to anyone other than the Board of Directors of the South Buffalo Railway Company?

A. I do not."

The COURT. This is the testimony of Mr. Petty, is it not?

Mr. BROMLEY. Yes. He was president.

The COURT. I know that, but did he have any interest in
450 the other companies?

Mr. BROMLEY. No; he had no other employment by any companies other than the railroad company.

The COURT. That is what I thought. Continue.

Mr. BROMLEY. (reading):

"Q. Does anyone other than the directors of your Company attempt to exercise any control or supervision over the performance of your duties as President of the South Buffalo Railway Company?

A. They do not.

Q. Or over your duties as director?

A. They do not.

Q. Are you as president, and the Board of Directors of the South Buffalo Railway Company, entirely free to manage the property, business, and affairs of the South Buffalo Railway Company in any manner that you and they may see fit?

A. Yes, we are.

Q. Since you have been president, has anyone connected with the Bethlehem Steel Corporation or the Bethlehem Steel Company attempted to or exercised any control or supervision over any of your acts or actions?

A. No.

Q. Are the affairs of the South Buffalo Railway Company managed by the officers and directors of that Company,
451 free from supervision or influence or control on the part of anybody?

A. Yes.

Q. Does the Board of Directors and officers of the South Buffalo Railway Company determine by themselves the amount of charges to be made for their services, subject, of course, to the laws and rules applicable to the operation of a common carrier?

A. Yes.

Q. Is the Company free to make any expenditures, capital or otherwise, which in the judgment of its Board of Directors and officers seem wise?

A. Yes.

Q. Can the Company declare or fail to declare dividends in the uncontrolled discretion of the Board of Directors of the Railway?

A. Yes.

Q. Does the Company manage its own finances?

A. It does.

Q. Does it own all of the equipment which it believes to be necessary to the performance of its duties as a common carrier?

A. Yes.

Q. Have the directors of the South Buffalo Railway Company, since you have been president, ever made an inspec-
452 tion of the lines and the property of the Railway?

A. Yes—they made a number of inspections.

Q. Would you say that's true for each year that you have been president?

A. Yes; we feel it is advisable that the officers might want to show our directors any new things that may have been done or accomplished; sometimes, the inspection is made, at least, once a year or more often, especially if there is some new thing which has been previously discussed at the meeting of the directors.

Q. You have never found that the directors are subject to your will or control in the decision of questions which have been put to them, have you?

A. No; I have found them, in my own personal experience and knowledge, a group of men who ask questions and who want to know all the facts before they make any decisions.

Q. You have never found that any one of them is subject to any control or supervision from any representative of the Bethlehem Steel Corporation?

A. No.

Q. Coming to the subject of the Northern Operating Company—it's true, isn't it, that the only railway service to the
453 Seneca Plant of the Bethlehem Steel Company is furnished by what you call the 'Seneca Division' of the South Buffalo Railway Company?

A. Yes; that's right.

Q. Does the Seneca Division have another name.

A. It might be called the 'Seneca Branch,' but I think 'Seneca Division' is the correct terminology.

Q. Is it true, Mr. Petty, that the tracks formerly owned by the Northern Operating Company constitute a connecting link between a part of the South Buffalo's main line and the Seneca Division of the South Buffalo Railway Company?

A. Yes.

Q. And those two stretches of track between the Seneca Plant of the Bethlehem Steel Company and the main line of the South Buffalo Railway Company form the only railway connection between the Seneca Plant and the main line of the South Buffalo Railway Company?

A. Yes; that's right.

Q. And it is true, isn't it, that at the time Bethlehem Steel Company bought the piece of track from the Northern Operating Company that there wasn't any doubt in your mind at all that the Bethlehem Steel Company would permit the South Buffalo Railway to operate over those tracks formerly owned by the Northern
454 Operating Company in order that the Seneca Plant of the Bethlehem Steel Company might be served by the South Buffalo Railway Company?"

Mr. CRAIG. No objection.

Mr. BROMLEY (reading):

"A. There would be no doubt in my mind but what satisfactory arrangements could be made with the Bethlehem Steel Company to permit us to continue operating there.

Q. Let me put it this way: Of course, you knew that was the only manner in which the Bethlehem Steel Company could get its goods shipped out by rail from the Seneca Plant, isn't that right?

A. Yes.

That's all."

Mr. STRANGE. I will read the redirect examination of the Witness Petty (reading):

"Redirect examination by Mr. CRAIG:

Q. Mr. Petty you testified on cross-examination that your compensation was fixed by the Board of Directors of each of the seven subsidiary railroads of the Steel Corporation upon your taking office as president of the roads?

A. Yes.

Q. Will you state whether or not the amount of the
455 compensation so fixed by the Boards of Directors of the seven railroads totalled the same amount which Mr. Grace had told you or suggested that your compensation would be?

A. No; because the figure which Mr. Grace talked about was the total figure including fixed compensation and incentives.

Q. And he spoke of a figure of how much?

A. Around $25,000.

Q. And how much did the figures set by the seven boards total?

A. The fixed compensation?

Q. Well, Mr. Grace suggested what figure?
A. A total of around $25,000.
Q. Fixed compensation plus——
A. That was the total over-all.
Q. Of all the railroads?
A. All the railroads, and the total of the fixed compensation plus the incentives, which would always vary from year to year.
Q. What action was taken by the Board of the seven roads?
A. In reading the minutes of the meetings at which the figures were set—at which I was not always present—the amount
456 was fixed at so much for the fixed compensation and a percentage figure of a thing which we call the 'net operating revenue.'
Q. Do you recall what was your total compensation from all the roads?
A. I don't recall.
Q. Was it about $25,000?
A. Yes.
Q. Was it pretty close to that figure?
A. In 1940, I think so—it might have been a little more.
Q. How much more?
A. Well, a little more—I don't know how much more.
Q. Was it a thousand dollars more?
A. Yes.
Q. Or less?
A. It might have been a thousand dollars more.
Q. What about the year 1941—what was the total you received from the seven roads then?
A. It was even more than it had been in 1940 because that was one of the big years.
Q. What was the amount?
A. I don't remember the exact figures.
Q. Was it more than $25,000?
A. Yes.
Q. Was it more than $30,000?
457 A. I don't think so.
Q. What about 1942?
A. That was less than 1941.
Q. Was that less than $25,000?
A. I think it was more than $25,000—between $25,000 and $30,000; that's as close as I can remember it.
Q. What about the year 1943?
A. Last year it was less than 1942, I remember, but I don't know how much less.
Q. Was it about $25,000?
A. Well, it was a little more than $25,000.

Q. Was it as much as $30,000?
A. No; it was less than $30,000—between $25,000 and $30,000.
Q. Was it less than $27,000?
A. I'll stop at that figure—between $25,000 and $30,000.
Q. You can't remember any closer than $5,000 what your compensation was last year—1943?
A. That's correct.
That's all."

Mr. BROMLEY. (reading):

"Re-cross-examination by Mr. BROMLEY:

Q. Mr. Grace, didn't say that would be your salary; he
458 merely said that if the Boards of Directors elected you as the president, he thought that a fair compensation for that office would be about $25,000, isn't that true?
A. Yes.
Q. He didn't know what your incentive compensation would be from year to year, did he?
A. No.
Q. He never said he would fix your compensation at any figure, did he?
A. No.
Q. That was up to the Boards of Directors on the basis of what they thought was fair, was it not?
A. Yes.
That's all."

(Short recess.)

Mr. CRAIG. May it please the Court, the plaintiff desires to read further testimony of Mr. Trageser (reading):

Paul A. Trageser

"Q. Mr. Trageser, you testified previously in this case, did you not?
A. Yes, Mr. Craig.
Q. And you have been present during the preceding testimony of Mr. David M. Petty?
A. Yes.
Q. You heard that testimony?
459 A. Yes.
Q. Do you recall that questions were asked of him in connection with the sale of what was referred to as the 'Dock Property' by South Buffalo Railway to the Bethlehem Steel Company?
A. I heard his testimony; yes, sir.
Q. Are you familiar with that transaction?
A. Yes, sir.

Q. Do you recall, in connection with that sale, whether the Dock Property was appraised?

A. At one time there was an appraisal made of the Dock Property before my incumbency, but I don't believe that an appraisal was made before the sale of the property in 1940—immediately before.

Q. Do you recall that the Dock Property was carried on the books of the South Buffalo Railway Company for $391,000?

A. Yes.

Q. That is, it was?

A. Yes."

The COURT. Did you say $291,000 or $391,000?

Mr. CRAIG. $391,000. Just to have the record clear, I understand, Mr. Bromley, that we are in agreement and it is stipulated that that was the sale price in the sale from South Buffalo Railway to Bethlehem Steel Company?

460 Mr. BROMLEY. Do you know that to be a fact? I don't.

Mr. CRAIG. I so understand it to be. If we cannot stipulate it, I will have to make inquiry. I thought you said awhile ago that there was no question about the amount of the sales price, but I wanted to clear it up now, and if we can't, all right.

Mr. BROMLEY. I think that is it. I will stipulate subject to correction if I find that I am wrong.

Mr. CRAIG. That is agreeable (reading):

"Q. You heard the testimony, also, relative to the sale of part of a 450-foot strip of land west of what was then known as 'Trace 7' of South Buffalo Railway, in 1943, to the Bethlehem Steel Company?

A. I heard that testimony; yes, sir.

Q. Do you know whether an appraisal of that property was made in connection with that sale?

A. I know that an appraisal was made; yes, sir.

Q. Do you know that that appraisal was for $16,000 for the property subsequently sold, Mr. Trageser?

A. No; I didn't recall it until you named that figure. If that question had been asked me, I should have said I didn't recall what the price was, but I am willing to accept $16,000 as the consideration.

Q. Do you know for what this property was carried on

461 the books of the South Buffalo Railway Company?

A. No, Mr. Craig, I can't recall.

Q. Do you know that the appraisal which was made was several times the book value of the property?

A. I think it was more than the book value; whether it was several times more, I can't recall at this time.

Q. Do you recall whether it was substantially more than the book value?

A. Yes.

Q. You heard the questions put to Mr. Petty and the answers given in connection with the gross operating revenues of the South Buffalo Railway Company for the years 1940 to 1943, inclusive?

A. Yes.

Q. To refresh your recollection, in 1943 the total for that item was $3,614,907 as taken from the report of the South Buffalo Railway Company to the Interstate Commerce Commission. Can you give an estimate as to what portion of the total operating revenues for 1943 were had in connection with business concerning the Steel Company?

A. I can give no such estimate, as the records of the South Buffalo Railway are not kept or maintained in any way to show what portion of that revenue comes from the Steel Company
462 or from any other shipper or receiver of freight along the road.

Q. The business from the Steel Company constitutes a majority of the business as far as revenues are concerned, of the South Buffalo Railway, does it not?

A. The Steel Company is the largest shipper and receiver of freight on the railroad, and a substantial part of the revenue of the road comes from the Steel Company business."

The COURT. Was there not testimony earlier in the case that the percentage was about 80 percent?

Mr. CRAIG. I think Mr. Bromley in his opening statement said something about that.

Mr. BROMLEY. I said, I think, 70 percent. I said I thought that the outside business was 30 percent.

Mr. CRAIG (reading):

"Q. The south Buffalo Railway Company does switching service for the Steel Company?

A. It performs terminal switching service on shipments to and from its connections and to and from the Steel Company, as well as local service on the railroad between the plants of the Steel Company and other shippers.

Q. Does it do more such switching service for the Steel Company than it does for other customers on the road?

A. Yes; but it does a substantial amount of switching
463 for the other customers.

Q. Would the answer you gave regarding revenues in the year 1943 also apply for the years 1940 to 1942, inclusive?

A. It would.

Q. And would the same thing apply for the preceding years to 1940, during the time that you were connected with the South Buffalo Railroad Company?

A. Yes, it would.

That's all."

Mr. BROMLEY (reading):

"Re-cross-examination by Mr. BROMLEY:

Q. The books of the South Buffalo Railway didn't contain an entry by way of any valuation or value of the piece of land which was actually sold, referring to the 450-foot strip, did they?

A. No, not for the portion of the 450-foot strip that was sold to the Steel Company; the books of the Company did not reflect any valuation for that.

Q. What the books showed was the valuation of a piece of land of which a portion was sold to the Steel Company?

A. That's right.

Q. So it isn't true that the books of the Company carried any value applicable to the land actually sold?

A. No.

464 Q. There wasn't any way of telling what the value of the land was from the books of the Railway Company, was there?

A. No; one section of the land may have been more valuable that the other.

Q. That is why you went out and got an expert appraisal upon the value of the portion which you were thinking of disposing of?

A. That's one of the reasons.

Q. And did you consider the price which you got for the Dock Property a fair and adequate price?

A. As an officer and director of South Buffalo Railway Company, I considered it a fair and adequate price, yes.

That's all."

Mr. CRAIG. Now, further redirect examination by Mr. Craig (Reading):

"Q. Do you recall whether the amount of the appraisal set by the appraiser on this part of the 450-foot strip which was sold, how that figure compared with the figure at which the entire 450-foot strip was carried on the books of South Buffalo Railway?

A. I'm sorry; I don't remember.

Q. You don't know whether it was more or less than that total?

465 A. No.

Q. Or the same?

A. No.

Q. You referred to the price which was received for the Dock Property. You thought, I believe you said, that that was a fair payment for that property?

A. Fair and adequate.

Q. As a matter of fact, didn't you consider it to be quite advantageous to South Buffalo?

A. Well, I felt the same way about it as Mr. Petty did, if, in view of all the circumstances, we could dispose of it at that price, that it would be a good thing for South Buffalo Railway to dispose of it.

Q. Didn't you feel it would be a very good thing for South Buffalo?

A. I won't emphasize the answer I have given to your previous question."

Mr. CRAIG. That ends the Trageser deposition. The Plaintiff at this time desires to read the testimony of Clayton J. Fatzinger. [Reading:]

Clayton J. Fatzinger

Mr. CLAYTON J. FATZINGER, called by the plaintiff, sworn, and testifies as follows:

Direct examination by Mr. CRAIG:

Q. Will you state your name and address, Mr. Fatzinger?

466 A. Clayton J. Fatzinger, Bethlehem, Pennsylvania.

Q. What is your connection with the South Buffalo Railway Company?

A. Auditor.

Q. How long have you been such?

A. Since February 1932.

Q. Are you Auditor, also, of the other subsidiary railroads of the Bethlehem Steel Corporation?

A. I am.

Q. How long have you been such?

A. Since February 1932.

Q. Where is your office?

A. 1275 Daly Avenue, Bethlehem.

Q. You do the work for all seven railroads there?

A. That's true.

Q. What, generally, are your duties as Auditor of the South Buffalo Railway Company?

A. To maintain the books, prepare the financial statements for the officers of the South Buffalo Railway Company, pay the salaries of the general officers, prepare all Interstate Commerce Commission reports, collect the money, and pay the bills.

Q. In connection with your duties, do you follow the same general procedure in connection with the affairs of all seven railroads?

467 A. Yes; I do.

Q. In the use of forms, are the same forms used for all railroads?

A. Yes.

Q. By whom are those forms prepared?

A. What forms do you have reference to? For instance, we particularly prepare the balance sheet and the income statement and the trial balance in our office for all seven railroads.

Q. Do you use forms frequently in the discharge of your duties—forms to be filled in?

A. I don't get your question.

Q. You don't prepare all documents and papers each time from beginning to end, do you?

A. Oh, no.

Q. That's what I mean—does that aid you in answering the question?

A. Well, I have Division Accountants——

Q. Does a Division Accountant act for all seven roads?

A. No; a Division Accountant for each road.

Q. Under you?

A. Under the supervision of myself.

Q. Do you pass on the forms that those men use in the discharge of their duties?

A. Yes.

468 Q. And do you supply them with the forms, or cause them to be supplied with the forms?

A. That's right.

Q. Are those forms presently subject to the approval of anybody connected with the Bethlehem Steel Company or the Bethlehem Steel Corporation?

A. I would say 'No.'

Q. In the past while you have been Auditor, have they been subject to any person's approval connected with the Steel Company or the Steel Corporation?

A. No.

Q. Do you recall the transactions in 1936 when the Steel Corporation made contributions to the South Buffalo Railroad Company?

A. Yes.

Q. Do you recall whether or not the entries in the South Buffalo Railway Company's books were approved by persons connected with the Steel Corporation?

A. Yes, they were.

Q. Counsel for the South Buffalo Railway Company and the other Defendants in this case have supplied the attorneys for the Plaintiff with a series of miscellaneous price lists. I will hand them to you and ask you if you are familiar with them?

A. (Witness examines papers handed to him.) Yes, I am."

469 Mr. CRAIG. Your Honor, I might say that these price lists to which reference was made will be offered in evidence (reading):

"Q. I hand you seven of those price lists, each effective January 1st, 1938, and each bearing, at the top, the name of one of the subsidiary railroads of the Steel Corporation. Do you have those documents before you?

A. Yes, sir.

Q. Is it not true, Mr. Fatzinger, that except for the name of the respective companies at the head of the several sheets, that those price lists are the same?

A. Substantially; yes.

Q. Aren't they exactly the same?

A. That's right.

Q. I hand you a similar list of seven, effective, in each instance, January 1st, 1936, and ask you to examine them to see if my statement is correct?

A. (Witness complies with counsel's request.) Yes, sir.

Q. Is it not true that, except for the heading on the respective sheets showing the name in each instance of a separate railroad company, a subsidiary of the Steel Corporation, that those

470 price lists are identical?

A. They are.

Q. I hand you a similar sheet of price lists, effective January 1st, 1935?

A. (Witness examines sheets handed him by counsel.)

Q. You have them before you?

A. Yes.

Q. Is it not true that, except for the name of the Company at the head of each sheet and that, in each instance, being a subsidiary railroad company of the Steel Corporation, that those price lists are identical?

A. They are.

Q. I hand you, finally, a list of seven price lists effective April 1st, 1932.

A. (Witness examines sheets handed him by counsel.)

Q. Is it—rather, you have them before you?

A. Yes.

Q. Now, is it not true that those price lists are identical except for the name of the railroad company at the head of each, and each company being a subsidiary railroad company of the Steel Corporation?

A. That's true.

Q. Were all these price lists issued by you as Auditor of
471 the several companies—the several railroad companies?

A. They were.

Q. Are you able to state, Mr. Fatzinger, if conditions affecting—that is, conditions affecting prices to be charged for the items set forth in those lists were the same relative to each railroad at the time the price lists were issued?

A. Well, we made the same billing basis on all the railroads.

Q. And why did you do that?

A. For standardization.

Q. Was any cost study made to determine what should be charged for the various services for the different railroads?

A. No.

Q. You wanted the amounts to be the same for all roads, didn't you?

A. As a standard billing practice.

Q. Why did you want it standard?

A. Simply to keep them alike.

Q. Do you recall, Mr. Fatzinger, that you wrote to the chief clerks of the several subsidiary railroads of the Steel Corporation that 'it has been decided to allow the railroads 20% profit on the labor and materials furnished the Bethlehem Steel
472 Company during the year 1935?'

A. I don't recall that.

Q. Do you recall whether at any time you wrote the chief clerks of the several railroads, or any other persons connected with the railroads, relative to what profit should be charged the Bethlehem Steel Company on labor and materials furnished the Bethlehem Steel Company during any particular period?

A. I don't recall.

Q. Do you deny that you might have sent out such instructions?

A. No.

Q. You don't deny it, but you don't remember it?

A. No; I don't remember it.

Q. Do you know whether, as a matter of fact, the several railroads have charged Bethlehem Steel Company the same margin of profit on labor and materials furnished the Bethlehem Steel Company?

A. I do not.

Q. That is, do you recall whether the same standardization has been followed in that particular as has been adopted in the matter of the miscellaneous price lists?

A. I don't recall.

Q. Do you know Mr. F. A. Shick?

473 A. I know of him.

Q. You don't know him personally?

A. No.

Q. Is he Comptroller of the Steel Company, do you know?

A. I believe he is.

Q. Have you had occasion to discuss with anyone in his office, or with anyone else connected with the Steel Company, any auditing or accounting problems or any other problems in the discharge of your duties as Auditor of the South Buffalo Railway Company?

A. No.

Q. You have not?

A. No."

474 (Mr. Bromley reads deposition as follows:)

"Cross-examination by Mr. BROMLEY:

Q. Not one of those sets of seven sheets are in effect at the present time, are they?

A. They are not.

Q. And the date of the most recent one is some time in 1938; isn't that right?

A. 1938; yes.

Q. Changes were made in that particular price list in 1939 or 1940?

A. There were.

Q. And changes have been made in that price list subsequent to 1939 or 1940?

A. There have been; yes.

Q. Isn't it true that, looking at all of those sheets—I believe there are four or five sets of seven each—which counsel has showed you, in every case the charges listed there are based on cost to the railroad company for performing the services enumerated?

A. That's true.

Q. They would result, would it not, in different charges by each railroad to the person for whom the services were rendered, if the costs were different?

A. Yes.

Q. As a matter of fact, you know that in each instance

475 the cost was different as among the several railroads?

A. That's right.

Q. So that the price paid by the concerns for whom these services were rendered was not at all the same as among the seven railroads; isn't that true?

A. That's true.

That's all."

Mr. CRAIG. The plaintiff desires to read the testimony of Russell F. Handwerk.

The COURT. Very well.

(Mr. Craig reads deposition of Russell F. Handwerk as follows:)

Russell F. Handwerk

"Q. Will you state your name and address?

A. Russell F. Handwerk, Bethlehem, Pennsylvania.

Q. And give us your connection with the South Buffalo Railway Company?

A. General Agent.

Q. How long have you held that position?

A. For about twelve years.

Q. Are you General Agent of the other six subsidiary railroads of the Bethlehem Steel Corporation, also?

A. I am.

Q. For the same period of time?

A. For the same period of time.

Q. Where is your office?

476 A. 1275 Daly Avenue, Bethlehem, Pennsylvania.

Q. What was your occupation prior to becoming General Agent for these several railroads?

A. I was clerk for the P. B. & N. E. Railroad.

Q. That's one of the subsidiaries?

A. Yes.

Q. How long were you employed in that capacity?

A. Since about 1917.

Q. And prior to that?

A. That was my first job."

Mr. STRANGE. At this time, may it please the Court, we wish to introduce in evidence a lease, or copy of a lease, of certain tracks owned by the Bethlehem Steel Company of New York, Incorporated, to the South Buffalo Railway Company.

In the plaintiff's complaint the identity of the Bethlehem Steel Company of New York is set out as being a predecessor of the Bethlehem Steel Company.

The copy was furnished by Counsel for the defendant.

The COURT. Is that the lease from the Railroad to the Company, you mean?

Mr. STRANGE. No, sir. It is a lease from the Company to the Railroad.

477 I said "tracks." I should have said of the land, right-of-way, on which the tracks are located.

Mr. BROMLEY. You described it as a lease of tracks. Of course, it is not any such thing.

Mr. STRANGE. I have already corrected that, Mr. Bromley.

Mr. BROMLEY. No objection.

(The copy of lease referred to was received in evidence and marked as "Plaintiff's Exhibit No. 13.")

Mr. STRANGE. We would like to read certain of the provisions of this lease, may it please the Court, which we think has peculiar importance in connection with this case, if we may do so.

Mr. BROMLEY. This is a lease back in 1922, is it not?

Mr. STRANGE. That is right. It is a lease dated October 10, 1922, between the Bethlehem Steel Company of New York, Incorporated, and the South Buffalo Railway Company; and is now in effect, insofar as it has not been modified or affected by a later lease dated October 1923, which we will presently offer in evidence.

May we proceed with the reading of it?

The COURT. You want to call attention to certain phases of it?

Mr. STRANGE. Yes.

The COURT. Has it been marked? It should be marked in evidence?

478 Mr. STRANGE. What we wish to do is to introduce the entire lease in evidence and then merely designate parts.

The COURT. Mark the exhibit 13?

Mr. STRANGE. That is right. The whole thing is Exhibit 13.

The COURT. That is marked already.

Mr. STRANGE. Yes.

Mr. BROMLEY. Do you offer it?

Mr. STRANGE. Yes.

Mr. BROMLEY. No objection.

The COURT. What you want to do is to call the Court's attention to certain phases of it?

Mr. STRANGE. That is right, sir.

The COURT. That only doubles the record here, that is all.

Mr. STRANGE. They are all matters which we think that——

The COURT. All right.

Mr. STRANGE. One of the purposes of the lease is set out——

The COURT. That will be taken care of by your summation and conclusion and brief, in order to point it out.

Mr. STRANGE. That is very true. We do not want to belabor the Court with this.

The COURT. I was only suggesting that because of the question of time, that is all. I will let you follow your course. Go over it twice, that is all.

Mr. STRANGE. One of the purposes of the parties, set out on page 1, is as follows:

479 "The parties hereto desire that the land, including the roadbed thereon, on which said standard-gauge railroad tracks are located, as well as other lands, including the roadbed thereon, upon which said tracks may hereafter be relocated or other tracks constructed, as hereinafter provided, shall be leased by the Steel Company to the Railway Company."

Now proceeding to page 4, beginning with paragraph numbered 1st, the lease provides:

"The Railway-Company shall have the right to relocate any of its railroad tracks, buildings and other structures located on the land of the Steel-Company as they shall at the time exist: provided, that the Railway-Company shall deem such relocation to be desirable in connection with the handling of the traffic, interchange or intraplant, or both, of the Steel-Company, or of said Bethlehem Steel Company or other lessee of said plant; and provided further that each such proposed relocation shall be approved by the Steel-Company or by said Bethlehem Steel Company or other lessee of said plant before any work in connection therewith, other than surveying and the preparation of plans, shall be done. The Steel-Company, however, will approve,

480 or cause said Bethlehem Steel Company or other lessee of said plant to approve, any such proposed relocation, provided that it shall not affect adversely the plans of the Steel-Company or of said Bethlehem Steel Company or other lessee of said plant in connection with its business. The cost and expense of any such relocation shall be borne entirely by the Railway-Company; provided, however, that in case the footage of the relocated tracks be greater than that of the tracks so to be relocated, the cost of the substructure of such increased footage shall be borne by the Steel-Company. The Railway-Company will, upon the request of the Steel-Company, or of said Bethlehem Steel Company, or other lessee of said plant, relocate any of its tracks, buildings, and other structures located upon the lands of the Steel-Company as they shall at the time exist, whenever the party which at the time shall operate said plant shall deem such relocation advisable in the conduct of its business. The entire cost and expense of any such relocation made at the request of the Steel-Company or of said Bethlehem Steel Company or other lessee of said plant shall be borne by the Steel-Company, or by the

481 lessee for the time being of said plant, if the lease thereof shall so provide; provided, however, that in case the foot-

age of the relocated tracks be greater than that of the tracks so to be relocated, the cost of the superstructure of such increased footage shall be borne by the Railway-Company. All property constituting the tracks or structures so to be relocated at the request of the Steel-Company or of said Bethlehem Steel Company or other lessee of said plant and not used in the relocated tracks or structures shall became the property of the Steel-Company. All tracks, exclusive of the substructure thereunder, and all other structures relocated in accordance with the provisions hereof shall be the property of the Railway-Company. The term 'substructure' as used in this Indenture shall be deemed to mean the roadbed exclusive of ballast (corresponding to that stage in the construction of a road the cost of whose completion is included under the account 'Grading' in the Interstate Commerce Commission Classification of Investment in Road and Equipment), but including trestles, culverts, and bridges; and the term 'Superstructure' as used in this Indenture shall be deemed to mean a
482 complete railroad track (including ballast) on the substructure."

Now, may it please the Court, as I read that I realized I had not called the Court's attention to other than the two covenanting parties, the Bethlehem Steel Company of New York, Inc., and the South Buffalo Railway Company. Now, in this lease the Bethlehem Steel Company of New York is referred to as the Steel-Company, but the Bethlehem Steel Company, a Pennsylvania corporation, had a part of the property under the lease; and where the Bethlehem Steel Company is referred to in here, of Pennsylvania, the term "Bethlehem Steel Company" is used, rather than "Steel-Company."

The COURT. Who signed the lease?

Mr. STRANGE. The Bethlehem Steel Company of New York and the South Buffalo Railway Company.

The COURT. Just the two signed?

Mr. STRANGE. Just two signed it, but by that provision that I have just read, repeated several times, the "Steel-Company" and then the "Bethlehem Steel Company."

The COURT. What do you mean by that, that the lease contained some exception and reservation to the Pennsylvania corporation?

Mr. STRANGE. No; not other than as was read.

The COURT. Well, that does not answer my question,
483 "other than read."

Mr. STRANGE. Yes, sir; the Bethlehem Steel Company of Pennsylvania.

The COURT. What did they reserve? What did they get out of it, separate from what the South Buffalo Railway Company got out of it?

Mr. STRANGE: If I may do so, let me read the first clause of that first paragraph:

"The Railway Company shall have the right to relocate any of its railroad tracks, buildings, and other structures located on the land of the Steel Company as they shall at the time exist, provided that the Railway Company shall deem such relocation to be desirable in connection with the handling of the traffic, interchange or intraplant, or both, of the Steel Company or of the said Bethlehem Steel Company, or other lessee of said plant."

Now, the Bethlehem Steel Company of Pennsylvania was a lessee of the plant. And in this provision it is provided that the relocation may be made upon those conditions.

The COURT. What do you claim for this lease? What are you going to do?

Mr. STRANGE. I beg your Honor's pardon?

484 The COURT. What do you claim for this lease? What bearing do you claim it has?

Mr. STRANGE. Well, the purpose we have of reading this paragraph and of the succeeding two paragraphs, is to point out or to disclose to the Court that the relocation and all the construction of tracks by the Railway Company is subject to the approval of the Steel Company and the Bethlehem Steel Company.

The COURT. Well, would that be inconsistent with the location of tracks within a plant, in a plant such as this?

Mr. STRANGE. Well, if I may do so, may it please the Court, that is one of the points we are undertaking to make here, that these tracks, their present location, their relocation, are so dominated by the Steel Company as to render them other than free agents with regard to the construction, constructing new track and relocating of old track.

The COURT. Ordinarily, the extent that it is, with the intricate amount of railroad connections inside of its borders, it would naturally, ought to have some control over the location.

Mr. STRANGE. We concede that very readily, may it please

485 the Court, but we say that that desire and that ability, that capacity is inconsistent with a free-operated and maintained railroad. And when I say "free" I mean free of dominance of the Steel Company. I might point out that these tracks, the Lackawanna—well, at any rate, unless objection is made thereto, the tracks involved here are all west of the Hamburg Pike, along in here [indicating]; and it composes quite a large part of the Railroad Company's trackage.

The COURT. Standing alone it would not be of great probative force, the fact that the Company reserved some control over the location of tracks within its own limits, its own property, an in-

tricate property such as this, it normally would do that, would it not?

Mr. STRANGE. We submit here that this lease provides complete and absolute control, that they are under, that they can require the Railroad Company at any time to reestablish its own tracks to suit the requirements of the Steel Company. And we will presently introduce letters, as late as 1940 or later, in which the present Bethlehem Steel Company has done exactly that thing.

The COURT. You have another lease, you said, following this?

Mr. STRANGE. Yes, sir. I will say, so far as the covenants
486 of the other lease are concerned, they are substantially similar to these. Unless the Court desires us to do so we would not repeat the reading.

The COURT. What is the reason for the lease the following year?

Mr. STRANGE. The reason for the lease the following year was that certain other land was incorporated in the lease, it covered certain land that was not covered in this one.

Now, beginning at the top of page 6, paragraph 2nd, the lease provides:

"The Railway Company will, upon request, construct any additional standard-gauge tracks which the Steel Company or said Bethlehem Steel Company or other lessee of said plant may desire to have constructed in order to secure service for any of the existing buildings which comprise said plant or any new buildings which may be constructed as a part of said plant (not including tracks in buildings), provided that such tracks are to be used in the handling by the Railroad Company of the traffic, interchange or intermill, or both, of the Steel Company, or of said Bethlehem Steel Company or other lessee of said plant. The cost and
487 expense of such new tracks shall be borne, of the substructure by the Steel Company or by the lessee for the time being of said plant, if the lease thereof shall so provide, and of the superstructure by the Railway Company, but such new tracks, when completed, exclusive of the substructure thereunder, shall be the property of the Railway Company. All relocations of tracks and other structures that shall be made in the interest of the Railway Company shall be made only in accordance with plans approved by the Steel Company or by said Bethlehem Steel Company or other lessee of said plant; and all relocations of tracks and all new tracks that shall be made at the request of the Steel Company or of said Bethlehem Steel Company or other lessee of said plant shall be made only in accordance with plans furnished by the Steel Company or by said Bethlehem Steel Company or other lessee of said plant."

Paragraph 3rd provides, in part, as follows, at the bottom of page 6:

"The Railway Company shall have the right to construct new station and office buildings and other buildings, stations, and structures for use in operating its railroad at points other
488 than those at which are located the buildings and other structures simultaneously with the execution and delivery hereof sold, assigned, transferred and conveyed to the Railway Company as aforesaid; and to make all such extensions and improvements of the railroad tracks and other structures of the Railway Company located on the land of the Steel Company as the Railway Company shall deem necessary in connection with its business; provided, always, that every such proposed new construction, extension, or improvement shall be approved by the Steel Company or by said Bethlehem Steel Company or other lessee of said plant and shall be done in accordance with plans likewise approved. The cost and expense of all such work (except the cost and expense of the substructure of all extensions and improvements to tracks, switch, shall be borne by the Steel Company or by a lessee of said plant as aforesaid), shall be borne by the Railway Company, and all such structures, improvements and extensions (except the substructure of the extensions and improvements to tracks) shall be its property."

Now, then, paragraph 4, on page 8, provides as follows:

"The Railway Company will maintain the narrow
489 gauge tracks formed by the third rail which now exists upon the standard gauge tracks which the Steel Company simultaneously with the execution and delivery hereof, as aforesaid, has sold, assigned, transferred, and conveyed to the Railway Company, and the Railway Company will construct additional similar narrow gauge tracks by the use of a third rail upon its standard gauge tracks located on the Demised Premises when requested so to do by the Steel Company or by said Bethlehem Steel Company or other lessee of said plant. The cost of constructing such additional narrow gauge tracks shall be borne by, and such tracks shall be the property of, the Railway Company. The Steel Company or said Bethlehem Steel Company or other lessee of said plant shall have the right to connect any of its railroad tracks which shall be located in and about said plant and in the buildings thereof with the tracks of the Railway Company located on the Demised Premises, both standard gauge and narrow gauge, such connections, however, to be made in such manner as shall be approved by the Railway Company."

Then paragraph 8th, beginning at the top of page 10, provides as follows:

490 "In case the Railway Company shall fail or omit to keep and perform any of the convenants and agreements herein contained on its part to be kept and performed, and such failure or omission shall continue for a period of six (6) months, then, and in each such event, the Steel Company may, at its option, terminate this Indenture upon giving to the Railway Company thirty (30) days written notice of its intention so to do, and upon the expiration of such thirty (30) days next following such notice this Indenture shall cease and terminate at the option of the Steel Company unless prior to the expiration of such period such failure or omission shall have been remedied; provided, however, that the Railway Company shall not be regarded as being in default in respect of the payment of any taxes upon the Demised Premises hereinbefore agreed to be paid by it so long as it shall in good faith contest the validity or the amount thereof. The termination of this Indenture in accordance with the provisions of this Article shall not affect or impair the validity of any claim of either party hereto against the other or of said Bethlehem Steel Company or other lessee of said plant against
491 the Railway Company existing at the time of such termination. Upon such termination the Steel Company may enter into and upon the Demised Premises and any and every part thereof and remove all persons therefrom and take possession thereof, and from thenceforth may have, hold, possess, and enjoy the Demised Premises; and all the estate, right, title, interest, property, claim, and demand whatsoever of the Railway Company in and to the Demised Premises shall wholly cease and determine and become void, anything herein to the contrary notwithstanding; subject, however, to the right of the Railway Company, for a period of ninety (90) days after such termination of this Indenture, to remove any of its property then on the Demised Premises, in case the Steel Company shall not have given written notice to the Railway Company within thirty (30) days after such termination of its intention to exercise its option to purchase said property in accordance with the terms of the Sale Agreement. In case the Steel Company shall not exercise its said option, all property of the Railway Company on the Demised Premises not removed as aforesaid during said ninety (90) days shall be
492 deemed to be the property of the Steel Company."

Now, there was just referred to a sale and instrument of sale. Plaintiff's Exhibit 14 is an indenture of sale entered into between the Bethlehem Steel Company of New York and the South Buffalo Railway Company, dated October 10, 1922, and covers the tracks and other properties located on the land that was covered by the lease just introduced as Plaintiff's Exhibit 13. We wish to offer Plaintiff's Exhibit 14 in evidence.

Mr. BROMLEY. No objection.

(The indenture of sale referred to was received in evidence and marked "Plaintiff's Exhibit No. 14.")

Mr. STRANGE. Now, may it please the Court, there is only one provision of this that we wish to call the Court's attention to at this time in the lease, an option for the purchase was referred to and the option is as follows: It appears at the bottom of page 6, beginning at the bottom of page 6 of the indenture of sale:

"The Railway Company agrees that at the expiration or other termination of said Indenture of Lease the Steel Company shall have the option to purchase from the Railway Company the
493 whole or any part of the railroad property of the Railway Company then located on the property of the Steel Company and the whole or any part of the railroad property of the Railway Company then used in handling the traffic (whether interchange or intermill) at said plant. In case the Steel Company shall desire to exercise its said option, it shall, within thirty (30) days after said expiration or other termination of said Indenture of Lease, give to the Railway Company a notice in writing of its said desire to purchase the property in said notice specified, and, such notice having been so given, the Steel Company shall then be bound to purchase such property. In the event that the parties shall be unable to agree upon the price to be paid therefor such price shall be the fair value thereof as it shall be determined by appraisal in the same manner as is provided in Article Eleventh of said Indenture of Lease for determining the value of the land covered thereby for the purpose of fixing the rent payable for the respective periods of the term thereof.

"The Railway Company agrees that, during the term of said Indenture of Lease, it will maintain in first class condition
494 the property hereby sold, assigned, transferred, and conveyed to it, and all additional property which it may acquire for use in connection with the handling of the traffic at said plant, or other property which shall be acquired by the Railway Company to take the place of any thereof; and the Railway Company agrees that, in case it shall sell or dispose of any of said property, or take up or remove any of said tracks, it will promptly thereafter acquire or construct other similar property to take the place of the property so sold, disposed, or taken up, or removed, unless the Steel Company shall waive such requirement. The Railway Company further agrees that it will not place any mortgage or other lien upon any of said property."

The COURT. That applies to the rolling stock, the tracks?

Mr. STRANGE. Well, sir, it applies to the tracks; it applies to all the switches, the scales, whatever may be on there.

The COURT. Yes.

Mr. STRANGE. And it is itemized in this.

Mr. CRAIG. There has been marked as Plaintiff's Exhibit No. 15 the journal voucher, or, I should say, an abstract of the journal voucher of South Buffalo Railway Company, which at this
495 time the plaintiff offers in evidence.

Mr. BROMLEY. No objection.

(The abstract of journal voucher referred to was received in evidence and marked "Plaintiff's Exhibit No. 15.")

Mr. CRAIG. This journal voucher, your Honor, headed "South Buffalo Railway Company" is made as of the date of January 16, 1923, and is for, it is stated to place at original value road and equipment purchases as per Indenture of Sale, dated October 10, 1922. I will not read the figures. At the bottom thereof is this: "Approved for entry, signed F. A. Shick and signed J. F. Findlay." The parties to this action, through their Counsel, have entered into this stipulation: The journal entry for recording on the books of the South Buffalo Railway Company in connection with the purchase of track and equipment under the Indenture of Sale, dated October 10, 1922, was approved by J. F. Findlay, auditor of South Buffalo Railway Company, and F. A. Shick, who, on January 16, 1923, the date of the approval of such journal entry, was Comptroller of Bethlehem Steel Corporation of New Jersey, who is an auditor of Bethlehem Iron & Steel Corporation,

Mr. BROMLEY. I think, Mr. Counsel, that you should point
496 out that on this journal voucher there were entries pursuant to the Indenture of Sale which divided the total purchase prices and the classes of property as shown, road and equipment and plant which, of course, the two auditors had to agree upon.

Mr. CRAIG. I will be glad to read the figures here.

Mr. BROMLEY. Please, please.

Mr. CRAIG. Certainly. There are three columns below that clause that I read about "to place at original value road and equipment purchases as per Indenture of Sale dated October 10, 1922." The first column is "Description." The second column is "Amount" and the third column is "Total." Below the first column appears this: "Debit: Property and Plant: Road $125,921.55, Equipment $175.00, Total $126,096.55." Then in the first column under "Description" is "Credit": "Reserve for Depreciation: Road $125,921.55, Equipment $175.00, Total $126,096.55."

And then I was pointing to the figures and words which
497 I just read. Then at the bottom of the voucher is "Approved for Entry (Signed) F. A. Shick, (Signed) J. F. Findlay."

And, as indicated in the stipulation, it is stipulated that J. F. Findlay at that time was auditor of the South Buffalo Railway

Company, and that F. A. Shick was, at the date of approval, Comptroller of Bethlehem Steel Corporation, a New Jersey corporation, and auditor of Bethlehem Iron & Steel Corporation.

The COURT. What do you claim for the voucher itself? I mean, the bearing that has, irrespective of the sales agreement?

Mr. CRAIG. On October 10, 1922, is the date when the Bethlehem organization, through its corporations, bought from Lackawanna Steel Company the plant and the stock of the South Buffalo Railway Company. And on that very date the new purchaser, the Bethlehem Steel Company, leased to South Buffalo certain land and sold to it the tracks and the other railroad property.

Now, in connection with that sale, as per Indenture of Sale, dated October 10, 1922, this journal voucher of South Buffalo Railway Company was made and it is approved for entry by not only the auditor of the Railway Company but also
498 by the Comptroller of the Bethlehem Steel Corporation.

The COURT. Well, they were both parties to the contract.

Mr. CRAIG. They were both parties to the contract, but it is the Steel Corporation.

The COURT. The significance you attach to it is the signature by the two different representatives?

Mr. CRAIG. It is the approval.

The COURT. Not the form of the voucher itself?

Mr. CRAIG. No.

The COURT. Not the other material in the voucher?

Mr. CRAIG. No.

Mr. STRANGE. We at this time wish to introduce in evidence Plaintiff's Exhibit marked 16, which is a lease of Bethlehem Iron & Steel Corporation, a corporation of the State of New York, the Bethlehem Steel Company, a corporation of Pennsylvania, and the South Buffalo Railway Company, dated October 10, 1923.

Mr. BROMLEY. No objection.

(The lease referred to was received in evidence and marked "Plaintiff's Exhibit No. 16.")

Mr. STRANGE. As heretofore stated, may it please the Court, this lease was entered into to cover other lands
499 than those covered by the 1922 lease. The few lines on that subject state as follows:

"The parties hereto desire that certain of said lands of the Lessor which are not covered by the Steel Company Lease, including the Railroad roadbed thereon, shall be leased by the Lessor to the Railway Company."

And the provisions in this lease are substantially the same as those read to your Honor with regard to the 1922 lease.

I should say that, and which I neglected to say, that the former lease was for a 99-year period and that this lease, Plaintiff's Exhibit 16, roughly, is for 98 years, so that the limitation ends at the same time as to each.

Mr. STRANGE. We at this time wish to introduce in evidence a letter marked "Plaintiff's Exhibit 17," which is a copy, purports to be a copy of a letter dated November 29, 1940, to Mr. F. M. Benning, Vice President and General Superintendent, South Buffalo Railway, Lackawanna, New York, Subject: Track Changes East Side 6 Mill, and purports to have been sent by "General Manager."

Mr. BROMLEY. No objection.

500 (The letter referred to was received in evidence and marked "Plaintiff's Exhibit No. 17.")

Mr. STRANGE. The letter states [reads Exhibit 17]:

Now, we at this time wish to introduce a copy of a letter marked "Plaintiff's Exhibit 18," dated December 31, 1940, purporting to have been sent to Mr. F. M. Benning, General Superintendent, South Buffalo Railway, Lackawanna, New York. Subject: "Track Connection North End of Structural Shipping Yard," and purporting to have been signed by "General Manager."

Mr. BROMLEY. No objection. May I state, your Honor, that I assume it is not necessary for the stenographer to copy the exhibits into the record.

The COURT. No; it is not necessary. Of course, there will be some duplication here by reading the exhibits, of course, if you do.

Mr. BROMLEY. Where he reads parts of an exhibit, I do not myself mind if they are copied into the record, but where he reads the whole of an exhibit which is received, I do not think it should be copied into the record, if your Honor agrees.

The COURT. Well, I do not think it should be necessary to copy into the record that, unless there is some particular point you want to bring out about it.

501 Mr. STRANGE. They are short, may it please the Court, and so closely associated and identified with the leases we just introduced that we thought it would be of aid to the Court in reading it at this time, just a very few lines of each.

The COURT. You may state what it is.

Mr. BROMLEY. I do not object to his reading the exhibits, so long as they are not copied in the record.

The COURT. It is not necessary for the stenographer to take it. State what it is.

Mr. STRANGE. The copy of a letter purports to have been dated December 31, 1940, to Mr. F. M. Benning, General Superintendent, South Buffalo Railway, Lackawanna, New York [reads Exhibit 18]:

We wish at this time to introduce in evidence copy of a letter marked "Plaintiff's Exhibit 19."

Mr. BROMLEY. No objection.

(The copy of letter, dated December 31, 1940, referred to was received in evidence and marked "Plaintiff's Exhibit No. 18.")

(The copy of letter referred to was received in evidence and marked "Plaintiff's Exhibit No. 19.")

(Mr. Strange reads Exhibit 19.)

Mr. STRANGE. The names are merely typed. There are no manual signatures.

502 The COURT. It will be admitted that they sent the letters?

Mr. BROMLEY. Yes, your Honor.

(Whereupon a recess was taken until 2:15 o'clock p. m.)

503 After Recess, 2:15 o'clock P. M.

Appearances: Same as before noted.

Mr. CRAIG. If the Court please, there has been marked as Plaintiff's Exhibit 20 a document supplied by Defendant's counsel to Plaintiff's counsel. It is styled and headed "Executive officers and the chief operating officials of South Buffalo Railway Company from 1922 to 1944," which Plaintiff at this time offers in evidence.

Mr. BROMLEY. No objection.

(Document headed "Executive officers and chief operating officials of South Buffalo Railway Company 1922 to 1944," thereupon was received in evidence and marked "Plaintiff's Exhibit No. 20.")

Mr. CRAIG. I shall not read this document setting forth these names, but I do mention that in the instrument there is indicated who among the named officers and operating officials was in the employ of Bethlehem Steel Company before his association with the South Buffalo Railway Company, and in one instance one person listed herein is an officer of the South Buffalo Railway Company, who later became an employee of the Bethlehem Steel Company.

504 The COURT. You say it is indicated. That, of course, is a conclusion. Is there any question about that?

Mr. BROMLEY. No.

The COURT. There are two, did you say?

Mr. CRAIG. No; there is one individual who was a South Buffalo employee and who later became a Bethlehem Steel Corporation employee. There are a number of individuals who prior to becoming South Buffalo Railway Company employees were employees of Bethlehem Steel Corporation, and it is indicated there.

The COURT. Does that appear from the exhibit?

Mr. CRAIG. Yes, sir.

Mr. BROMLEY. In connection with your last statement, the one man who was an officer or employee of South Buffalo and who later became an employee of Bethlehem Steel Company, that was, of course, after he resigned from South Buffalo. There was no overlapping. He did not hold employment with both companies at the one time.

Mr. CRAIG. No; we don't so contend, and I think the document so clearly indicates. This document only comes down to 1944, and may it be stipulated at this time, Mr. Bromley, that there has been no change in the personnel as set forth in here from the last time indicated on Plaintiff's Exhibit No. 20?

505 The COURT. From 1944?

Mr. CRAIG. Yes, sir; to date.

Mr. BROMLEY. I so stipulate.

Mr. CRAIG. At this time, your Honor, the plaintiff proposes to offer in evidence a number of documents. Some time ago a number of these copies were submitted to counsel for defendants with the request that a stipulation be made as to authenticity, and so forth. A number of other documents have been furnished to counsel for plaintiff by counsel for defendant. So in that connection a stipulation has been entered into, which I shall read.

Communications and documents set forth in Exhibit 200 attached hereto and made a part hereof may, subject to objection as to relevancy and materiality, be introduced in evidence by plaintiff without proof that they respectively were signed by the person or persons by whom they purport to be signed, or that they respectively are true copies of the original documents of which they purport to be copies. Defendants reserve the right to show that any of such documents is not a true copy of the document of which it purports to be a copy. Exhibit 200 sets forth in detail the documents and communications which are included in the stipulation.

506 The COURT. What you mean there is in reference to these letters?

Mr. CRAIG. Yes.

The COURT. Have you gone over these? Is an objection to any of these?

Mr. BROMLEY. No, sir. I do not know what they are, but I do not know of any objection.

The COURT. I thought you had gone all over them.

Mr. CRAIG. I might say, your Honor, that inasmuch as the ones which are admitted, of course, will be part of the record, and in view of the fact that there has been a great deal of reading in this case, unless your Honor feels otherwise, I do not think that the

plaintiff desires to read all of the letters. Maybe we will want to pick out a few over the years.

The COURT. It is not necessary to read any of them as far as that is concerned now, unless you think you should do so to elucidate matters. When Exhibits are offered in evidence, they are before the Court to read.

Mr. CRAIG. There are some letters in here which do refer to matters which have been testified to previously in the case.

The COURT. I understood counsel for the defendant to
507 say that they have not read some of these and their objections only go to certain points, not to the point of their admission, but subject still to their objection as being irrelevant and immaterial, and in other respects, but how are we going to find out about that unless an opportunity is given to counsel to go over them and see what he wants to object to?

Mr. CRAIG. I propose to have them marked as we go along and submit them.

The COURT. There is no need for the reporter copying these exhibits.

Mr. CRAIG. Unless the Court directs otherwise. It may be that some of these we may want to read for purposes of illustration, and only that.

Mr. BROMLEY. I would like to go over these myself, if your Honor please, and I would like to have the reporter with me so that we can mark them so that I can be sure how they are marked.

The COURT. We will take a recess for that purpose.

(Short recess.)

508 Mr. CRAIG. May it please the Court, at the time that we introduced in evidence the copies of the leases between the Bethlehem Steel Company and the South Buffalo Railway Company and the Indenture of Sale, I failed to read a stipulation that the parties entered into; and I think this would be an appropriate time to read it.

"The minutes of the meetings of the Board of Directors and the minutes of the meetings of Stockholders of the South Buffalo Railway Company do not record any action either by the Board of Directors or by the Stockholders relative to the Indenture of Sale and the Lease between Bethlehem Steel Company of New York, Inc., and South Buffalo Railway Company, both dated October 10, 1922, or any action relative to the lease between Bethlehem Iron & Steel Corporation and South Buffalo Railway Company, dated October 10, 1923, on or prior to those respective dates. Nothing herein shall be deemed to preclude the defendants from showing that such minutes do record a subsequent approval of those transactions by both the stockholders and directors of South Buffalo Railway Company."

There have been marked "Plaintiff's Exhibits from 21
509 to 141, inclusive," which at this time the plaintiff offers in evidence.

Mr. BROMLEY. No objection.

(Letter of January 9, 1923, from John M. Gross to W. A. James was received in evidence and marked "Plaintiff's Exhibit No. 21.")

(Letter of January 25, 1923, from James to Gross was received in evidence and marked "Plaintiff's Exhibit No. 22.")

(Letter of January 30, 1923, from Gross to James was received in evidence and marked "Plaintiff's Exhibit No. 23.")

(Letter of January 31, 1923, from James to Gross, was received in evidence and marked "Plaintiff's Exhibit No. 24.")

(Letter of March 8, 1924, from Burns to Burnett, et al, received in evidence and marked "Plaintiff's Exhibit No. 25.")

(Letter of March 12, 1924, from F. M. Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 26.")

(Letter of July 8, 1925, Leonard to Nivin, was received in evidence and marked "Plaintiff's Exhibit No. 27.")

(Letter of July 14, 1925, Shick to Leonard, was received in evidence and marked "Plaintiff's Exhibit No. 28.")

(Letter of March 12, 1926, Mitchell to Benning, three pages, was received in evidence and marked "Plaintiff's Exhibit No. 29.")

510 (Letter of March 15, 1926, Benning to Gross, referred to was received in evidence and marked "Plaintiff's Exhibit No. 30.")

(Letter of March 18, 1926, Gross to Benning, was received in evidence and marked "Plaintiff's Exhibit No. 31.")

(Letter of March 25, 1926, Benning to Mitchell, was received in evidence and marked "Plaintiff's Exhibit No. 32.")

(Letter of May 12, 1928, Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 33.")

(Letter of February 12, 1931, Benning to Gross, was received in evidence and marked ("Plaintiff's Exhibit No. 34.")

(Letter of March 4, 1931, Gross to Benning, was received in evidence and marked "Plaintiff's Exhibit No. 35.")

(Letter of March 25, 1931, Benning to Gross, was received in evidence and marked "Plaintiff's Exhibit No. 36.")

(Letter of May 18, 1931, Benning to Gross, was received in evidence and marked "Plaintiff's Exhibit No. 37.")

(Letter of July 8, 1931, Benning to Gross, was received in evidence and marked "Plaintiff's Exhibit No. 38.".

(Letter of August 26, 1931, Benning to Gross, was received in evidence and marked "Plaintiff's Exhibit No. 39.")

511 (Letter of July 16, 1931, Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 40.")

(Letter of July 31, 1931, James to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 41.")

(Letter of October 6, 1931, Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 42.")

(Letter of November 3, 1931, James to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 43.")

(Letter of December 1, 1931, James to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 44.")

(Letter of December 15, 1931, James to Benning, was received in evidence and marked "Plaintiff's Exhibit No. 45.")

(Letter of January 16, 1932, Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 46.")

(Letter of February 17, 1932, Benning to James, was received in evidence and marked "Plaintiff's Exhibit No. 47.")

(Letter of July 11, 1934, Benning to Burns and Trageser, was received in evidence and marked "Plaintiff's Exhibit No. 48.")

(Letter of July 25, 1934, Burns to Roberts, was received in evidence and marked "Plaintiff's Exhibit No. 49.")

512 (Letter of May 9, 1935, Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 50.")

(Letter, no date, Crawford to Blank (Pick-up and store delivery door), was received in evidence and marked "Plaintiff's Exhibit No. 51.")

(Letter of March 28, 1936, Crawford to Blank (Same heading as No. 51), was received in evidence and marked "Plaintiff's Exhibit No. 52.")

(Letter of April 20, 1936, Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 53.")

(Letter of September 16, 1936, Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 54.")

(Letter of October 26, 1936, Benning to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 55.")

(Letter of November 15, 1936, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 56.")

(Letter of November 26, 1936, Benning to Ensinger, was received in evidence and marked "Plaintiff's Exhibit No. 57.")

(Letter of December 10, 1936, St. Clair to Benning, was received in evidence and marked "Plaintiff's Exhibit No. 58.")

513 (Letter of February 8, 1937, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 59.")

(Letter of February 23, 1937, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 60.")

(Letter of March 19, 1937, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 61.")

(Letter of April 2, 1937, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 62.")

(Letter of May 9, 1937, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 63.")

(Letter of August 14, 1937, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 64.")

(Letter of October 28, 1937, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 65.")

(Letter of August 24, 1937, James to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 66.")

(Letter of February 25, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 67.")

(Letter of February 26, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 68.")

514 (Letter of March 5, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 69.")

(Letter of March 24, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 70.")

(Letter of April 26, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 71.")

(Letter of May 16, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 72.")

(Letter of October 20, 1938, Benning to James, was received in evidence and marked "Plaintiff's Exhibit No. 73.")

(Letter of July 16, 1937, James to Benning, was received in evidence and marked "Plaintiff's Exhibit No. 74.")

(Letter of October 27, 1938, James to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 75.")

(Letter of December 22, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 76.")

(Letter of April 6, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 77.")

(Letter of April 4, 1938, Benning to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 78.")

515 (Letter of June 12, 1936, Benning to Trageser, was received in evidence and marked "Plaintiff's Exhibit No. 79.")

(Letter of June 18, 1936, Trageser to Benning, was received in evidence and marked "Plaintiff's Exhibit No. 80.")

(Letter of September 3, 1943, Comptroller, Bethlehem Steel Corporation to Petty, was received in evidence and marked "Plaintiff's Exhibit No. 81.")

(Letter of September 16, 1943, Petty to Shick, was received in evidence and marked "Plaintiff's Exhibit No. 82.")

(Letter of October 2, 1943, Blank to Dullenkopf, was received in evidence and marked "Plaintiff's Exhibit No. 83.")

(Letter of October 6, 1943, Dullenkopf to Jacobs, was received in evidence and marked "Plaintiff's Exhibit No. 84.")

(Letter of October 6, 1943, Dullenkopf to Daley, was received in evidence and marked "Plaintiff's Exhibit No. 85.")

(Letter of November 17, 1943, Daley to Yardmasters, was received in evidence and marked "Plaintiff's Exhibit No. 86.")

(Letter of March 27, 1941, Petty to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 87.")

(Letter of April 3, 1941, Eckhardt to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 88.")

516 (Letter of July 15, 1943, Cutler to Royer, was received in evidence and marked "Plaintiff's Exhibit No. 89.")

(Letter of July 20, 1943, Royer to Entwisle, was received in evidence and marked "Plaintiff's Exhibit No. 90.")

(Letter of July 23, 1943, Entwisle to Royer, was received in evidence and marked "Plaintiff's Exhibit No. 91.")

(Price List of April 1, 1932, South Buffalo Railway, was received in evidence and marked "Plaintiff's Exhibit No. 92.")

(Price List of April 1, 1932, Steelton Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 93.")

(Price List of April 1, 1932, Cornwall Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 94.")

(Price List of April 1, 1932, Patapsco Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 95.")

(Price List of April 1, 1932, Conemaugh Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 96.")

(Price List of April 1, 1932, Fore River Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 97.")

(Price List of April 1, 1932, P. B. N. E. Railroad, was received in evidence and marked Plaintiff's Exhibit No. 98.")

517 (Miscellaneous Price List of January 1, 1935, South Buffalo Railway, was received in evidence and marked "Plaintiff's Exhibit No. 99.")

(Miscellaneous Price List of January 1, 1935, Steelton Railway, was received in evidence and marked "Plaintiff's Exhibit No. 100.")

(Miscellaneous Price List of January 1, 1935, Cornwall Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 101.")

(Miscellaneous Price List of January 1, 1935, Patapsco Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 102.")

(Miscellaneous Price List of January 1, 1935, Conemaugh Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 103.")

(Miscellaneous Price List of January 1, 1935, Fore River Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 104.")

(Miscellaneous Price List of January 1, 1935, P. B. N. E. Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 105.")

(Price List of January 1, 1936, South Buffalo Railway, was received in evidence and marked "Plaintiff's Exhibit No. 106.")

(Price List of January 1, 1936, Steelton Railway, was received in evidence and marked "Plaintiff's Exhibit No. 107.")

518 (Price List of January 1, 1936, Cornwall Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 108.")

(Price List of January 1, 1936, Patapsco Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 109.")

(Price List of January 1, 1936, Conemaugh Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 110.")

(Price List of January 1, 1936, Fore River Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 111.")

(Price List of January 1, 1936, P. B. N. E. Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 112.")

(Price List of January 1, 1938, South Buffalo Railway, was received in evidence and marked "Plaintiff's Exhibit No. 113.")

(Price List of January 1, 1938, Steelton Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 114.")

(Price List of January 1, 1938, Cornwall Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 115.")

(Price List of January 1, 1938, Patapsco Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 116.")

(Price List of January 1, 1938, Conemaugh Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 117.")

519 (Price List of January 1, 1938, Fore River Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 118.")

(Price List of January 1, 1938, P. B. N. E. Railroad, was received in evidence and marked "Plaintiff's Exhibit No. 119.")

(Memorandum of December 30, 1935, Fatzinger, was received in evidence and marked "Plaintiff's Exhibit No. 120.")

(Letter of November 1, 1930, Gross to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 121.")

(Letter of November 11, 1932, Gross to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 122.")

(Letter of November 28, 1930, James to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 123.")

(Letter of December 15, 1930, Gross to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 124.")

(Letter of November 29, 1932, Gross to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 125.")

(Memorandum of November 29, 1932, Kemmerer to Gross with note of T. Burns, was received in evidence and marked "Plaintiff's Exhibit No. 126.")

(Letter of March 3, 1933, Gross to Burns, was received in evidence and marked "Plaintiff's Exhibit No. 127.")

(Letter of September 1, 1942, Trageser to Ganey, was received in evidence and marked "Plaintiff's Exhibit 128.")

520 (Extract from minutes of Directors meeting of July 10, 1936, was received in evidence and marked "Plaintiff's Exhibit No. 129.")

(Memorandum McMath to Shick, November 5, 1936, was received in evidence and marked "Plaintiff's Exhibit No. 130.")

(Letter, December 29, 1936, Moore to McMath, was received in evidence and marked "Plaintiff's Exhibit No. 131.")

(Letter, December 30, 1936, McMath to South Buffalo Railway, was received in evidence and marked "Plaintiff's Exhibit No. 132.")

(Letter, January 19, 1937, Moore to McMath, was received in evidence and marked "Plaintiff's Exhibit No. 133.")

(Letter, February 2, 1937, McMath to Moore, was received in evidence and marked "Plaintiff's Exhibit No. 134.")

(Letter, February 9, 1937, McMath to South Buffalo, with memorandum of agreement at the foot thereof by Trageser, was received in evidence and marked "Plaintiff's Exhibit No. 135.")

(Journal voucher, January 6, 1937, South Buffalo Railway Co., No. 129, was received in evidence and marked "Plaintiff's Exhibit No. 136.")

521 (Journal voucher, Bethlehem Steel Corporation, No. 479, February 26, 1937, was received in evidence and marked "Plaintiff's Exhibit No. 137.")

(South Buffalo Railway Co. journal voucher No. 155, February 26, 1937, was received in evidence and marked "Plaintiff's Exhibit No. 138.")

(Bethlehem Steel Corporation journal voucher No. 402, January 6, 1937, was received in evidence and marked "Plaintiff's Exhibit No. 139.")

(South Buffalo Railway Journal voucher No. 117, November 2, 1936, was received in evidence and marked "Plaintiff's Exhibit No. 140.")

(South Buffalo Journal voucher No. 118, October, 1936, was received in evidence and marked "Plaintiff's Exhibit No. 141.")

The COURT. Does that cover all of them?

Mr. CRAIG. Yes, all have been marked, your Honor. I have gone through these exhibits rather hastily, your Honor, and I have marked some. Certainly, considering the total amount, a small proportion of the amount of them, which we would like to read, if you would care to hear them. I think some of them will pertain to subjects which have been discussed heretofore;
522 some of them, of course, will not.

This is Plaintiff's Exhibit 25, communication——

Mr. BROMLEY. This reading need not be taken by the stenographer, need it, your Honor?

The COURT. No, I think not, just as long as we have the exhibits here.

Mr. CRAIG. The reading is not for the record.

The COURT. No.

(Mr. Craig reads Exhibit No. 25.)

Mr. CRAIG. Plaintiff's Exhibit No. 29, which is a letter from Seneca Iron & Steel Company to Mr. F. M. Benning, Vice President and General Manager, South Buffalo Railway Company, Lackawanna, New York, dated March 12, 1926.

(Mr. Craig reads Exhibit No. 29.)

The COURT. What do you claim for a letter of that length? Is that a letter from the Seneca Company to the Railroad Company?

Mr. CRAIG. Yes. It is preliminary, your Honor.

The COURT. I cannot see how that shows any connection between the Railroad Company and the Corporation.

Mr. CRAIG. Well, there are letters immediately following which I propose to read, in which the Railroad Company wrote Mr. Gross for advice.

The COURT. Is that directed to the Railroad Company?

523 Mr. CRAIG. Yes, sir. The first letter is from the Seneca Iron & Steel to the Railroad Company. The second letter is from Mr. Benning, the Vice President of South Buffalo to Mr. J. M. Gross, of Bethlehem, whom the testimony has brought out is connected with the Bethlehem Steel Company, concerning this matter.

"March 15, 1926. Mr. J. M. Gross, G. T. M., South Buffalo Railway Company, Bethlehem, Pennsylvania."

The COURT. South Buffalo?

Mr. CRAIG. That is the way he is addressed in this letter.

The COURT. But you said he was connected with the Bethlehem.

Mr. CRAIG. That is the testimony, but this is an illustration of how the thing worked back and forth, regardless of what the position was.

The COURT. What was his position at that time?

Mr. CRAIG. 1926, as I recall, he testified he was General Traffic Manager of Bethlehem Steel Company.

Mr. BROMLEY. Or the subsidiary companies—I have forgotten which.

Mr. CRAIG. But not of the Railway Company.

Mr. BROMLEY. No.

Mr. CRAIG. There is no testimony here that he had any official connection with the South Buffalo.

The COURT. Would there be any reason why it would be
524 directed to him as an official of the Railway Company?

Mr. CRAIG. You mean addressed as such?

The COURT. Would there be any reason for that?

Mr. CRAIG. Well, of course, we contend the reason is that the South Buffalo people looked to him for guidance, although he had no official connection with the Railway Company, he was with the Steel Company. Nevertheless, the Railway people were addressing him as if he were connected.

The COURT. It would be superficial to try to cover up anything in that way, because his position was definite as one employed by the Steel Company.

Mr. CRAIG. That is true, your Honor, but here we have the situation where the subsidiary, which is supposed to be independent, taking a problem concerning a shipper other than Bethlehem Steel Company, to Mr. Gross of the Steel Company.

The COURT. Proceed.

Mr. CRAIG. "Mr. J. M. Gross, G. T. M., South Buffalo Railway Company, Bethlehem, Pennsylvania." [Reads Exhibit No. 30.]

Then Plaintiff's Exhibit 31 is a letter—we have a photostatic copy of it—it is headed "South Buffalo Railway Company, from John M. Gross, General Traffic Manager, to Mr. F. M.
525 Benning, General Superintendent of Traffic, South Buffalo Railway Company, Lackawanna, New York."

(Mr. Craig reads Exhibit No. 31.)

Mr. CRAIG. Then a letter, dated March 25, 1926, from Benning, General Superintendent, to Seneca Iron & Steel Company.

(Mr. Craig reads Exhibit No. 32.)

Mr. CRAIG. Plaintiff's Exhibit 35, a letter of March 4, 1931, from J. M. Gross, Vice President, to Mr. F. M. Benning, General Superintendent, South Buffalo Railway Company, Lackawanna, New York.

(Mr. Craig reads Exhibit No. 35.)

Mr. CRAIG. Plaintiff's Exhibit No. 47, being a letter from F. M. Benning, General Superintendent, to Mr. W. A. James, Chief Engineer, South Buffalo Railway Company, Lackawanna, New York, dated February 17, 1932.

(Mr. Craig reads Exhibit No. 47.)

Mr. BROMLEY. May I ask, Counsel, that I might know what his position about that letter is?

Mr. CRAIG. Well, it indicates that Mr. Burns, who was the Bethlehem Company Plant Manager, had approved the disposition of two locomotives belonging to South Buffalo Railway Company.

Mr. BROMLEY. Don't you realize that Mr. Burns was going
526 to use them as scrap, Mr. Craig? The Steel Plant was going to use them as scrap?

Mr. CRAIG. I don't know what the Steel Company was going to do, but I take it they were South Buffalo locomotives, and he had approved of the disposition of them.

Mr. BROMLEY. He was going to buy them and use them as scrap.

Mr. CRAIG. Well, maybe he was going to buy them, but our contention is that he approved the disposition of them by the South Buffalo Railway Company.

Plaintiff's Exhibit 48, a communication from F. M. Benning, General Superintendent, to Mr. T. Burns, General Manager, and Mr. P. A. Trageser, President, dated July 11, 1934.

(Mr. Craig reads Exhibit No. 48.)

527 (Mr. Craig reads Plaintiff's Exhibits Nos. 49, 56, 57, 59 and 69.)

(Mr. Strange commenced the reading of Plaintiff's Exhibit 81.)

The COURT. What do you claim for a letter of that character? Would not the corporation be entitled to a report of the financial condition of the railway company in order to make its report as a holding company?

Mr. CRAIG. Yes. We are about to read the detailed information that they want. Of course, this is connected with the accounting practice of considering the operations of the company as distinguished from the payments of any dividends, and it goes far beyond, we think, the relationship which ordinarily exists between shareholder and company. It goes into much more detail.

The COURT. Do you mean it gives them any direction as to dividends?

Mr. CRAIG. No. You see this letter is written in 1943 after the purported reformation of 1940, but considering the reformation——

The COURT. The letter itself standing alone would be of
528 no significance. It would only be the necessary thing for the comptroller of the corporation to have a financial statement from the subsidiary.

Mr. CRAIG. Considering their type of bookkeeping. Of course, we contend——

The COURT. It would be proper to direct them to follow some method of bookkeeping practice which was accurate, or something which disclosed the true condition of the company.

Mr. CRAIG. I think, for instance, in the instruction it tells them what forms to fill out. It is headed "Statement of Information Desired Periodically as stated from South Buffalo Railway Company," and it sets it forth in very considerable detail as to forms, and so forth. That is it is a very specific minute direction as to how to furnish this information.

The COURT. I suppose the corporation would be entitled to every minute detail as far as it bears on the operation of the subsidiary.

Mr. CRAIG. And they wanted much of the information very much. They are keeping, we think a very close tab as to what goes on, and closer than is usual between a stockholder and the corporation.

The COURT. I do not know. Of course, ordinarily, the
529 holding company ought to be commended for keeping a close watch of its subsidiaries.

Mr. CRAIG. It is a question when it goes over from watching closely to supervision. We think especially in view of what has happened in the past in connection with other financial transactions that while it is not spelled out specifically here, in view of those previous transactions, it can be inferred from this that they are still looking after the finances of the subsidiary.

Mr. BROMLEY. I do not think that counsel ought to call this memorandum a direction. It was merely a request, and I hope you will read the answer of the railway company as long as you have read the request.

Mr. CRAIG. We plan to read that immediately after this document, Mr. Petty's answer to the Corporation.

(Mr. Strange continues and finished reading Plaintiff's Exhibit 81.)

The COURT. It seems to me it is unnecessary to read these forms in detail. You can't remember and keep in mind all those things. If we have in mind the point you have made as to what the differences are, whether they are following the request of the corporation, or whether they are not, that is one thing. The point is, I suppose, whether they did yield to the request of
530 the corporation in making the report. I cannot carry those in my mind.

Mr. STRANGE. No, sir; the idea was simply to give your Honor a general idea of the precisenes and the extent to which these reports were required of the railroad company by the corporation. If I may read the reply of Mr. Petty, President, which is only a few lines——

The COURT. Yes.

Mr. STRANGE. The original letter was to Mr. Petty by the Comptroller. Now, this is Mr. Petty's reply.

The COURT. I understand. Of course, I cannot very well retain in mind all those details. The letter, of course, may be all right.

Mr. STRANGE. The letter is dated September 16, 1943, from D. M. Petty, President, to Mr. F. A. Schick, Comptroller, Bethlehem Steel Corporation, 25 Broadway, New York, New York [reading].

(Mr. Craig reads Plaintiff's Exhibit 120).

531 Mr. CRAIG. And in connection with that document, there has been a stipulation entered into between Counsel as follows: "C. J. Fatzinger, Auditor, South Buffalo Railway Company and of the other six subsidiary railway companies of Bethlehem Steel Corporation named in the amended complaint, sent a copy of the memorandum addressed to all Chief Clerks by C. J. Fatzinger to the Chief Clerk of the South Buffalo Railway Company and a copy thereof also to the Chief Clerks of each of the other subsidiary railroads on or about December 30, 1935."

Now, your Honor, I had intended to but I think I shall omit the reading of rather extensive communication and documents concerning the Northern Operating Corporation branch line that we have had discussed here this morning. It is interesting but there is a great deal of it.

The COURT. You make a statement as to what you claim in that respect. Maybe it would be of aid, the material parts of them. It would be a waste of time to read them all.

Mr. CRAIG. Well, the first is a letter from John M. Gross, Vice President, to T. Burns, General Manager, Lackawanna. It

432 is on the letterhead of South Buffalo Railway Company. It is dated November 1, 1930. It takes up a discussion, as I recall it, of our position in using the railroad of the Northern Operating Company and it speaks about securing of a permanent right-of-way and it says that one of the compensations is the elimination of rentals now paid to the Northern Operating Corporation which during the years 1926 to 1929 averaged $4,693 per annum.

The COURT. Are these letters in evidence too; 141?

Mr. CRAIG. Yes. This is Exhibit 121 which I am referring to.

And Plaintiff's Exhibit 122 is a letter on the letterhead of South Buffalo Railway Company from John M. Gross, Vice President, to Mr. T. Burns, General Manager, Lackawanna, New York, dated November 11, 1932, in which he says in part: "As soon as our preliminary facts have been assembled we will see that you are informed of the possibilities in the situations and after that has been done we will do whatever is necessary in order to make more secure the position of South Buffalo Railway Company between the two parcels of property which it owns which are occupied

by the property now owned by the Northern Operating Company."

533 Then a communication from W. A. James, Chief Engineer, to T. Burns, General Manager, dated November 28, 1930, on letterhead of Subsidiary Companies of Bethlehem Steel Corporation.

The COURT. Burns was the General Manager of the——

Mr. CRAIG. Of the Steel Company.

The COURT. Of the Steel Company; yes.

Mr. CRAIG. Yes, sir. In which he says, in part: "As you know, this right-of-way is our only means of connection to Seneca Iron & Steel Company and the Corrugated Bar Plants, for which connection we pay approximately $4,600 per year."

A letter dated November 29, 1932, from John M. Gross, Vice President, to Mr. T. Burns, General Manager, Lackawanna, New York, which is on the letterhead of South Buffalo Railway Company; and he asks, as I read it here, for your opinion as to what action should be taken, if any, in order to make the South Buffalo's position in the use of this property more secure. "Your opinion at your convenience will be appreciated."

That is Plaintiff's Exhibit 125.

The COURT. Was the title to the land taken by the Company or the Railroad? The title to the land, by whom was that taken?

534 Mr. CRAIG. It says, Mr. Gross, in writing Mr. Burns, says: "I am enclosing a memorandum which briefly outlines all of the facts which are in our possession concerning the South Buffalo's use of these lines and in order that we can treat with this subject intelligently we should have your estimate of the answers to the following questions."

There are five questions. One starts out, "What is the life of the Seneca and the Kalman plants expressed in years? Do your real estate people know of any other lands which are now controlled by the Northern Operating Company which might be sold if the South Buffalo moves to acquire the property which is now being used," and so forth, and it winds up "and your opinion as to what action should be taken, if any, in order to make the South Buffalo's position in the use of this property more secure."

Mr. BROMLEY. Did you answer the question? The Steel Company bought the plant.

The COURT. That is what I wanted to know.

Mr. CRAIG. Well, eventually it did.

Mr. BROMLEY. Certainly it did.

Mr. CRAIG. There is no question about it. But I want to develop what took place leading up to that.

535 The COURT. The Railroad speaks to them of the use of the land in that letter.

Mr. CRAIG. Yes, and of course there is talk about making South Buffalo secure in the connection there between the tracks down at the Seneca Plant and its main line.

The COURT. That land would be the same footing as the land within the old plant, would it not, where they permit the Railroad to put rails on the land? The land is owned by the corporation?

Mr. CRAIG. Yes. Of course, here the Bethlehem Steel people, who are taking care of making South Buffalo's position secure, that is, they are discussing it; they are not discussing in the part that I am referring to——

The COURT. That is a letter from the South Buffalo.

Mr. CRAIG. No, it is on the South Buffalo letterhead, but it is from John M. Gross to Mr. T. Burns, both Bethlehem people.

Then finally I am omitting some of these documents concerning the same matter. South Buffalo Railway Company, 1275 Daly Avenue, Bethlehem, Pennsylvania, September 1, 1942, Plaintiff's Exhibit 128, from Paul A. Trageser, First Vice President, to Mr. P. J. Ganey, Manager, Real Estate Department, Bethlehem

536 Steel Company. [Reads Exhibit No. 128.]

I am approaching the end. The only ones that I have left, I think they are quite important, relate to those financial transactions in 1936. That is, the first is the matter of the payment of interest by South Buffalo on its indebtedness to Bethlehem Steel Corporation but limited to South Buffalo's income and providing there would not be any carry-over if South Buffalo's income is not sufficient to pay the interest in a given year. I think it will be unnecessary, with that statement, to read the fairly extended excerpt from the minutes of the Board of Directors of South Buffalo Railway Company, in which that arrangement was set forth and approved.

The COURT. You do not mean by that there was any release of payment of interest? It was postponed from year to year?

Mr. CRAIG. No, sir. As I read it, if the income was not sufficient in the year to pay the interest, it was not to be carried over.

The COURT. I took it the other way from your statement. In other words, not to be paid?

Mr. CRAIG. Not to be paid.

Mr. BROMLEY. That was a 6% interest, wasn't it, Mr. Craig?

537 Mr. CRAIG. 6% interest and subject to the conditions which I mentioned.

Mr. BROMLEY. That is why the arrangement was made.

Mr. CRAIG. I don't know why. I know what the fact was.

The COURT. 6% was not so out of line a few years ago. It is now.

Mr. CRAIG. Now, the last batch I have here are in connection with the contribution of $1,900,000 in 1936. And I think, your Honor, that that is of sufficient importance and interest to be read, and there are not any memoranda attached; that is, they are straight letters.

Plaintiff's Exhibit 130, Bethlehem, Pennsylvania, November 5, 1930, from R. E. McMath, Vice President, to F. A. Shick, Vice President. This first letter appears to be in connection with the smaller contribution. Your Honor will recall there were two contributions in 1936.

(Mr. Craig reads Exhibit No. 130.)

Mr. CRAIG. Now, a letter going over to the larger transaction now, a letter from Hoyt A. Moore and Robert E. McMath, dated December 29, 1936, Exhibit 131.

(Mr. Craig reads Exhibit No. 131.)

Mr. CRAIG. Then a letter from Bethlehem Corporation by R. E. McMath, Vice President, to South Buffalo
538 Railway Company, Lackawanna, New York, dated December 30, 1936, Plaintiff's Exhibit No. 132.

(Mr. Craig reads Plaintiff's Exhibit No. 132.)

The COURT. What does that say, do not take the issue of stock by a certain time as to make an advance, it will be a contribution—is that the substance of it?

Mr. CRAIG. Yes. It says: "We realize that you desire to have the $1,900,000 at an early date and in any event, and we hand you our check, and it is part of our agreement if you shall not be able to complete the issue and sell to us at par the additional shares of your capital stock of the aggregate par value of $1,900,000 as of the date of the confirmation by you of the agreement as herein set forth, then the enclosed check shall be deemed to be a contribution by us to you in the amount thereof, as of the same date."

This letter is dated December 30, 1936.

The COURT. What reason would there be why they did not issue stock?

Mr. CRAIG. Well, it is part of that situation, as Mr. McMath explained in his deposition, it had to be done by the end of 1936, they said, in order, in their opinion, to put South Buffalo
539 in a position to declare that dividend. That is, if it were not declared it was thought that the Undistributed Profits Tax would apply and they thought that with this large debt of some two million dollars outstanding it had to be cut down.

And below Mr. McMath's signature.

(Mr. Craig reads from the exhibit.)

Mr. CRAIG. Then Plaintiff's Exhibit 133 is a letter from Hoyt A. Moore to R. E. McMath, Vice President, Bethlehem Steel Company, on the letterhead of Cravath, Swayne and Moore, 15 Broad Street, New York, January 19, 1937, South Buffalo Railway Company increase of capital.

Mr. Craig reads Plaintiff's Exhibit 133, 134, and 135.

(Whereupon a recess was taken until Friday, January 25, 1946, at 10 o'clock a. m.)

547 Proceedings of Friday, January 25, 1946, 10 O'clock A. M.

Appearances: Same as before noted.

Mr. CRAIG. If the Court please, the Counsel for the respective parties have entered into a stipulation which I will ask the court reporter to read.

(The court reporter read the stipulation as follows:)

It is hereby stipulated between the attorneys for the respective parties hereto that for the five-year period ending December 31, 1945, the average annual business of defendant South Buffalo Railway was divided approximately as follows on the basis of revenue received:

70% was received from defendant Bethlehem Steel Company and 30% was received from the other shippers on the line of the South Buffalo Railway.

Mr. CRAIG. If the Court please, there has been marked as "Plaintiff's Exhibit No. 142" a document headed "Data Compiled from Annual Reports of South Buffalo Railway Company to the Interstate Commerce Commission." At this time the plaintiff offers its Exhibit 142 in evidence.

The COURT. What year is that? What period does that cover?

Mr. CRAIG. Well, it covers from the year ended June 30,
548 1903, to the year ended December 31, 1944.

Mr. BROMLEY. No objection.

(The document headed "Data Compiled from Annual Reports of South Buffalo Railway Company to the Interstate Commerce Commission, referred to, was received in evidence and marked "Plaintiff's Exhibit No. 142.")

PAUL A. TRAGESER, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. CRAIG.

Q. You are Paul A. Trageser, a Vice President and Director of South Buffalo Railway Company, are you not?

A. Yes, sir.

Q. You have testified previously in this proceeding?

A. Yes, sir.

Q. Mr. Trageser, at the present time the offices of the seven subsidiary railroads of Buffalo Steel Corporation are in one building, are they not, at Bethlehem, Pennsylvania?

A. Yes, sir.

Q. That building is owned by one of the subsidiary railroads, is it not?

A. Yes, sir.

Q. And which one of the roads?

A. Philadelphia, Bethlehem & New England Railroad.

649 Q. How long have the offices of the subsidiary railroads been in that building?

A. Since about July 1940.

Q. Where were the offices of the subsidiary railroads prior to that time?

A. In a building at 701 East Third Street, Bethlehem, Pennsylvania.

Q. Who owned that building?

A. Bethlehem Steel Company, as far as I know.

Q. Were there any offices in there except the offices of the subsidiary railroads?

A. The general offices of the Bethlehem Steel Company.

Q. Was that the main office of the Bethlehem Steel Company at Bethlehem?

A. Yes, sir.

Q. Do you know how long the offices of the railroad had been in that building—offices of the railroads?

A. No; I don't know how long they had been in that building. As far as I know, they had been in the building for a period of ten years.

Q. That is, ten years prior to 1940?

A. Yes, sir.

Q. As I understand it, the present practice in paying the salaries, or any other compensation, to the officers of these

550 seven subsidiary railroads is for each railroad to make out its own check to the person who is receiving the compensation; is that correct?

A. That is correct.

Q. So far as you know, has that always been the practice of paying the compensation?

A. I don't know whether it has always been the practice: It has been the practice for at least eight or nine years.

Q. What was the practice prior to that time, so far as you know?

A. The practice prior to that time, so far as I know, was for one of the railroads to pay and to bill the proportion allocable to the other railroad to the railroads.

Q. Let us see if I understand that: One of the subsidiaries, do I understand correctly, would pay the total amount of compensation to the officer, due for the given period?

A. Which subsidiary do you mean? Subsidiary railroad?

Q. Subsidiary railroad.

A. Yes, sir.

Q. Which railroad did that?

A. Philadelphia, Bethlehem & New England.

Q. And, then, do I understand that the Philadelphia, Bethlehem & New England Railroad billed the other six subsidiary railroads for their proportionate share of the total amount paid to the officers?

A. That is my recollection.

551 Q. Mr. Trageser, in the Bethlehem property west of the Hamburg Turnpike it is true, is it not, that at a number of points the tracks of the South Buffalo Railway Company and Bethlehem Steel Company join? Is that correct?

A. That is not only true in the territory west of the Hamburg Turnpike, but it is also true in the territory east of the Hamburg Turnpike.

Q. Are there any kinds of markings to indicate where those junctions take place?

A. Yes, sir.

Q. What are those markings?

A. Plates on the ties.

Q. What kind of plates, and do they have any words on them?

A. S. B. Ry., I think, is on the plate. It is a small plate.

Q. When were those plates installed?

A. To the best of my recollection they were installed in 1941.

Q. And prior to that time was there any marking of that or a similar nature to indicate the point of junction?

A. Physically on the ground?

Q. Yes.

A. At some places; yes.

Q. What proportion would you say?

A. The smaller proportion of the total. I don't know what proportion, but the smaller proportion of the total. We

552 are confining ourselves to physical markings on the ground, I suppose?

Q. Yes.

A. Of course, you understand that the railroad maintained currently and kept up to date very carefully in its office prints showing the division of the ownership of the track.

Q. I am talking only about the physical markings.

A. Yes; that is what I thought. Yes.

Q. How did you put it as to the amount?

A. I said the smaller proportion of the total number of places where the track of the Railway Company and the Steel Company join.

Q. Can you come any closer than that in your estimate?

A. I am very sorry. I can't.

By the COURT:

Q. Where the track joined on, say, what purpose did it serve in joining them? Did it lead into some part of a building or some of the buildings or some of the structures there?

A. Your Honor, those are side tracks taking off from the track of the railroad, like the side tracks on any railroad, and those marks were put on not because we thought it was necessary, but because some of the people connected with the Interstate Commerce
553 Commission who had been making an investigation there suggested that that might be a good thing to do.

Q. My point was, was there any significant purpose in joining the two, or was it just a build-up of the system?

A. A build-up of the system. Of course, the tracks had to join physically so that the railroad could continue its operation with the cars that it had to move.

Q. I am speaking about where these different plates were put in.

A. Just a small plate that was attached to the tie.

Q. The track itself, part of the track was designated as you have suggested here as part owned by the Railroad Company?

A. Yes, sir.

By Mr. CRAIG:

Q. Mr. Trageser, as you know there has been introduced in evidence Plaintiff's Exhibits 1 and 2, being the two map, the exhibit 1 being the map dated January 1, 1945, and exhibit 2 being the map dated, I believe, October 15, 1945, and I believe you have indicated previously, or we have mentioned the fact that there are differences between those two maps.

A. Yes, sir.

Q. Mr. Trageser, between those two maps will you state whether or not there was any relocation of South Buffalo
554 tracks insofar as operations with Bethlehem Steel Company are concerned?

The COURT. Made when?

Mr. CRAIG. Between the dates on the two maps.

A. The only one I can recall, Mr. Craig, that falls within that category is a track change at what has been referred to as the

structural shipping yard of the Steel Company and the mills of the Steel Company to the north of the structural shipping yard serving that yard.

Q. That was a relocation of the South Buffalo track?

A. That is right.

Q. The South Buffalo Railway Company procured the permission of Bethlehem Steel Company to make that relocation?

A. It was not necessary for South Buffalo to procure the permission of Bethlehem Steel Company to make that location.

Mr. CRAIG. Just a minute. I move that that answer be stricken as not responsive.

The COURT. "Yes" or "No" is the answer.

The WITNESS. No.

By Mr. CRAIG:

Q. Now, will you state whether or not there was any change in the Bethlehem Steel track which has been referred to generally here as the track formerly belonging to the Northern
555 Operating Company and purchased by Bethlehem Steel Company?

A. Yes; there has been.

Q. The South Buffalo Railway Company had nothing to do with that, did it?

A. No.

Q. And that change has not affected your use of track whereby you have the connection with your main line and the track in the so-called Seneca Division?

A. No.

556 Q. Mr. Trageser, I want to go back just a moment to the matter of the markings at the point of junction where the Bethlehem Steel tracks and the South Buffalo tracks met and prior to the time you said that these metal markings were placed. What kind of markings were at any of those points of junction prior to the time you put on these metal plates which you have described?

A. Some of the rails were marked—and, of course, you understand that the plates were put on not only at the junctions between the Bethlehem Steel Company tracks and the South Buffalo tracks but also at the junctions between all of the side tracks of all of the industries on South Buffalo.

Mr. CRAIG. Your Honor, I move that latter part of the answer be stricken.

The COURT. It may go out as not responsive.

Q. I am interested in——

A. Marks on the rails. In direct answer to your question——

Q. Yes; can you tell us of what those markings consisted?

A. No, I cannot. All I know is that there were marks at some places.

Q. You said you were having difficulty in getting a better approximation of less than half or to that effect that those junctions were marked. Are you able to state whether that was as low as 20% of the total of the junctions?

557 A. Yes; I would be willing to say that was as low as 20% of the total of the junctions.

Q. Any lower than that?

A. Yes, lower than that.

Q. How low?

A. Well, I think perhaps as low as 10%.

Q. As low as 5%?

A. No.

Q. As low as 10%?

A. Yes.

Mr. CRAIG. You may examine.

Cross-examination by Mr. BROMLEY:

Q. When these metal plates were affixed to the ties, were they affixed at the point where your track joined the tracks belonging to industries other than Bethlehem Steel Company?

A. Yes, sir.

Q. And did the same situation exist at those industries which had no connection with Bethlehem Steel Company, insofar as the joining of the tracks is concerned?

A. Yes; tracks joined the South Buffalo tracks there just the same as they did the conjunctions between the tracks of the Bethlehem Steel and the South Buffalo.

Q. And that is the same situation as exists on all trunk
558 lines wherever there are side tracks running in to industries, is it not?

A. Yes, sir.

Q. In other words, the Railroad owns the track up to some point or other as it leads in to the industry and beyond some point the industry owns the tracks?

A. Yes, sir.

Q. That is universal practice everywhere in the United States, is it not?

A. So far as I know.

Q. Directing your attention to the time when the South Buffalo offices in Bethlehem were in a Bethlehem Steel-owned building, what is the fact as to whether the offices were or were not physically separated in some manner, if any, from the offices of the Steel Company?

A. Well, they were in a room or group of rooms physically separated from offices of the Steel Company.

Q. And those rooms, or group of rooms, were marked as the offices of the South Buffalo Railway, were they not?

A. Yes.

Q. Directing your attention to the tracks in the area west of the Hamburg Turnpike shown on the map in the area of the Lackawanna plants of the Steel Company: Can you tell us generally what tracks were covered by Exhibits 13 and 16, which
559 were the leases of 1922 and 1923 of the land on which those tracks rested? Just generally, what tracks were they?

A. Well, they were the yard leads and passing tracks and yard tracks.

Q. Which, by reason of the lease and the Indenture of Sale, have resulted in the Bethlehem Steel Company owning the land and leasing it to the Railway Company?

A. That is right.

Q. And the Railway Company owning the tracks on the land?

A. That is right.

Q. Now, I want to know whether that arrangement thus embodied in those leases Exhibits 13 and 16 in any way affected your main line track in that area?

A. Oh, no, no.

Q. And who owns and has always owned the land under your main line track west of the Hamburg Turnpike?

A. South Buffalo Railway.

Q. And am I correct in saying that the main line track of the South Buffalo Railway west of the Hamburg Turnpike is the track located on the land which runs along the Hamburg Turnpike to the west of it and finally crosses it to the north?

A. That is right.

Q. And both that track and the land under it is owned by the Railway, is it not?

560 A. That is right; as far as I know always has been.

The Court. I thought you had referred to these, what appears to be main lines, running in the plant property, as part of the main line. Does it branch off from the Hamburg Turnpike? Do you refer to them?

Q. I point, in response to his Honor's question, to that part of the main line which goes north from the WYE and up in there [indicating]. Who owns the land under those main line tracks?

A. The South Buffalo Railway.

The Court. And how about that, from that point, from the point you indicate, up the other way, up to the Hamburg Turnpike?

Mr. Bromley. From here to here [indicating on map]?

The Court. Yes.

Mr. BROMLEY. From the WYE to the Hamburg Turnpike?

The COURT. Yes.

Q. Who owns that?

A. South Buffalo Railway.

The COURT. I did not know whether you were distinguishing the land along the Hamburg Turnpike from that within the confines of the property of the corporation or company as main line.

Mr. BROMLEY. No, sir. I wanted to indicate that all the main line is owned by the Railway, wherever it is.

561 That is right, is it not?

The COURT. I wanted to know what you mean to apply to main line.

Q. When I say "all the main line" you mean, do you not, Mr. Witness——

The COURT. I suppose that that is off the property, I assume.

Mr. BROMLEY. Yes.

Q. And everywhere else?

A. Yes.

The COURT. That line runs down to the Seneca station, do you call that a part of the main line too?

The WITNESS. That is the Northern Operating line.

The COURT. The lower part?

The WITNESS. The Seneca you said, your Honor?

The COURT. Yes; or to the Cement?

The WITNESS. Oh, the Federal Portland Cement Company?

The COURT. The Federal Portland Cement Company.

The WITNESS. No; that is not owned by South Buffalo.

Q. And that is not main line?

A. No.

The COURT. That is what I mean.

Q. Mr. Craig mentioned the Northern Operating Company, and I direct your attention to Exhibits 121 to 128, which are letters having to do with the eventual purchase of that piece of

562 isolated track from the Northern Operating Company, owned by the Nickel Plate Company, by the Bethlehem Steel Company. Are you familiar generally with that situation and did you have something to do with it?

A. The purchase by the Steel Company?

Q. Yes.

A. No; I had nothing to do with that.

Q. Did you have anything to do with respect to any attempts, if any were made by the Railway Company, to buy that land and track from the Nickel Plate?

A. Yes; I endeavored to buy it.

Q. For the Railway Company?

A. That is right.

Q. And that was before the purchase by the Bethlehem Steel Company?

A. Oh, about four or five years before.

Q. What did you do with respect to your attempt to buy it for the Railway Company?

A. Conferred with the President of the Nickel Plate Railroad in Cleveland, and afterwards Mr. Benning and I conferred with the Vice President of the Nickel Plate Railroad in Buffalo, and received from them an offer to sell it to the Railway Company.

Q. At what figure, do you remember?

A. $80,000.

563 Q. And what was your decision, as you expressed to them, with respect to that offer?

A. Entirely too much money and that we could not justify the purchase of the line as presently operated or as far as any prospective operation in the future was concerned at any such figure.

Q. And did you refuse the offer?

A. Well, not formally. We just didn't do anything about it. I think I spoke to Mr. Brook, the President of the Railroad afterwards, and told him that $80,000 was entirely too high and we were not interested at any such figure; and never heard anything more from them.

Q. Did anyone connected with Bethlehem Steel Corporation or Bethlehem Steel Company ever tell you that you should not buy the property, that they wanted to buy it?

A. No, sir.

Q. Did you ever confer with anybody or receive any directions from anybody from the Steel Corporation or the Steel Company as to whether or not the Railroad should or should not buy that property?

A. No, sir.

Q. And was it your decision and the decision of your other officers, if any were involved, that the Railway could not pay that price and did not desire the property?

A. Mr. Benning, his assistant and I, made the decision.

Mr. BROMLEY. That is all.

564 Redirect examination by Mr. CRAIG:

Q. Mr. Trageser, you have spoken of the fact that the main line of the South Buffalo Railway Company which you have described is on land owned by South Buffalo Railway Company, and that includes the main line west of the Hamburg Turnpike at other places. Now, it is a fact, isn't it, that the other track of South Buffalo Railway Company west of the Hamburg Turn-

pike is on the ground leased from the Bethlehem Steel Company by South Buffalo Railway Company under the leases referred to?

A. Yes, sir.

The COURT. Do you mean all of it, including your main line?

Mr. CRAIG. No; I said, excepting the main line.

By Mr. CRAIG:

Q. That takes in, of course, the tracks shown on the two maps west of the Hamburg Turnpike, shown in white, except the main line?

A. Yes; that is right.

Q. I want to get it clear in this connection about what you say the main line is. I think we have been over it, but I want to get it cleared up. Do I understand that west of the Hamburg Turnpike the main line toward the north end of the map crosses the Hamburg Turnpike generally from east to west, and
565 then parallels the Hamburg Turnpike on the west side, coming down to what has been called the Y and near the car repair shop; that is main line, isn't it?

A. Yes, sir.

Q. And then the main line turns in an easterly and then in a northerly direction as you have heretofore described? I am omitting for the present any extension of the main line beyond the Y. On this Plaintiff's Exhibit 2, which is the map of October 15, 1945, will you state of the South Buffalo track shown paralleling the Hamburg Turnpike on the west side how much of that track or how many of the tracks shown are main-line track?

A. Well, according to this exhibit, one of them; and that is the main line.

The COURT. What is the width of the right-of-way there?

The WITNESS. I ought to be ashamed that I can't answer that question, but I would say 13 feet.

By Mr. CRAIG:

Q. But that main line is the only line which is on land owned by South Buffalo west of the Turnpike; isn't that correct?

A. Yes, Mr. Craig.

Mr. CRAIG. That is all.

566 CHARLES F. DULLENKOPF, a witness called by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Dullenkopf, you are a vice president and a director of South Buffalo Railway Company, are you not?

A. I am.

Q. And also general superintendent of the Railway?
A. Yes, sir.
Q. How long have you held those positions?
A. Since September 1, 1943.
Q. And prior to that time what was your occupation?
A. Vice President and superintendent of the Philadelphia, Bethlehem & New England Railroad at Bethlehem, Pennsylvania.
Q. That is a subsidiary railroad of the Bethlehem Steel Corporation, is it not?
A. It is.
Q. And how long had you been on that railroad?
A. Approximately 11 years.
Q. Prior to that time what had been your occupation?
A. Various positions with the Bethlehem Steel Company.
Q. How long had you been with the Bethlehem Steel Company?
A. Approximately 24 years.
Q. Will you tell us in general what your duties were with
567 the Bethlehem Steel Company during that period?
A. For a time as a foreman on raw material handling, scrap handling, assistant superintendent of the Yard Department, and finally superintendent of the Yard Department of the Bethlehem Steel Company.
Q. At what plants of the Bethlehem Steel Company had you worked?
A. The Bethlehem plant.
Q. At Bethlehem, Pennsylvania?
A. At Bethlehem, Pennsylvania.
Q. I will ask you whether or not when you came to South Buffalo in the capacities which you have described, whether or not you found a situation existing at the structural shipping yard of Bethlehem Steel Company at the Lackawanna Plant whereby a South Buffalo locomotive was especially assigned to perform services there?
A. I was advised that occasionally there was some such condition.
Q. Who advised you of that?
A. Our various operating people.
Q. Did you investigate the situation yourself?
A. Only by question to them.
Q. Question to whom, your operating people?
A. That is right.
Q. And what did you find that situation to be?
568 A. That there was occasional periods of time wherein the locomotive of the South Buffalo Railway was standing by and rendering some service, but it was also in a majority the nat-

ural sequence of no one wanting to do any work unless it was wholly supervised.

Mr. CRAIG. Will you repeat the last part of the answer?

(The reporter read, as follows: "But it was also in a majority the natural sequence of no one wanting to do any work unless it was wholly supervised.")

Mr. CRAIG. I move that that part be stricken, your Honor.

The COURT. Strike it out.

Q. Did I understand you to say that the engine stood by? Is that your terminology?

A. The engine was idle.

Q. Now, do I get this to be the situation, that there was at the structural yard a South Buffalo engine and crew; is that right?

A. That is right.

Q. At this time which you mention? And that engine and crew stood there for work at the structural shipping yard; is that correct?

A. Stood there and of their own accord wanting to stay there to perform such work as was wanted by the Bethlehem Steel Company as well as the Railway.

Q. After the engine and crew would finish one piece of
569 work at the structural shipping yard for the Steel Company, do I understand that then the engine and crew would stand by awaiting further orders from the Steel Company to be executed?

A. There was the natural question as to whether the crew of their own accord or whether under the natural sequence of not wanting to do any work stood there.

Mr. CRAIG. Your Honor, I move that answer be stricken.

The COURT. I think that is not responsive. Read the question.

(Last question read.)

The COURT. Just "Yes" or "No".

The WITNESS. I do not know.

By Mr. CRAIG;

Q. But you do know that the engine and crew stayed there and didn't undertake any other jobs, don't you?

A. That is right.

Q. And they stayed there until a further order came from the Bethlehem Steel Company people at the structural shipping yard for work to be done at the yard; isn't that correct?

A. That was their natural preference, yes.

Mr. CRAIG. I move that part about the natural preference be stricken.

The COURT. It is not a question of their natural preference.

570 Strike it out.

Q. Isn't that the fact?

A. I was so informed.

Q. As a result of your investigation?

A. That is right.

Q. Which you made among your own South Buffalo people?

A. That is right.

Q. You ordered that practice discontinued, didn't you?

A. I did, sir.

Q. How soon after you found out about it?

A. Oh, in the matter of several days.

Q. And why did you order it discontinued?

A. Chiefly because it was not a proper economical point, and, secondly, if they were standing by it was not an arrangement that I felt was proper.

Q. What was not proper about it?

A. Any locomotive crew at any time standing by.

Q. That is, that engine and crew should have been doing other tasks if available, shouldn't they?

A. If in the opinion of the management, yes.

Q. And it was your opinion as General Superintendent that that engine and crew should be doing other things, wasn't it?

A. Just as well as any crews at any time, yes.

Q. After your order was given isn't it a fact that the
571 orders issuing from the Steel Company concerning this structural shipping-yard work were then handled without having an engine to stand by to await orders from the Company?

A. The orders from the Bethlehem Steel Company were given direct to the yardmaster, so that he may properly supervise the work.

Q. But thereafter you didn't have a South Buffalo engine and crew standing by to await the orders from the Steel Company concerning the structural shipping yard work, did you?

A. We did not. The orders were given to the yardmaster.

Q. Mr. Dullenkopf, I hand you Plaintiff's Exhibit 19, and ask you to read that, please.

(Handing to witness.)

(Witness reads to himself.)

Mr. Craig. Your Honor, this is the letter from E. F. Entwisle, General Manager of the Steel Company, to Mr. Dullenkopf as Vice President and General Superintendent of South Buffalo, in which Mr. Entwisle says that in connection with the Steel Company's operations that a certain mill, No. 14 Mill, "We (the Steel Company) are considering an eastward extension of the buildings now identified as covered runways numbers 3 and 4 of the structural shipping yard and that the proposed building extension

572 will make necessary rather extensive track alterations," and they enclose prints of a drawing colored to show the changes required in the Steel Company trackage and prints colored to show that changes were required in Railway Company tracks, and it follows on, "Please let us know at your earliest convenience if the Railway Company is in a position at the present time to service the proposed lay-out. In the meanwhile we are issuing our miscellaneous purchase order (giving the number) to cover the proposed work, so that if you approve there will be no delay in the beginning of the work." That is May 29, 1945.

By Mr. CRAIG:

Q. Are you able to state whether or not the South Buffalo did the work mentioned in this letter?

A. The major portion of it I am of the opinion has been completed.

Q. To the best of your knowledge it has been done?

A. That is right.

Q. And by South Buffalo Railway Company?

A. The South Buffalo Railway Company performs track work for anyone that requires that. In this case we did.

Mr. CRAIG. I move that the first part of the answer be stricken.

The COURT. Yes. You did perform the track work there?

573 A. That is right.

Mr. CRAIG. You may examine.

Cross-examination by Mr. BROMLEY:

Q. The Railway performs track work for any of its shippers, if requested, doesn't it?

A. It does.

Q. And this particular track work was occasioned by the fact that the Bethlehem Steel Company was enlarging one of its mills; is that so?

A. That is correct.

Q. And in order to serve the enlarged mill they wanted additional tracks built or tracks moved?

A. Correct.

Q. Now, this situation that you say you found existing at the structural shipping yard of the Bethlehem Steel Company was nothing more than a situation of your men loafing on the job, was it?

A. It was.

Q. And you gave orders to the yardmaster to see to it that, if they had nothing to do at the structural shipping yard instead of loafing, they should go to work somewhere else?

A. Yes, those orders were given to all of the supervisory force.

Q. And in your answers which were stricken out, what you

574 were attempting to say was that you have more trouble with labor now than you used to have?

Mr. CRAIG. Just a moment.

The WITNESS. We always have.

Mr. CRAIG. Just a moment.

The COURT. He stated what they did. I think that is sufficient.

Mr. BROMLEY. All right. That is all.

By the COURT:

Q. To what extent does this exist, occasionally or continuously or intermittently?

A. I would say, your Honor, intermittently. The volume of it I wouldn't know.

Q. Sometimes they would lay there at the mills at one point where they should be in service you thought at other points?

A. That is right.

Redirect examination by Mr. CRAIG:

Q. Over how long a period of time had this condition existed?

A. That I wouldn't know myself.

Q. Well, you made your investigation, didn't you?

A. I made the investigation, but I did not question as to over what length of period of time that it had occurred. My thought was with having improper practices or loafing

575 discontinued to a proper extent.

Q. At the time, as a matter, you know, don't you, as a result of your investigation among your own people that that had been going on since in the month of May 1943, don't you?

A. I was advised by our people that it had been going on for some period of time, but I have not had any impression formed in my mind as to what period of time that was.

576 Q. It wasn't a matter of a few days, was it?

A. Oh, no. It was a matter of probably several months.

Mr. CRAIG. That is all.

Mr. BROMLEY. That is all.

Mr. STRANGE. May it please the Court, we wish at this time to offer that part of a deposition of Robert J. VanDusen, which was taken at Buffalo, New York, November 27, 1945.

"Q. Mr. VanDusen, are you employed——

The COURT. Just a moment. Is there objection to this?

Mr. BROMLEY. Yes. I think it is all immaterial.

The COURT. Well, the point I had in mind was the question of the reading of the deposition, the time it takes. I think the deposition will have to be read by the Court, otherwise he would be derelict in his duty. You bring out the points to connect his testi-

mony with. Of course, it will be covered, I presume, by your brief. Point out what the material parts of the testimony are. It will save time.

Mr. STRANGE. It is not a very long deposition, may it please the Court, and deals generally with operating conditions on and about the South Buffalo Railway Company yard, particularly with that method and manner of the assemblying of cars for movement up on the High Line of the yard, the location of
577 which has heretofore been pointed out to your Honor; and as to other matters relating to the operating details, indicating the extent to which the services are rendered for the Bethlehem Steel Company.

The COURT. For the control, you mean? Service is one thing.

Mr. STRANGE. Well, we will contend that, from the very nature of the services and from the incidents, that control would be inferred.

The COURT. What I had in mind was not simply this deposition. You have read, of course, for the time being, these long depositions here. I presume there may be other depositions as well offered by the Government. Are those to be read, or the direct testimony? Are those depositions to be submitted?

Mr. CRAIG. Well, there will be some other depositions. As a matter of fact, your Honor, we could put Mr. Van Dusen on the stand. Counsel for both sides agreed that this perhaps would be a little more expeditious than putting the witness on the stand.

The COURT. If he is not put on the stand, the testimony is in by the introduction of that deposition. That is the point. What I was trying to do was to arrive at something that might save time, without jeopardizing the rights of the parties. You will naturally brief the points that you seek to support.

578 Mr. CRAIG. I think that if Counsel for the defendants are willing to waive the objections which ordinarily would be made as we go along in taking the testimony of a witness, in reading these depositions, as far as we are concerned the entire deposition may go in.

The COURT. Of course, objections may be interposed, I cannot tell. If your objection relates to immateriality alone, the testimony relates to the subject stated, I think it might be of substance.

Mr. BROMLEY. May it please your Honor, I am perfectly willing to have your Honor read the deposition and state on the record that I object to each and every question in it on the ground of immateriality only. May I say in that connection all this deposition shows is that the Bethlehem Steel Company orders loaded cars by car number and that this switching railroad assembles those

cars in the order ordered on the switching order, a practice which every railroad does, for which our Railroad is paid. We deliver the cars to the consignee in that order, something that is ordinary practice everywhere, and something we get paid for under our tariffs.

The COURT. I will receive the evidence for what it may be
579 worth. Have you the pages there? You said part of the deposition.

Mr. STRANGE. We intended to offer that part of the deposition composed of the direct examination.

The COURT. Of this Witness VanDusen?

Mr. STRANGE. VanDusen.

The COURT. All right. Received in evidence.

Mr. STRANGE. Shall I read it, may it please the Court?

The COURT. No, that is not necessary.

Mr. CRAIG. I take it the same situation applies here, that it may be considered that each side adopts as its own the questions propounded by Counsel, respectively?

The COURT. I suppose that is true. That is the rule, that is true.

Mr. CRAIG. Yes.

Mr. BROMLEY. May it please the Court, I offer the cross and and re-cross.

Mr. STRANGE. And we offer the redirect.

The COURT. Very well. The deposition, when does it appear that was taken?

Mr. STRANGE. That was taken in Buffalo on November 27, 1945.

The COURT. Before whom, what stenographer?

Mr. STRANGE. Harvey D. Forbes.

The COURT. All right. He is present. Mark that, then.

(The deposition of Robert J. VanDusen referred to, com-
580 posed of pages 68 to 88, inclusive, was received in evidence and marked "Plaintiff's Exhibit No. 143.")

Mr. BROMLEY. Your Honor, the whole deposition, direct, cross, redirect and re-cross has one number as 143?

The COURT. Oh, yes.

CHARLES E. KEW, a witness called by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Kew, what is your connection with the South Buffalo Railway Company?

A. Assistant General Superintendent.

Q. How long have you held that position?

A. Since October 1941.

Q. I want to direct your attention to the period from June 1 to June 10, 1943, inclusive, and ask you to state whether or not it is a fact that cars consigned to Bethlehem Steel Company and coming to it from line haul carriers and received by South Buffalo at interchange were held for periods at interchange or were held in interchange and were in transit to Bethlehem Steel Company for periods varying from about 110 hours to over 200 hours?

Mr. BROMLEY. I object to that as immaterial.

581 Mr. CRAIG. It is preliminary, your Honor of course.

The COURT. Overruled. The period of time you state is between what dates?

Mr. CRAIG. June 1 and June 10, 1943.

The COURT. What do you say as to that?

The WITNESS. That is, between 100, and how many hours, Mr. Craig?

Q. Between 110 hours and over 200 hours.

A. That is possible that they were, yes.

Q. Do you recall approximately how many cars were involved in this procedure which I have described?

A. I don't recall just off-hand. We handled a lot of cars during that period.

Q. Well, I am talking about the ones that were either held in interchange or were at interchange and in transit for this length of time.

A. That would include cars of all commodities?

Q. Yes.

A. To the Bethlehem Steel Company as a single consignee?

Mr. BROMLEY. I did not hear you.

The COURT. Speak up louder.

The WITNESS. I am sorry. I have a sore throat. That would include cars of all commodities to the Bethlehem Steel Company only?

Q. Yes.

582 Mr. BROMLEY. Do you know anything about this, Mr. Witness?

The WITNESS. It would be very vague to me, Mr. Bromley, because it involves without records before me.

The COURT. Your testimony must be to your knowledge, you see, what you know about it. That is what the inquiry is.

Q. What is your answer? I did not get it.

A. It would be over 250 cars.

Q. Most of those cars involved, as I have described, were cars of coal, were they not?

A. That would probably have comprised the bulk.

Q. What other commodities would be involved, or were involved?

A. I would not rightly recall. I think coal would have been the principal commodity during that period, June 1 to June 10, 1943.

The COURT. You mean by your answers that during that period 250 cars were held on the tracks of the South Buffalo Railway or switches for a period of 50 to 200 hours? 250 cars were so involved? I do not just get your answer clearly.

The WITNESS. It would have been that many at least, I imagine; yes, sir.

Mr. CRAIG. And held for 110 to over 200 hours.

The COURT. Yes.

583 By Mr. CRAIG:

Q. But these other commodities, state whether or not some of those cars were cars containing scrap?

A. To the best of my knowledge there would have been some.

Q. And weren't there some cars of steel in there, too?

A. Well, steel principally on the South Buffalo is an out-bound commodity. You asked me for cars on in-bound as I understood it.

Q. Well, I will take it, let us confine it to in-bound. Probably no steel in the in-bound cars?

A. I would not think there would be any; no, sir.

Q. State whether or not there were some cars of coke involved also on the in-bound?

A. That is probable.

Q. Will you state concerning the out-bound traffic during this same period, June 1 to June 10, 1943, whether or not it is a fact that some cars consigned from Bethlehem Steel Company, which were to be delivered at interchange to line haul carriers, were in transit from the Steel Company to interchange, including the stay at interchange, of 100 hours to more than 200 hours?

A. I cannot properly answer the question, only in that my general knowledge would be that there would probably have been cars retained in transit that long.

Mr. BROMLEY. Well, I move to strike it out as incompetent.

584 The COURT. Strike it out.

Mr. CRAIG. All right.

Q. Directing your attention to the in-bound traffic in these cars of at least 250, isn't it a fact, Mr. Kew—I will ask you to state whether or not it is a fact that South Buffalo Railway Company received notice from the Interstate Commerce Commission of an

order concerning the delivery of coal to consignees and under what conditions it should or should not be delivered?

A. Yes; we did receive such an order.

Q. And do you recall when that order was received or notice of that order?

A. June 2d, to the best of my knowledge. I am not too clear on that exact date. It was during the period of June 1, 1910. That I do recall.

Q. How long was that order in effect, if you recall?

A. Until June 5 or 6, to the best of my knowledge. For a period of about two and one-half days in total, I believe.

Q. Yes. That is as far as you were concerned, in effect, in the neighborhood of 55 to 60 hours, was it not?

A. In that neighborhood; yes.

The COURT. Your claim for this is this would advance the interest of the Corporation?

Mr. CRAIG. Yes, sir; the way it worked out. More the
585 Company than the Corporation, of course, in its operations.

The COURT. Well, we had the question before here involving some violation of the regulations in keeping these cars.

Mr. CRAIG. Well, we are endeavoring to establish through this and through other things that there was a cooperation between the Railroad and the Company, which goes beyond the usual service rendered by common carriers to a shipper; a degree of cooperation which goes beyond that line.

The COURT. Well, of course, that would charge the overtime in to the benefit of the Corporation, would it not?

Mr. CRAIG. This, sir, is not connected with the——

The COURT. Demurrage?

Mr. CRAIG (continuing). Matter of demurrage or per diem.

The COURT. Why not?

Mr. CRAIG. We do not make any claim in this connection relative to that.

The COURT. Well, the Railroad had to pay demurrage if they kept these cars over a certain length of time, did it not?

Mr. CRAIG. This particular aspect of the evidence is not concerned with the matter of demurrage between the Railroad and the Steel Company. This is a matter of what we consider to be an unusual accommodation.

586 The COURT. For the Corporation?

Mr. CRAIG. For the Steel Company by the Railroad. We are not making any claim of any erroneous charges, your Honor.

The COURT. Well, I was speaking about whether, if there had not been any arrangement and had been a regular charge for demurrage, it resulted at least in some financial benefit to the—well, of course, it would be to the shipper.

Mr. CRAIG. Yes. We are not in that field, however.

The COURT. All right. How much allowance was given for delivery of cars on the tracks of the long haul line before you have got to pay demurrage?

The WITNESS. How much allowance does the South Buffalo Railway Company give a shipper or a consignee?

The COURT. Yes, how long a time.

The WITNESS. 48 hours' free time to unload a car.

By Mr. CRAIG:

Q. Now, as a rule, Mr. Kew, in your operations with Bethlehem Steel Company, when a car of coal, or a number of cars of coal, come to you at interchange from line haul carrier, consigned to Bethlehem Steel Company, how long does it take you to move that car from interchange to point of delivery to the Steel Company?

587 A. That would be a highly variable figure, Mr. Craig. It would depend on what railroad delivered the car to us, what type of commodity it might be, the eventual destination.

Q. I am talking about coal.

A. Oh. The coal alone to the Bethlehem Steel Company?

Q. Yes.

A. Well, there, again, volume of traffic would have to do with it, and the manner in which the traffic might be delivered to us by the delivering carrier. In many cases we might get coal in rather long drafts, so that it could be moved quickly, without any attempt made to make up a specific train of coal; in other cases we might get an occasional car spread out amongst all types of freight at interchanges, and in order to make up a cut of coal to go up to the Bethlehem Steel Company's car dumper—if that is what you are speaking of—it would take much longer.

588 Q. Well, wherever the point of delivery is?

A. That would be the principal point of delivery.

Q. Well, do you make it a practice not to deliver coal to Bethlehem Steel Company after you receive it at interchange for a period of 110 hours to over 200 hours?

A. Yes; we don't make it a practice. It would be probable that such a condition may exist in certain types of traffic.

The COURT. They have the right to keep that track 48 hours, don't they?

A. That would be at the consignee's unloading point, your Honor, not on our rails. In the normal course of switching of cars some cars may take longer than others for us to deliver eventually to a consignee.

The COURT. I had this in mind: I thought your railroad had the right to hold that car for 48 hours, did it not, without paying any demurrage?

The WITNESS. No; your Honor, demurrage has nothing to do with the railroad itself. Demurrage is strictly up to the consignee after he receives the car. Demurrage does not apply to the railroad itself from an operation standpoint.

The COURT. From one railroad to another?

The WITNESS. No; there is no demurrage. The subject of demurrage does not enter into the movement of a car
589 from one railroad to another.

The COURT. If it was held more than 48 hours the consignee then pays the overcharge, the demurrage?

The WITNESS. If he has received the car, yes.

The COURT. If he has received the car?

The WITNESS. Yes, sir.

Mr. CRAIG. Your Honor, there has been marked as Plaintiff's Exhibit No. 144 a certified copy of service order No. 120 of the Interstate Commerce Commission, which the Plaintiff offers in evidence at this time.

Mr. BROMLEY. No objection.

(Certified copy of service order No. 120 of the Interstate Commerce Commission was received in evidence and marked as "Plaintiff's Exhibit No. 144.")

Mr. CRAIG. That order is what is known generally as a coal freeze order. It was issued at various times during the war, and at this particular time it was in effect generally in the period as described by Mr. Kew in the forepart of June 1943. I have certified copies as to the time when the Interstate Commerce Commission made it effective and released it. Perhaps I had better offer those in evidence before I discuss the matter further.

There has been marked as Plaintiff's Exhibit No. 145 a
590 certified copy of service order 120–C of the Interstate Commerce Commission terminating this coal freeze order on the 4th day of June 1943. There has been marked as Plaintiff's Exhibit 146, certified copy of service order No. 120–B of the Interstate Commerce Commission making effective the so-called coal freeze order on the first day of June 1943, but I think Mr. Kew testified that the railroad did not actually receive notice of it until June 2nd. Isn't that right?

The WITNESS. No; I didn't testify to that, Mr. Craig.

By Mr. CRAIG:

Q. Didn't you express an opinion on that, your recollection?

A. I said as near as I could recollect it was about the end of June that we received the notice. I wasn't sure of the exact date.

Q. But to the best of your knowledge from the time you received notice of its being made effective until the time of revocation, it was in the neighborhood of 55 to 60 hours?

A. That is correct.

Mr. CRAIG. At this time Plaintiff offers its exhibit 145 as heretofore described.

Mr. BROMLEY. No objection.

(Certified copy of service order No. 120–C of the Interstate Commerce Commission was received in evidence and marked as "Plaintiff's Exhibit No. 145.")

591 Mr. CRAIG. And also offers its exhibit 146 as heretofore described.

Mr. BROMLEY. No objection.

(Certified copy of service order No. 120–B of the Interstate Commerce Commission was received in evidence and marked as "Plaintiff's Exhibit No. 146.")

Mr. CRAIG. Now, your Honor, under that coal freeze order which was in effect at the times indicated it provided, among other things, in effect, that no common carrier by railroad subject to the Interstate Commerce Act shall deliver any carload of bituminous coal to a consignee unless and until the consignee or person eligible to receive the coal under the terms of a War Production Board order shall certify to the railroad that he has less than ten days' supply of bituminous coal on hand. If I have omitted any pertinent provisions I am sure counsel will call my attention to it, but I think that is the part we are interested in at the present time.

By Mr. CRAIG:

Q. Will you state, Mr. Kew, whether or not as a matter of fact these cars which you have described as being held in interchange and in transit for the periods of time mentioned were held and the time was consumed as the result of this so-called coal freeze order?

592 Mr. BROMLEY. I object to that as incompetent, because calling for a conclusion.

The COURT. If you can show what directions were given in this respect, all right, any directions that were given with reference to this proposal. If you can show that by this or some other witness what the directions were, all right.

Q. I will ask you this, Mr. Kew: I will ask you to state whether or not it is a fact that after this coal freeze order went into effect and you got notice on June 2d that the South Buffalo did have at interchange or in transit cars of coal, bituminous coal, consigned to Bethlehem Steel Company?

The COURT. Did have what, did you say?

Mr. CRAIG. Cars of bituminous coal consigned to Bethlehem Steel Company.

The COURT. You said something about interchange.

Mr. CRAIG. Well, cars which South Buffalo had received at interchange from the line-haul carriers, of course.

The WITNESS. The question, as I understand it, Mr. Craig, was, was it a fact that the South Buffalo Railway Company had cars of bituminous coal on its tracks for the Bethlehem Steel Company at the time that the coal freeze order went into effect.

Q. Yes.

593 A. Yes.

Q. And will you state whether or not it is a fact that after the coal freeze order came into effect that South Buffalo received at interchange from the line-haul carriers other cars of bituminous coal consigned to Bethlehem Steel Company?

A. That is correct.

Q. And it is true also, isn't it, that at the time the coal freeze order went into effect and after it went into effect that South Buffalo had received from the line-haul carriers at interchange cars of other commodities consigned to Bethlehem Steel Company?

A. Yes, sir.

Q. And isn't it true that those cars are included in the at least 250 cars which you say were held at interchange or were in transit for this period of 110 hours to over 200 hours?

A. I can only answer without reviewing the record that it is possible.

Q. Don't you know that to be the fact that those cars were involved?

A. It would be possible; yes. I don't know how many cars.

Q. Aren't you quite sure of that?

By the COURT.

Q. Were there some?

594 A. Yes, sir.

By Mr. CRAIG.

Q. Now, isn't it true that the reason that cars of commodities other than bituminous coal which were at interchange or in transit consigned to Bethlehem Steel Company, as you have heretofore described, were not delivered because of the tie-up of cars of bituminous coal which you held as the result of this coal freeze order, cars of coal consigned to the Bethlehem Steel Company?

Mr. BROMLEY. I object to that.

The COURT. Well, as I said before, I think you should show what action was taken by somebody in authority in that respect, some direction. If there was nothing done about it, that is one thing. If there was a direction to hold these cars, that is another thing.

Mr. CRAIG. I will try to approach the situation from another angle.

By Mr. CRAIG:

Q. Now, I will ask you to state whether or not it is true that South Buffalo Railway Company did not deliver the cars of bituminous coal consigned to Bethlehem Steel Company and to which you have referred, and which you have described, because of the existence of this coal freeze order?

595 Mr. BROMLEY. I object to that as incompetent, because calling for a conclusion.

The COURT. Your position was what?

The WITNESS. Assistant General Superintendent.

The COURT. What are your duties in that respect?

The WITNESS. As an assistant in general charge of the operation of the railway.

By Mr. CRAIG:

Q. Does that include the matter of the getting of cars to and from interchange which are consigned to or from Bethlehem Steel Company?

A. Yes, sir.

The COURT. If you can show that he was directed by somebody in authority to deliver these cars, all right, or whether he gave a direction or not to deliver them. You may show that.

By Mr. CRAIG:

Q. You are acquainted with this situation which we have been discussing, aren't you?

A. I am.

Q. It is part of your job to order when cars are to be delivered to Bethlehem Steel Company, received at interchange, cars of coal, for instance, to see that those cars get from interchange to be delivered to Bethlehem Steel Company?

596 A. That would be a portion of my responsibility as well as of all other industries in general——

Mr. CRAIG. I move that be stricken out, about other industries.

The COURT. He is speaking about Bethlehem. It would be your duty with respect to Bethlehem?

The WITNESS. Yes.

By Mr. CRAIG:

Q. And likewise it is part of your job to see that those cars, which are consigned by Bethlehem Steel Company and which are to be delivered to the line-haul carriers at interchange, that those cars are gotten from the Steel Company and taken to interchange and delivered to the line-haul carriers; isn't that so?

A. That is right.

Q. And during this period in June, including up to June 10th, it normally would have been a part of your duties to have directed the delivery of those cars of coal and other commodities which you have described to Bethlehem Steel Company, wouldn't it?

A. Yes, sir.

Q. Now, isn't it a fact that during the period we are talking about and during the period that these cars were held that you did not direct those cars to be delivered?

A. Under the order; yes.

597 Q. Well, it is a fact that that was the action or inaction that you took; isn't that true?

A. Yes.

Q. And that was because of the existence of this coal freeze order, wasn't it?

A. That is correct.

Q. And why did you not order that coal delivered to Bethlehem Steel Company?

Mr. BROMLEY. I object to that for the same reason. It is incompetent because it is a conclusion.

Mr. CRAIG. I think he knows why he did not act in what I understand is the usual way about getting the coal to the Bethlehem Steel Company.

The COURT. I will let him state. I assume he is under the authority of the General Superintendent.

Mr. CRAIG. I understand it is part of his duty to see that those cars get from interchange and be delivered to Bethlehem Steel Company.

The COURT. I will let him state. What reason was there, if any, why the cars weren't delivered?

The WITNESS. Because of the coal freeze order which was issued by the Interstate Commerce Commission prohibiting the railway delivering bituminous coal to consignees on its line.

By Mr. CRAIG:

598 Q. I will ask you to state whether or not, Mr. Kew, you knew as a matter of fact that it was possible for other users of coal to gain possession of shipments of coal which the consignee of that coal was not eligible to receive, did you not?

A. That is correct.

Q. And you knew, didn't you, that you, as a carrier subject to this order and subject to the Interstate Commerce Commission Act and to the Commission, could not deliver that coal to a consignee unless the consignee certified that he had less than a ten-day supply of coal on hand? You knew that, didn't you?

A. As I understand your question, I knew that a consignee could not receive coal unless he had proper certification of less than ten days' supply; was that the question?

Q. Yes.

A. Yes; I knew that.

Q. And the Bethlehem Steel Company never did certify in that way, did it?

A. No, sir.

Q. So that therefore you did not deliver the coal to it; isn't that correct?

A. That is correct.

Q. Isn't it a fact that you held these cars of coal on
599 your own tracks after you received them at interchange?

A. That is correct.

Q. And isn't it a fact that as a result of the holding of these cars of coal that you were unable to move to the Steel Company cars containing other commodities which were consigned to it and which you had received at interchange from line-haul carriers?

A. No.

Q. Well, there were other cars of commodities, isn't it so, which you held during this period for $100 or more, either at interchange or in transit before you delivered them?

The COURT. He has already said there were some of these cars in that number of cars held at the time.

Mr. CRAIG. Yes.

By Mr. CRAIG:

Q. Do I understand you to say that the length of time consumed there was not because of your holding of these coal cars?

A. Not in the direct sense that the question was put to me, I don't believe, Mr. Craig.

Q. Was it in any way?

A. It would only have been through a congestion which might be created, and it wouldn't have prohibited the South
600 Buffalo Railway from delivering the cars in its normal sense of switching.

Q. I don't mean, of course, under the order, but I mean as a practical effect of your holding of coal cars these other cars containing other commodities were held up and not delivered, were they not?

A. Because caused by congestion of the holding of coal cars; is that the implication?

Q. Yes.

A. Yes.

Q. What, if any, attempt did you make, that is, did South Buffalo make to find out whether or not any other shippers on your line had less than a ten days' supply of bituminous coal on hand?

A. The South Buffalo reported to the Commission each day the number of cars of coal held for all consumers or consignees on its line, and what attempt was made by consignees in applying to the Commission I wouldn't know. We received nothing that I recall from the Commission.

Mr. CRAIG. I move that that answer be stricken. I want to find out what the South Buffalo did to find consignees.

The COURT. He answered that the South Buffalo reported to the Interstate Commerce Commission, they reported the cars they had on hand. That was responsive.

By Mr. CRAIG:

Q. I will put this question: Did you do anything beyond
601 that which you have described in attempting to find other persons on your line, other shippers, who had less than a ten-day supply of bituminous coal on hand?

Mr. BROMLEY. I object to that as immaterial. There is no showing he had any duty to do it.

The COURT. That is probably so. It would not be his obligation as assistant superintendent there to look up possible users of this coal.

Mr. CRAIG. You are discussing it from the standpoint of competency; is that right, your Honor?

The COURT. Yes, competency and materiality. On the face of the record here it would not appear that he had any authority to make such an investigation.

Mr. CRAIG. As I understand it, we have got two things here: One is the materiality, and the other is the competency of this witness. Of course, when it comes to materiality I think the testimony here is that these coal cars were held and it caused a congestion in the South Buffalo yards, and for the moment waiving the matter of competency that there was no attempt made to clear that up by finding other persons on their line who could use that coal, or doing anything with it.

The COURT. The point is any effort made by whom?

Mr. CRAIG. By the South Buffalo Railway Company.
602 The COURT. I do not think that you can assume any obligation on the part of an assistant superintendent to control cars on the line in that period, to look up consignees for an excess of coal. It might be the superintendent over him.

Mr. CRAIG. I will try to approach it from the superintendent.

By Mr. CRAIG:

Q. Mr. Kew, I want to discuss for a moment your system of getting information for the computation of demurrage charge by South Buffalo Railway to Bethlehem Steel Company prior to January 11 or thereabouts, 1944. Now, t l me what system you followed in gathering your information on which you based those demurrage charges.

A. How far prior to January 11, 1944?

Q. Well, take it a year before, or pick your own time. It makes no difference to me.

A. When I first came to the South Buffalo in 1941, the practice which was in effect at the time was for a standing yard check to be made such as is standard on most trunk lines by men actually in the field who would check the placement of cars standing in various yards in the industries and the South Buffalo Railway tracks daily, and would record that information on indi-
603 vidual car record cards in the car record office, at which point the car record was used by the car record clerical staff to compile the necessary information for the collection of demurrage charges, but as the war went on——

Q. Just a moment, before we get this shift-over. As of what time each day was that check made?

A. As of 7 A. M. each morning.

Q. That is the dividing line each day for demurrage purposes, isn't it?

A. That is correct.

Q. Do I understand that South Buffalo would send out these various persons who would make an actual physical check of the various yards to ascertain the location of various cars; is that right?

A. That is correct.

Q. Take for instance, the property of Bethlehem Steel Company west of the Hamburg Turnpike, there is shown on these maps the various tracks of South Buffalo Railway Company and the Bethlehem Steel Company; is that right?

A. That is correct, of all consignees.

Q. That was the system in effect when you came with the Railway?

A. That is correct. That is pretty much of a universal system as far as trunk-line railroads are concerned.

Q. I think you were saying as time went by or something——

604 A. During the year 1943 we lost most of these younger men who did this actual physical yard check work to the army. The result was that we were getting a very poor quality of boys, mostly 15 and 16 and 17 years old, or 16 and 17 years old,

in that neighborhood, who were making these checks in the yard, and we found after a few months of that that we weren't getting accurate checks, and the only system which we could then go to, which would be reasonably accurate, would be to set up a system of transcribing the conductor's switch list records, which show——

Q. May I go back a moment?

Mr. BROMLEY. May he finish his answer, your Honor?

Mr. CRAIG. Your Honor, there is a change in the method here, and I wanted to get, if I could——

The COURT. You have asked him about the method.

Mr. CRAIG. Not about the new method. He is about to switch over——

The COURT. He is telling you about the new method.

Mr. CRAIG. Well, let him go ahead, and I will pick it up.

By Mr. CRAIG:

Q. Proceed.

A. We utilized a system of transcribing the card written record of the conductor himself on what we call a switch list, showing the car number, the car ownership, the final destination of the
605 car, of the track from which that particular conductor moved the car, and the track to which he moved it, and the approximate time at which the movement was made. We copied that information into a book record in the car record office manually, and it gave us a fairly comprehensive record for the calculation of demurrage and other charges to be assessed against customers on the line, but we found that the system involved a vast amount of manual recording and extremely bulky volumes of information were being compiled that were difficult to utilize properly. I believe that change actually took place about January 1944, when we actually swung over to the recording of the information from conductor's switch lists in the office. The condition was brought about all during the year 1943 by a decline in the type of man we had in the field who would previously have been doing the physical yard checking, so that in the middle of the summer of 1944, we worked up with the Remington-Rand Business Machine Company a system of business machine accounting, which would mechanically record information given to the clerical staff in the car record office from the conductor's switch list, and from those machines the information was taken to compute the demurrage per diem charges and all other things that were necessary from a car-accounting standpoint.
606 That took at least a year to put into what we would call today fairly good operation, and due to the mechanical equipment we found many improvements that had been made.

We have been constantly changing the method. The business machines have been going about getting the information and doing something with it until today we feel we have a fairly comprehensive car record system, which is a definite improvement over either of the old systems that we had.

Q. Have you finished your answer?

A. Yes, sir.

607 Q. I will ask you to state whether or not it is a fact that, as the result of the work done by these car checkers prior to January 1944, the result was a number of errors in the computation of demurrage charges made by South Buffalo Railway Company to Bethlehem Steel Company?

A. I can assume that the errors were there because the records made by the car record clerks—that is, the car checkers—did not always agree with the record which was made by the conductor as to the actual place where the car might have been at a given time.

Q. Yes. Isn't it a fact that you based your computations on this yard inventory which was made each morning at 7 A. M. by your checkers?

A. Will you ask that question again, please?

Q. (Question repeated by reporter as follows: "Yes. Isn't it a fact that you based your computations on this yard inventory which was made each morning at 7 A. M. by your checkers?")

A. Prior to January 1944?

Q. Yes; I am referring to that period.

A. Yes.

Q. Isn't it a fact that you found that there were so many mistakes made in this yard inventory system that you felt it

608 necessary to switch over to the other system which you have described?

A. I believe I said that; yes.

Mr. CRAIG. You may examine.

Cross-examination by Mr. BROMLEY:

Q. So far as you know, you never did deliver any coal to Bethlehem Steel Company, or any other consignee, in violation of the freeze order, did you?

A. No.

Q. And the freeze order, of course, affected all coal coming in, not only coal coming in for Bethlehem Steel Company?

A. That is right.

Q. And you did have coal for other people during this period?

A. That is correct.

Q. And the freeze order forbade you delivering the coal to anybody, did it not?

A. Yes.

Q. So you had to keep it in your yard?

A. That is right.

Q. And coal was coming in every day while the freeze order was in effect, was it not?

A. That is correct.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

609 Q. Did I understand you to say that you had to keep this coal in your yard? Did you state that?

A. That is right, on the tracks of the South Buffalo Railway, coal which was involved in the freeze order.

Q. Yes. What you mean by that is that you simply were not permitted to deliver it to a consignee who failed to certify that he did not have at least less than ten days' supply of coal on hand?

A. That is right. Inasmuch as we had no such certification we had to keep the coal on our tracks.

Q. If there had been a certification you could have moved it from your yards, could you not?

A. That is correct.

Mr. CRAIG. That is all.

Mr. BROMLEY. May it please your Honor, I move to strike out all the testimony of this witness as immaterial.

The COURT. I will let it stand. Denied. That is all.

Mr. CRAIG. I still want to call the General Superintendent in connection with that matter of order.

Mr. BROMLEY. I warn you now, Mr. Craig, that Mr. Dullenkopf won't know about it. The Vice President, Mr. Trageser, will.

Mr. CRAIG. All right. That will save us some time. Mr. Trageser, you take the stand.

610 PAUL A. TRAGESER, a witness recalled for the Plaintiff, having been previously sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. You are Paul A. Trageser, you testified heretofore, did you not?

A. Yes, sir.

Q. You have been in the court room, have you not, and heard the testimony of Mr. Kew?

A. Yes, sir.

Q. Now, concerning coal which was held on the tracks of the South Buffalo Railway Company during this so-called coal freeze period in the forepart of June 1943, I will ask you whether or not it was any part of your duties during this time to see that cars

consigned to Bethlehem Steel Company were kept moving to the consignee?

A. Part of my duty to see that they were not moved to the consignee while the service order was in effect.

Q. Well, that is agreeable. And that was part of your duty, then, to see that this coal was not delivered to Bethlehem Steel Company, was it not?

A. Those were the instructions that I gave.

Q. Did you know that there was any congestion resulting in your yards and on your tracks as the result of holding
611 these cars of coal?

A. I did.

Q. Did you know that the holding of the cars of coal was delaying the delivery of other commodities in cars consigned to the Steel Company?

A. I knew, based on the reports that were being made to me by telephone by the Superintendent in charge of the Railroad, that the application of the service order and compliance with it by the South Buffalo Railway would naturally and was delaying all of the traffic that the South Buffalo had to handle.

Q. What instructions, if any, did you give to your subordinates in South Buffalo Railway Company concerning any effort to deliver that coal, other than to the consignee, the Bethlehem Steel Company?

A. I gave them no instructions.

Mr. CRAIG. That is all.

Cross-examination by Mr. BROMLEY:

Q. Did you consider it a part of your obligation to go out and look for people who had less than ten days' coal on hand in order to see if you could not turn the coal over to them?

A. Certainly did not.

Mr. CRAIG. Just a minute. I object to that, what he con-
612 sidered his obligation.

The COURT. I take it he must be concluded in his position that there was no legal obligation on his part to look up prospective needs.

Mr. BROMLEY. I do, too.

The COURT. So I think the fact that he said that he did not give any orders in this respect is of no importance here.

Mr. BROMLEY. That is all.

Mr. CRAIG. Your Honor, due to the illness of one of the witnesses, it has thrown my presentation a little bit out of order, an employee of the South Buffalo Railway Company, and I was wondering, sir, if we might have a recess so I can reorganize a little bit.

The COURT. Oh, yes.

Mr. CRAIG. I think it will save us time.

The COURT. All right. To what time do you want to recess, what time this afternoon? Take all the time you need. We will save time, perhaps.

Mr. CRAIG. Well, sir, if agreeable, we will make every effort to get in position to proceed at 2:30.

The COURT. All right. I will be in Chambers. Let me know if you are ready at that time.

Mr. CRAIG. Very well.

(Whereupon a recess was taken until 2:30 o'clock P. M.)

613 Afternoon Session, 2:30 P. M.

Appearances: Same as before noted.

Mr. CRAIG. If the Court please, the plaintiff offers in evidence the deposition of John E. Jacobs, taken at Buffalo, New York, on November 27, 1945. This offer is made on the condition which accompanied the offering of the previous deposition, that, I believe of Robert J. VanDusen, whereby the plaintiff adopted as its own those questions and the answers received thereto on direct examination and the defendants offered that part consisting of the questions and answers on the cross examination.

Is that agreeable, Mr. Bromley?

Mr. BROMLEY. I don't know what it means. You offer the direct; I offer the cross. I want the complete deposition.

Mr. CRAIG. Yes.

Mr. BROMLEY. I have no objection to the whole deposition.

The COURT. Are you marking those depositions?

Mr. CRAIG. The deposition has been marked as Plaintiff's Exhibit 147.

Now, in addition, there is some testimony of Mr. Jacobs, which the plaintiff wants in the record, consisting of certain testimony which Mr. Jacobs gave in a proceeding pending before the
614 Interstate Commerce Commission.

The COURT. You said Mr. Jacobs wants in the record?

Mr. CRAIG. Which the plantiff wants in the record of Mr. Jacob's testimony in the Interstate Commerce Commission proceeding. And it is planned that that testimony will be transcribed later and marked as an exhibit and offered by the plaintiff in evidence.

(Deposition of John E. Jacobs referred to was received in evidence and marked "Plaintiff's Exhibit No. 147.")

Mr. BROMLEY. Do you want to reserve a number for the Jacobs' testimony?

The COURT. It is all in.

Mr. BROMLEY. No, sir. He has now just finished offering parts of the Jacobs' testimony from Ex Parte 128. I think you should reserve Exhibit No. 148 for that. I shall have it typewritten and handed to the reporter.

Mr. CRAIG. Well, I have no objection to that. I will change the number on these subsequent depositions. I think we can do that, so we will reserve No. 148 for the additional testimony.

The COURT. 147 is the deposition?

Mr. CRAIG. Yes, but this is additional testimony.

The COURT. I know what you mean. That will be 148.

615 Mr. CRAIG. We will reserve 148 for that.

There has been marked as Plaintiff's Exhibit 149 a deposition of Edward F. Entwisle, taken by the plaintiff at Buffalo, New York, on November 27, 1945, which, subject to the same understanding as in the deposition of Mr. Jacobs, as to the offering, the plaintiff offers that deposition, Exhibit 149, in evidence at this time.

Mr. BROMLEY. No objection.

(The deposition of Edward F. Entwisle referred to was received in evidence and marked "Plaintiff's Exhibit No. 149.")

(Exhibit No. 148 is reserved for Jacobs' testimony from Ex Parte 128 to be furnished later.)

Mr. CRAIG. Plaintiff's Exhibit No. 150 is the deposition of James D. Dewitt, taken by the plaintiff in Buffalo, New York, on November 27, 1945, which, subject to the same understanding and conditions as in the case of the depositions of Robert J. VanDusen, John E. Jacobs, and Edward F. Entwisle, the plaintiff offers in evidence.

Mr. BROMLEY. No. objection.

(The deposition of James D. Dewitt referred to was received in evidence and marked "Plaintiff's Exhibit No. 150.")

616 Mr. CRAIG. Plaintiff's Exhibit 151 is South Buffalo Railway Company Local and Proportional Freight Tariff of Switching Charges, which plaintiff now offers in evidence.

Mr. BROMLEY. I have no objection to it, but I should like to point out that it is only one of eight freight tariffs in effect; all eight of which have been duly filed by the Railroad.

(South Buffalo Railway Company Local and Proportional Freight Tariff of Switching Charges referred to was received in evidence and marked "Plaintiff's Exhibit No. 151.")

617 PAUL A. TRAGESER, recalled as a witness in behalf of the Plaintiff, having been previously sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. I hand you Plaintiff's Exhibit 151, South Buffalo Railway Company local and proportional freight tariff of switching charges. That tariff was effective March 28, 1940, wasn't it?

A. Yes, sir.

Q. And that tariff is in effect at the present time, is it?

A. Yes, sir.

Q. And has been in effect between its effective date and the present; is that correct?

A. Yes, sir; subject to the changes covered by certain supplements to put in effect orders of the Interstate Commerce Commission providing for increases in the charges shown in the tariff.

Q. Have those increases gone into effect in the intervening period?

A. Yes, sir.

Q. What are those increases, do you recall?

A. Without looking at the tariffs, my recollection is that there was one of them which was a six per cent increase in freight
618 rates, which expired by limitation of the order of the I. C. C. Whether that was restored and again expired, I don't know without looking at the tariffs.

Q. There has not been any change in the base rate as indicated in that tariff, has there?

A. There has not.

Q. Mr. Trageser, isn't this the tariff under which South Buffalo receives payment from the line-haul carriers for freight which South Buffalo receives in interchange from the line-haul carriers and consigned to Bethlehem Steel Company?

A. May I ask that that question be read, please?

(Question read.)

A. It is only one of a series of tariffs under which that situation prevails.

Q. Well, at least it is the one which applies to the items which are listed in the tariff; isn't that true?

A. Yes, sir.

Q. But the tariff in and of itself does not provide for any payment by the trunk lines for the service that the South Buffalo performs as agent for the trunk line carriers?

A. Well, do you mean that there are other tariffs published by South Buffalo or someone connected with it in connection with these payments?

A. No, sir; I don't mean that.

Q. Well, who publishes the tariffs to which you refer?
619 A. The trunk-line carriers.

Q. And the same situation then prevails on out-bound shipments from Bethlehem Steel Company, where the cars are

to be delivered to the trunk-line carriers at interchange; isn't that true?

A. Well, with respect to the payment by the trunk lines to the South Buffalo as agent for the trunk-line carriers for the service which the South Buffalo performs for them the same tariffs cover both in-bound and out-bound traffic.

Q. That is this Plaintiff's Exhibit 151 is the South Buffalo Railway tariff in that connection, isn't it?

A. Yes, sir.

Q. Isn't it a fact that in connection with the fixing of the amount of the charge for this service in connection with South Buffalo's transporting of freight from interchange to the Bethlehem Steel Company and vice versa, one of the factors taken into account is the point of delivery to South Buffalo Railway on the in-bound freight?

A. Well, of course, Mr. Craig, as far as that is concerned, the rates published in that tariff are nothing more than the original rate which was published many years ago, long before I had anything to do with the South Buffalo Railway, built up and taken down by various increases and decreases provided for in orders of the Interstate Commerce Commission, and just how the
620 original figure was arrived at according to my information in the year 1901 or 1902 or 1903, I can't say.

Mr. CRAIG. Your Honor, I move that answer be stricken. I am talking about this tariff which was issued March 28, 1940, issued by Mr. Trageser, and I am asking him whether or not the element which I described was a factor in setting the amount set forth in this tariff.

The COURT. I understood that Mr. Trageser was showing the origin of this tariff back in 1900.

Mr. CRAIG. A tariff; not this tariff; I take it, your Honor.

The COURT. I will let it be stricken out and ask the question again.

(Question read.)

The WITNESS. I can't say what factors were taken into consideration.

Q. Well, you issued the tariff, didn't you?

A. Yes, sir.

Q. Did you have any part in working out these figures?

A. No, sir.

Q. Who did?

A. Working out the figures? Only insofar as applying whatever orders had been issued to the rates which were previously in effect.

621 Q. Do you mean to say that this point of delivery on the in-bound freight to Bethlehem Steel Company and the point

from which you pick it up at Bethlehem Steel Company on the out-bound freight does not play any part in determining the amount?

A. I mean to say, if you are putting the question that way, that the rates provided in that tariff do not apply to the point of delivery to the Bethlehem Steel Company or anybody else on the railroad, nor from the point of shipment on the railroad in all cases.

622 Q. Well, does it apply in any case?

A. Yes.

Q. Well, I will hand you the tariff, which is Exhibit 151, and I will ask you to indicate the instances where that is a fact.

A. You cannot get that from this tariff.

Q. Where can you get it?

A. This tariff is restricted in its application in so far as what I testified to by other tariffs.

Q. Issued by the——

A. South Buffalo Railway.

Q. Do you have those tariffs?

A. Yes, sir.

Q. In your possession here?

A. Yes, sir.

Q. May I see them, please?

(Witness produces and hands papers to Counsel.)

Q. Now, you have handed me South Buffalo Railway Company's local freight tariff of terminal charges, I. C. C. No. 69, which cancels I. C. C. No. 67, issued October 2, 1945, effective November 1, 1945, issued by Paul A. Trageser, Vice President, Bethlehem, Pennsylvania; and on the front page of which it says: "Note: The operation of the provisions referring to this note is suspended until January 1, 1946, and will become operative

623 on January 1, 1946." Previously do I understand that the provisions of this tariff were not in effect prior to January 1, 1946?

A. The note you read does not have anything to do with the application of the tariff. It has to do with the note that is at the top of the tariff, Mr. Craig; and the tariff was in effect prior to the 1st of January 1946. In fact, as you have read the filing numbers to me, it cancels an I. C. C. tariff which, according to my best recollection, was in effect from some time early in 1942.

Q. When did this tariff become effective?

A. May I look at it, please?

Q. Certainly [handing tariff to witness].

A. That tariff became effective on November 1, 1945, and it canceled I. C. C. No. 67.

Q. Now, I find, you might say, that this tariff consists of one page, that to which I have referred so far is on what would be

called the front side of the sheet. The back side it is headed, "Terminal Charges. On interstate traffic interchanged with railroads connecting with this Company at Buffalo, New York, and at Lackawanna, New York, for delivery at Material Storage Yards adjacent to Bethlehem Steel Company's Open Hearth plants Nos. 1, 2, or 3, or Trestle serving Bethlehem Steel
624 Company's blast furnace plants, the following charges, in addition to the charges published in I. C. C. No. 62 will be made."

That I. C. C. No. 62 is Plaintiff's Exhibit No. 151, is it not?

A. It is.

The COURT. What does the initial charge have reference to?

Mr. CRAIG. I am just about to read that, your Honor. "For sorting and assembling cars on tracks of this Company in its South Yard or South Yard Extension and movement to Material Storage Yard adjacent to Bethlehem Steel Company Open Hearth Plant No. 1, $1.50 per car."

Q. That is correct, is it not?

A. Yes, sir.

Q. That has nothing to do with the basic charge of hauling to and from interchange?

A. It is in addition to that charge.

Q. Yes; but it does not change the basic rate?

A. No; except that it is an additional charge.

Q. In addition thereto?

A. That is right, for the service rendered and which is described.

Q. Yes. And following: "For sorting and assembling cars on tracks of this Company in its South Yard or South
625 Yard Extension and movement to Material Storage Yard adjacent to Bethlehem Steel Company Open Hearth Plant No. 2 $1.50 per car." That is the same situation as the prior charge, is it not?

A. The same situation; yes, sir. It is an addition to the line-haul rate for the service covered by the item published in the tariff.

Q. Is that true relative to these other tariffs to which you have referred, that they are simply additions to the rates set forth in the tariff which is Plaintiff's Exhibit No. 151?

A. Well, we are racing along so fast I don't know what tariffs we are talking about.

Q. Well, you just handed me this one to which I am referring now.

A. Yes. Of course, that tariff that you are talking about there applies to interstate traffic. There is another tariff that covers intrastate traffic.

Q. Isn't the same situation involved in that tariff?

A. Yes, sir.

Q. All right. Now, what other tariffs do you have?

A. Covering the situation to which we have just been discussing?

Q. Yes.

A. The other tariff that I handed you.

626 Q. Does that do anything other than make an addition to charges set forth in Plaintiff's Exhibit 151?

A. No.

Q. Well, are there any other tariffs?

A. Well, there is a tariff which was published on an order of the Public Service Commission of New York, directed to the South Buffalo Railway and other common carriers operating in New York, applying on interchange traffic, covering sand, gravel, rock, crushed stone, slag, and aniline slag, which provides for rates different than the rate in Plaintiff's Exhibit 151.

Q. That is on intrastate traffic?

A. On intrastate traffic; yes, sir.

Q. Plaintiff's Exhibit 151 is not only an Interstate Commerce Commission tariff but it is a local or New York tariff, too, is it not?

A. It is a tariff that applies on interstate as well as intrastate traffic, and, of course, is filed with both the Interstate Commerce Commission and the Public Service Commission of New York.

Q. This tariff to which you referred a moment ago on the various commodities, does that constitute simply an increase over the basic rate set forth in the tariff marked Plaintiff's Exhibit 151?

A. On the contrary, it is a decrease.

627 Q. A decrease from that basic rate?

A. Yes, sir.

Q. Now, going back, then, to the basic rate, which, I understand, is the rate contained in Plaintiff's Exhibit 151, that tariff, isn't it a fact that one of the factors taken into account in fixing the rate set forth in that tariff is the point of delivery to the Bethlehem Steel Company on in-bound traffic, and the point where South Buffalo gets the traffic from Bethlehem Steel Company on the out-bound interchange traffic?

A. Except as qualified or restricted by Curlett's tariff, which you have and which you have not offered, and the terminal operations to which I have referred, the line-haul rate out of which the trunk line carriers pay the South Buffalo Railway Company an absorption for the service it performs for them, contemplates that the service goes through to the point of unloading and starts at the point of loading.

Mr. CRAIG. You may examine.

Cross-examination by Mr. BROMLEY:

Q. Exhibit 151 applies to all shippers on your lines, not only Bethlehem Steel Company, does it not?

A. Yes, sir.

628 Mr. BROMLEY. I ask that the local freight tariff of terminal charges, I. C. C. No. 69, be marked for identification as "Defendants' Exhibit D–1."

(Local freight tariff of terminal charges, I. C. C. No. 69, referred to was marked as "Defendants' Exhibit D–1" for identification.)

629 By Mr. BROMLEY:

Q. Now, on this Defendant's Exhibit D–1 for identification, in addition to the provisions to which your attention was called by Mr. Craig, there is the following provision, isn't there: "For sorting and assembling cars immediately adjacent to the material-storage yard of Bethlehem Steel Company at Open Hearth Plant No. 3 and movement to tracks and material-storage yard, a dollar a car"?

A. There is.

Q. And in addition to that there is this provision, is there not: "For sorting and assembling cars on tracks of this Company in its yards at the foot of the trestle serving the blast-furnace plants and moving on such tracks from such point of unloading on the trestle, a dollar a car"?

A. That provision is in the tariff.

Q. What other tariffs are there; and I wish when you refer me to them you would do so in an order which follows Exhibit 151 and Exhibit for identification D–1?

A. There is a tariff applying on interchange intrastate traffic, published on March 28, 1940, filed with the Public Service Commission of New York, applying on sand, gravel, rock, crushed stone, slag, and aniline slag for treatment at sintering works, providing for a rate of 14 cents per net ton.

Mr. BROMLEY. I ask that the last-described tariff be
630 marked "Defendants' Exhibit D–2" for identification.

(Commodity tariff No. 6, March 28, 1940, marked as "Defendants' Exhibit D–2" for identification.)

Q. What is the next one, sir?

A. There is a tariff applying on both interstate and intrastate interchange traffic as well as local traffic moving between points on the South Buffalo Railway, which became effective on January 1st, 1946, published by W. S. Curlett, to which South Buffalo is a party, providing rules governng receipt and delivery of cars of freight onto and/or from private tracks and industrial tracks.

Mr. BROMLEY. I ask that that be marked as "Defendants' Exhibit D–3" for identification.

(Tariff January 1st, 1946, published by W. S. Curlett, marked as "Defendants' Exhibit D–3" for identification.)

Q. What is the next one?

A. There is a tariff applying on intrastate traffic moving between points on the South Buffalo, effective April 16, 1945, styled "Tariff of Charges for Local Movement," which carries the schedules of charges for the movement of cars between points on the South Buffalo Railway and also certain other items.

Mr. BROMLEY. I ask that be marked "D–4" for identification.

(Tariff April 16, 1945, charges for local movements, marked as "Defendants' Exhibit D–4" for identification.)

631 Q. What is the next one?

A. There is a tariff applying on both interstate and intrastate traffic, interchange or local, effective March 28, 1940, styled "Local Freight Tariff of Weighing Charges" at all points on South Buffalo Railway Company.

The COURT. That relates to weighing charges, exclusively?

The WITNESS. Yes, sir.

Mr. BROMLEY. I ask that be marked "D–5" for identification.

(Tariff effective March 28, 1940, local freight tariff weighing charges, marked as "Defendant's Exhibit D–5" for identification.)

Q. What is the next one?

A. There is a tariff applying only on intrastate traffic effective November 1st, 1945, styled "Local Freight Tariff of Terminal Charges," which tariff publishes for intrastate traffic the same terminal charges as are carried on interstate traffic named in I. C. C. No. 69.

Mr. BROMLEY. Which is Defendants' Exhibit D–1 for identification. I ask that the last described tariff be marked as "D–6" for identification.

(Tariff November 1st, 1945, local freight tariff terminal charges was marked as "Defendants' D–6" for identification.)

Q. The next one, please.

A. There is a special supplement to all tariffs issued by South Buffalo Railway which are named on the tariff filed
632 with both the Interstate Commerce Commission and the Public Service Commission of New York effective December 31, 1945, postponing until a date six months after the legal termination of the war the blanket increases allowed by the orders of the Interstate Commerce Commission and the Public Service Commission of New York some time prior thereto.

Q. Is that increase referred to in any of the tariffs which have been marked so far?

A. It is carried, I think, on all of the tariffs in a note on the top of the tariff.

Mr. BROMLEY. I ask that be marked "D–7" for identification.

(Supplement tariffs December 31, 1945, marked as "Defendants' Exhibit D–7" for identification.)

Q. The next one?

A. There is a tariff directory and index of freight tariff classifications issued by the South Buffalo Railway which is required to be filed by the regulations of the Interstate Commerce Commission and the Public Service Commission of New York, issued on January 15, 1946, known as I. C. C. No. 70 and P. S. C. N. Y. No. 108.

Q. What is that, just a directory of the tariffs already marked?

A. A tariff directory and index.

Q. It does not add anything to what I have already
633 marked, does it?

A. No.

Mr. BROMLEY. Mark that "Defendants' D–8" for identification.

(Tariff directory and index January 15, 1946, marked as "Defendants' Exhibit D–8" for identification.)

The WITNESS. In addition to the tariffs I have named the South Buffalo Railway Company is a party to various tariffs and classifications issued by agents applying to traffic such as the official classification of National Car Demurrage Rules and Charges, the tariff covering the classification of explosives and other dangerous articles, a list of open and prepay stations, the Railway Equipment Register. I think that is all of them. Of course, they are all listed in this tariff directory and must be.

Q. When your railroad makes a local movement for any shipper on your line, which I understand to be a movement from one part of your line to another, does the consignee or the consignor pay you in cash for that service the rate prescribed in the tariff?

A. Hardly ever in cash. He pays by check.

Q. What about the Bethlehem Steel Company?

A. They pay by check.

Q. The same way that everybody else does?

634 A. Every day; yes, sir.

Q. When these tariffs refer to a local movement of freight, what does that comprehend?

A. It comprehends a movement from one point on the South Buffalo to another point on the South Buffalo.

Q. And are there shippers other than Bethlehem Steel Company for whom you make that kind of movements?

A. Yes.

Q. Do you make them for Bethlehem Steel?

A. Yes sir.

Q. When some shipper routes an interstate shipment from some point on your line to some point in New York or some point in some other state who collects the freight charges for that?

A. If the shipment moves prepaid the South Buffalo collects the freight charges. If the shipment moves collect, as most all of them do, the carrier performing the final service in the delivery of the car collects the freight charges.

Q. And how do you get your payment for the service which you have rendered in connection with that movement?

A. By settlements with the trunk-line carriers based on forms which show each and every such shipment and are checked by the agents of the trunk-line carriers prepared daily.

635 Q. And you are paid in money by cash or check from the trunk-line carriers for this service, are you?

A. Yes, sir.

Q. And, of course, the trunk-line carrier is paid by the consignee or the consignor the total freight rate which includes that part of it which you get?

A. That is right.

Q. On interstate shipments out-bound or in-bound what do you get, just so that we can understand it, how much of what?

A. We get varying amounts; generally 18 cents a ton, but not necessarily.

Q. And whatever those amounts are are set forth in Exhibit 151, are they?

A. Yes; and also in the tariffs of the trunk-line carriers linked up with the rates named in Exhibit 151, the publication of that tariff 151 as I tried to explain to Mr. Craig in and of itself by South Buffalo Railway would not require the payment by the trunk lines of any amounts to the South Buffalo Railway.

Q. Isn't that just another way of saying that the trunk lines have to agree how much they will pay you?

A. And publish it in a tariff that they have.

Q. And publish it in their tariffs?

A. In their tariffs.

636 Q. And you can't charge the trunk lines any more than they agree to pay you?

A. Well, we can charge them, but they won't pay it. In fact, they don't absorb all the charges of the South Buffalo. There is a great deal of traffic that moves to points within the switching territory or from points within the Buffalo switching territory on which the charges of South Buffalo are not absorbed.

Q. Well, who pays you for that?

A. If the shipment is collect the consignee on the South Buffalo pays. If the shipment is prepaid, the consignor will pay the unabsorbed charges of South Buffalo.

Mr. BROMLEY. That is all.

Re-direct examination by Mr. CRAIG:

Q. Mr. Trageser, the purchasing agent of South Buffalo Railway is R. F. McGuire, isn't he?

A. Yes, sir.

Q. And he is purchasing agent of the other six subsidiary railroad companies of Bethlehem Steel Corporation, isn't he?

A. Yes; and, of course, as in the case of any of the officers of South Buffalo, in common with the others he serves under an order of the Interstate Commerce Commission all seven.

Mr. CRAIG. That is all.

Mr. BROMLEY. That is all.

637-640 Mr. CRAIG. Your Honor, as I said before the noon recess, the illness of one of the witnesses whom we have subpoenaed, who is an employ of the South Buffalo Railway Company, has made a difference in my presentation. I understand that there is a strong likelihood at least that the witness will be able to shake off the illness and be in court the first of the week. And I would like to ask at this time if I could postpone further presentation until that time.

The COURT. That is satisfactory to the Court, if it is to Counsel.

Mr. BROMLEY. Yes, your Honor.

The COURT. We will have to make it Tuesday, if that would be satisfactory.

Mr. CRAIG. That is agreeable to plaintiff.

Mr. BROMLEY. Yes, your Honor.

The COURT. All right. When we adjourn this case it will be adjourned until Tuesday morning at 10 o'clock.

(Whereupon a recess was taken until Tuesday, January 29, 1946, at 10 o'clock A. M.)

641 Proceedings of Tuesday, January 29, 1946, 10 o'clock A. M.

Appearances: Same as before noted.

LESTER G. WEINHEIMER, a witness called by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Weinheimer, what is your connection with the South Buffalo Railway Company?

A. I am Supervisor of car records.

Q. How long have you held that position?

A. I think, under that title, about two and one-half years.

Q. Did you have the same duties under some other titles?

A. That is right.

Q. What was that title?

A. I was Chief Clerk of the Car Record Department.

Q. How long were you Chief Clerk of the Car Record Department?

A. Oh, about six years.

Q. Will you describe your duties in the positions which you have named?

A. Well, the duties are to render demurrage bills and per diem reports and all car record work and local billing.

Q. That last was local billing?

642 A. Local billing, that is right.

Q. What is that?

A. Local billing is—we receive bills from the industries on our line, which we match against moves on our switch lists, and then in turn we turn those to the accounting department, who collects the revenue.

Q. These bills of which you speak, are they shippers' orders?

A. That is right. R–115 is the form.

Q. You check them against something, you say?

A. That is right.

Q. And against what do you check them?

A. Against the conductor's switch list to see that the cars made the move.

Mr. CRAIG. Your Honor, Plaintiff's Exhibit No. 152 is a blank shipper's order, also known as R–115, of South Buffalo Railway Company, to which form the witness has referred.

At this time Plaintiff offers in evidence its Exhibit 152.

(Blank shipper's order, R–115, referred to was received in evidence and marked "Plaintiff's Exhibit No. 152.")

Mr. CRAIG. And Plaintiff's Exhibit 153 is a blank daily report of switching of South Buffalo Railway Company, which Plaintiff now offers in evidence.

The COURT. Is that the record of a single day, do you mean?

643 Mr. CRAIG. Well, not for a complete day; no, sir.

The COURT. Goes to show the character of the——

Mr. CRAIG. I will have the witness explain these more in detail, your Honor.

The COURT. All right.

(Blank daily report of switching referred to was received in evidence and marked "Plaintiff's Exhibit No. 153.")

Mr. CRAIG. On Exhibit 153, which is the daily report of switching, this particular blank, there is at the upper right-hand corner stamped the number "102." This is a copy which has been furnished me by defendant's Counsel. And this figure 102 just

happens to be stamped on there. That is, 102 does not appear on every blank. It just happens to appear on this blank.

The COURT. What significance has the 102 number? What do you mean by that? What significance has the 102?

Mr. CRAIG. As I understand it, every day the daily reports of switching, of which there are a considerable number, bear consecutive numbers.

The COURT. Oh, I see. All right.

Mr. CRAIG. It may be, your Honor, that, if you were to have these blanks before you, the testimony of this witness would be more understandable [handing blanks to the Court].

The COURT. All right.

644 Q. As I understand it, in connection with your work concerning the local billings there come to you in your department these shippers' orders; is that right?

A. That is right.

Q. How are they filled in or how have they been filled in?

A. They show the industry from where the cars are moved to the destination, and they carry some charge account number. They also carry the initial and number of the car and the commodity and the date.

Q. Who executes that shipper's order?

A. The industry.

The COURT. The shipper, you mean?

The WITNESS. That is right.

By Mr. CRAIG:

Q. Now, this shipper's order covered what kind of information?

A. The local movement on the South Buffalo Railway.

Q. That is where the point of consignment and the point of destination are on the South Buffalo Railway Company line?

A. That is correct.

Q. This form involves no interchange movement, does it?

A. No, sir.

Q. That is, do I understand if Bethlehem Steel Company wants a shipment carried from one point on its property
645 to another point on its property on your South Buffalo Railway Company line the Bethlehem Steel Company executes the shipper's order for that movement?

A. That is correct.

The COURT. Does that apply to these other companies that connect with the long-haul company, you mean?

The WITNESS. No.

The COURT. I mean other plants along the line.

The WITNESS. The Donner-Hanna issues practically the same form.

By Mr. CRAIG:

Q. On the shipper's orders executed by Bethlehem Steel Company is there anything else on that shipper's order?

A. The only other thing is whether it is prepaid or not to be prepaid. If it is to be prepaid it so states on the R–115.

Mr. BROMLEY. May it please the Court, may I ask the witness to speak more loudly?

The COURT. Yes; speak louder.

By Mr. CRAIG:

Q. Will you state whether or not the Bethlehem Steel Company places on the shipper's order any account number?

A. Yes; they do place an account number on there.

Q. Whose account number is that?

A. The Bethlehem Steel's account number.

646 Q. You spoke about, I believe, checking the shippers' orders which you received against the daily report of switching; is that correct?

A. That is right.

Q. Now, relative to the daily report of switching, what is shown on that and by whom is it made?

A. That is made by our conductor.

Q. That is the South Buffalo Railway conductor?

A. That is right; and he on that, on the top he places the engine number, the date, and then as he moves these cars he shows them by initial and number, commodity, from and to, and time, and then it is signed by that conductor.

Q. In checking the shippers' orders against the switch lists will you tell what is done?

A. Well, first of all we take the conductor's switch lists and sort them out by time, and then they are stamped numerically from 1 to however many we have, which is around 350 to 400 daily, and then we sort the R–115's in different packages, that is, according to the different moves from one portion of the Bethlehem industries to another unit, and also with outside other than Bethlehem Steel industries, and then we take the switch lists and match one against the other. Now, that is, when we have a car of slabs that originates in unit 15 mill of the Bethlehem Steel and it is

647 going to the strip mill of the Bethlehem Steel, those would be in one portion, and when the billing clerk comes to the switch lists with that move that is moved and checked with that switch list and that time is used for demurrage purposes on foreign cars.

Q. In checking the shippers' orders against the switch lists, do you ever find any discrepancies?

A. Yes, we do.

Q. Will you illustrate the type or types of discrepancies that you find?

A. Sometimes we may not have an R–115 for a particular move.

Q. That is, you will not have a shipper's order for a move that shows on a daily report of switching?

A. That is correct. Then we use the term "force the bill."

Q. I was about to ask you, when you have a move which is shown on the conductor's daily report of switching, and you have no shipper's order for that move, what do you do?

A. We make a bill.

Q. Now, we are speaking about the Bethlehem Steel Company? It applies to the Bethlehem Steel Company, doesn't it?

A. That applies to every industry on the South Buffalo.

The COURT. You mean that it corresponds with the con-
648 ductor's report?

The WITNESS. That is all.

By Mr. CRAIG:

Q. When you speak of forcing a shipper's order, what do you do?

A. We just show where the conductor shows the car from and to, and that is all. We put a date on it.

Q. Isn't it correct to say that you make out a shipper's order?

A. That is right, but we don't make it out in detail. We don't show any charge account number on it when we are dealing with the Bethlehem Steel Company.

Q. When you speak of charge account number, you mean the Bethlehem number?

A. That is right. We just make out a sort of a skeleton R–115.

Q. In the skeletonized form what do you do?

A. We show the initial number, the commodity, from and to, and also the date.

Q. Is that shipper's order which you force signed by you?

A. No, sir.

Q. On this line just a little below the middle of this sample shipper's order which has been placed in evidence I find the word "shipper" and then following it a line. Is that line filled in?

A. No, sir. At one time we just put an initial on there. Now we don't put anything on there at all.

Q. You used to put an initial?

A. Out initial, whoever made it.

649 Q. How do you know when you make out this skeletonized form, then, for what shipper you are making it out?

A. Well, from years of experience, we can tell; and also by the notation that the conductor puts on the switch list.

Q. When you force, for instance, an R–115 in connection with a Bethlehem Steel Company move, you then place that forced

shipper's order with the shipper's orders which have been executed by Bethlehem Steel Company?

A. That is right.

Q. What is done then with these shipper's orders R–115's, both executed by Bethlehem Steel Company and forced by your department in shipments concerning Bethlehem Steel Company as consignor?

A. Daily those are numbered and sent to Mr. Craig's department.

Q. Who is Mr. Craig? This is Mr. J. F. Craig?

A. That is right.

Q. Who is he?

A. He is the—well, I don't know just what his title is. I guess it is Assistant Auditor.

Q. Of South Buffalo Railway Company?

A. That is right.

Q. What happens to the daily reports of switching, these
650 switch list to which you have referred?

A. We retain those for the length of time covered by the I. C. C., which is, I believe, three years at the present time.

Q. You do not turn them over to Bethlehem Steel Company?

A. No, no; we keep those. Those are our records.

Mr. CRAIG. You may examine.

The COURT. With what frequency would you say the absence of the shipper's orders appears?

The WITNESS. You mean how many do we force?

The COURT. You have hundreds of them a day from these various shippers, largely from Bethlehem Steel Company?

The WITNESS. That is right. We have I would say, perhaps, between 800 and 1,100 a day.

The COURT. How many on the average would you miss each day?

The WITNESS. That we do not have the R–115 for?

The COURT. Yes.

The WITNESS. I would say perhaps between 10 and 15 daily.

Cross-examination by Mr. BROMLEY:

Q. You find this situation of forcing R–115's exists with respect to other industries on your line do you not?

A. That is correct.

Q. After you have made out the R–115 showing the
651. movement of a car for a particular industry which has overlooked giving you a shipping order do you collect the charge?

Mr. CRAIG. Just a minute. I object to that. I do not think this man is competent to testify on that subject.

The COURT. I do not know. He says he turned it over to the officer. If he knows he may state.

Q. What is your purpose in turning these forced R–115's over to the auditor?

A. That he can collect the freight charges.

Q. But you have nothing yourself to do with this collection?

A. No, sir.

Q. And isn't it a fact that with respect to a forced billing, you check Exhibit 153 against Exhibit 152; that is, the whole pile of them, to make sure that the Railroad gets its full revenue for whatever service or movement it has performed for its customers, or any of them?

A. That is correct.

Mr. BROMLEY. That is all.

652 JOHN F. CRAIG, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Craig, what is your connection with South Buffalo Railway Company?

A. A Division Accountant and Assistant Secretary-Treasurer.

Q. How long have you held those positions?

A. Since July 1939.

Q. What are your duties as such?

A. Why, accounting procedure and collection of freight charges and any cash connected with the Company.

Mr. BROMLEY. I did not hear you.

The COURT. Speak a little louder, please.

The WITNESS. Accounting duties, general accounting duties, in the collection of freight charges and cash connected with the Railroad.

Q. Included in the collection of freight charges, do you deal with local movements on South Buffalo's line?

A. That is correct.

Q. You have heard Mr. Weinheimer testify, have you not?

A. Yes, I have.

Q. And, as I understand it, Mr. Weinheimer turns over to you the shippers' orders or R–115's, which have either

653 been executed by the shipper, or, in some instances, forced, as he defined it, by South Buffalo Railway Company?

A. That is correct.

Q. In connection with Bethlehem Steel Company only, will you describe what you do with those shippers' orders which come to you from Mr. Weinheimer?

A. Why, each day I receive any number of bills, from 800 to a thousand, which cover the local billing on freight consigned to the Bethlehem Steel Company. I take these bills and have them sorted out into various amounts of charges, such as, $4.40, $5.50, whatever is covered by the tariff——

Q. Just a minute, if I may. You sort them into piles?

A. That is right.

Q. And each pile represents a certain amount of switching charge?

A. That is right.

Q. That is, some of your switching charges under your tariff

Q. And $5.50 per move?

A. $5.50.

Q. And $5.50 per move?

A. That is right.

Q. And $6.60 per move?

A. That is right.

Q. What are the others?

654 A. Up to $8.80.

Q. $7.10?

A. And $8.80. Then they are counted and put onto a freight bill, as to the number of cars, and extended into into these various groups and then totaled, which is covered by a blanket billing.

Q. Is this done daily?

A. This is done daily.

Q. And what form does this blanket billing take to Bethlehem Steel Company?

A. It is a regular freight bill issued to all customers.

Q. Well, for instance, in connection with your moves, each of which is a $4.40 move, how is that stated?

A. Why, we will say, for instance, there were a hundred cars at $4.40, a hundred cars at $5.50, and they are totaled; naturally your tax would be applied to them and then totaled for collection.

Q. That is, you do not itemize the moves, do you?

A. No, I do not.

Q. And that bill is rendered daily?

A. That is right.

Q. Is settlement made daily on those bills so rendered?

A. That is right.

Q. All right. Now, do you at that time retain the shipper's orders or these 115s?

655 A. I do.

Q. What else do you do with those shipper's orders?

A. We take those 115s, resort them into charge account numbers.

Q. Whose charge account numbers?

A. Bethlehem Steel Company, which is shown at the bottom of the bill.

Q. Now, those account numbers are not shown on the bottom of all these shipping orders, are they?

A. That is, as far as the Bethlehem Steel Company is concerned. Some, of course, the old style, was in the center of the bill.

Q. Now, as I understand it, when the shipper's order is made out by Bethlehem Steel Company, the Steel Company places the account number on the order?

A. That is correct.

Q. Now, what about these shipper's orders which were forced in Mr. Weinheimer's department for the South Buffalo Railway Company?

A. All right. In a case like that, the clerk calls up the clerk at the Bethlehem Steel Company and asks him what number they want that charged to.

Q. What clerk?

A. The clerk in the Accounting Department of the Bethlehem Steel Company.

656 Q. You say that the account number of Bethlehem Steel Company is placed on the shipper's order by clerks in Mr. Weinheimer's department?

A. Not in Mr. Weinheimer's department.

Q. In your department?

A. That is right, for accounting purposes.

Q. And after that procedure is had all shipper's orders have Bethlehem Steel Company's account numbers on them?

A. That is right.

Q. Who designates those account numbers?

A. Why, they are originally put on, on the ones that are not forced, are put on by the mill, or the Bethlehem Steel Company, whoever is in charge of that.

Q. I mean, do you make up these account numbers?

A. No, we don't make up the account numbers.

Q. Where do they come from?

A. They come from Bethlehem Steel Company, any railroad we get them from; more likely they have their own procedure of accounting.

Q. Will you proceed with your explanation as to what is done?

A. After furnishing the blanket billing covering these amounts, we take these and sort them out into charge account numbers.

Q. These charge account numbers of Bethlehem Steel Company?

A. They vary anywheres—two to three hundred numbers
657 on them. Of course, they are not used every day, but in that

way we make up a detailed statement to support that blanket billing that is issued each day and on a detail form showing the account numbers of so many cars under the caption of $4.40, $5.50. In totaling up these cars, each car of the same amount of charges on the face of the blanket billing.

Q. Do I understand that you take these shippers' orders and individually place them in their respective Bethlehem Steel Company account numbers?

A. That is correct, after we have them—the original sorting into classification as to the tariff charge.

Q. Yes. Well, now, do you have two things, then: You sort not only according to account number but according to the amount of the switching charge?

A. That is right. You have to, to get your total for your bill.

Q. How do you do that, physically?

A. Just in pigeon holes, sometimes on the desk or in the pigeon holes.

Q. Do these pigeon holes respectively bear the account numbers of Bethlehem Steel Company?

A. That is right.

Q. After they are sorted, for instance, into the pigeon
658 holes, and as you have described, what is done with those shipper's orders?

A. That is when they are made on the distribution sheet to cover your blanket billing for the day.

Q. That is, you actually take those shipping orders out of a pigeon hole representing a Bethlehem Steel Company account?

A. That is right; and count them and apply the number of cars, as I say, under the heading $4.40, $5.50, and whatever rate has been applied; and with that, after you get your distribution, the total of those cars will equal the total of your blanket billing.

Q. How often do you make up this detailed statement?

A. At present we are doing it daily.

Q. How long have you done that?

A. About two months.

Q. What was the system prior to that time?

A. Every ten days.

Q. When do you total the detailed statement?

A. When did we?

Q. When do you total?

A. We do not total it any more. We total them daily to support that daily billing.

Q. Formerly did you total them periodically?

A. Periodically; ten days; and then total them up for the thirty days' period; and then that was to cover the
659 billing for the entire month.

Q. Will you state whether or not you submitted this detailed statement to Bethlehem Steel Company?

A. Did we submit it to them?

Q. Yes.

A. Oh, yes; I do submit it to them to secure——

Q. I am talking about under your prior system.

A. Yes.

Q. What did you submit to Bethlehem Steel Company?

A. A detail, a sheet for each account number, covering the number of days up to ten, twenty, and thirty days, or thirty-one, whatever it happens to be, with the grand total as to the number of cars which would cover that particular account number.

Q. So that that statement submitted at the end of the month is supposed to come out even with the total number of daily statements; is that correct?

A. That is right. It does come out correct.

Q. What happens to these shipper's orders, R-115?

A. They are retained in the office.

Q. They are never turned over to Bethlehem Steel Company?

A. No, they are not; but they are in readiness for inspection at any time.

Q. These detailed statements you make out, do I understand that there is a separate sheet for each Bethlehem Steel

660 Company account number?

A. No; not as of today.

Q. I am talking about your former system.

A. There was a separate sheet covering the 30-day or 31-day period.

Q. So, whatever you said, 150 or 200 separate Bethlehem Steel accounts, you kept a separate sheet, did you?

A. That is right.

Q. When did you change that system?

A. About two months ago.

Q. What is your present system?

A. That was daily; we submit a daily report supporting the blanket billing.

Q. That is the only difference, as I understand it, between the old system and the new system, is that, instead of submitting your monthly statement, as you describe, you now submit it daily?

A. That is right. This form of billing, of course—this form of billing helps our Department in this respect: That I won't have to issue a freight bill for each and every car that was moved.

661 Mr. CRAIG. You may examine.

Cross-examination by Mr. BROMLEY:

Q. By that last statement did you mean that Bethlehem Steel Company would be entitled each day to a detailed freight bill listing by car numbers all of the movements which your railway had made for it?

A. That is correct.

Q. All shippers are entitled to that kind of a bill, aren't they?

A. All shippers are entitled to it.

Q. Do I understand you to say that this system which you have described for Mr. Craig is a convenience to you and your department?

A. Absolutely.

Q. Does it save labor for you?

A. Plenty of labor.

Q. Supposing you had to follow the customary device of sending a freight bill by car number to Bethlehem Steel Company at any interval you choose, would you have to hire more clerks to do it for you?

A. That is correct.

Q. How many?

A. I would say at least two clerks, because you would have to issue anywhere from eight hundred to a thousand bills
662 separately daily, and put on the car number and the originating point and the destination and the rate and extension on each one.

Q. And the car numbers?

A. And the car numbers.

By the COURT:

Q. I do not just understand your explanation of the required work. Will you explain it? How do you explain what saves you work in making your reports daily?

A. In this way: By furnishing a blanket billing which covers the number of cars such as 800 or 1,000 cars. We only have to put one entry on there; we will say 200 cars at 4.40, 200 cars at 5.50, and so on until you make up your thousand cars. Then by supporting it with a detailed statement covering the number of cars in their respective columns, that is 4.40, that requires only one bill with the supporting detail to cover that bill, whereas I would have to issue an individual bill for each of what we call a shipper's order, what we call R–115, which would be 800 bills.

Q. Why would you have to do that if you gave the Bethlehem Steel Company one every ten days? I do not see the difference.

A. Well, if I bill them daily I would have to give them a separate expense bill or freight bill each day for each
663 and every car.

Q. That is what you are doing now, you say?

A. No, we are not. We still have the same system, but instead of cutting it down from 10 to 8, we have cut it down to every day.

Q. You bill them every day?

A. Yes.

Q. You have to send the same bills, don't you, whether it is 10 days or 30 days?

A. That is right, but instead of sending the details every ten days or thirty days we send them daily.

The COURT. I do not see the difference in the way it works.

By Mr. BROMLEY:

Q. Does your system that you say you adopted two months ago of sending these bills daily instead of every ten days save you any work?

A. Does it save any work?

Q. Yes.

A. No; it would be about the same.

The COURT. Your question prior to that was how much help it would save, and he said two or three men.

Mr. BROMLEY. I was not talking about the difference of rendering the bills daily or every ten days. I was talking about
664 the difference between sending a freight bill by car numbers, which the law requires, and making up these ten-day bills or every day bills by Bethlehem Steel account numbers instead of car numbers.

By Mr. BROMLEY:

Q. Did you understand that was what I was asking you about?

A. That is right.

Q. That is the distinction you draw, isn't it?

A. Yes, sir.

The COURT. The account numbers being based upon the tariff, you mean?

Mr. BROMLEY. Yes; and the type of service which was rendered for Bethlehem Steel Company.

By Mr. BROMLEY:

Q. Isn't that right, Mr. Witness?

A. That is right.

Q. Would you be glad to adopt this same system by company account numbers for any other shippers on your line if they were willing to do it?

A. If they were willing to do it.

Mr. CRAIG. I object to that, your Honor.

The COURT. Objection sustained.

Mr. BROMLEY. Has any other shipper on your line ever asked you to adopt this account number system?

A. No, sir; they haven't.

665 Mr. CRAIG. I object to that, too.

The COURT. Overruled. Has any other shipper requested this type of billing daily?

The WITNESS. No, they haven't.

By Mr. BROMLEY:

Q. As to other shippers you have to bill them by car numbers?

A. That is correct. Everything will appear on the freight bill which is nothing but a transcript of the bill itself.

Q. Is that more or less work for the same amount of movement than you have to do for Bethlehem Steel Company under the present system?

A. It would be more. It is more work.

Q. But they are entitled to that as you understand the law, is that correct?

Mr. CRAIG. I object to that.

The COURT. Sustained.

Mr. BROMLEY. You do not dispute it, do you, counsel?

The COURT. The law will take care of itself.

By Mr. BROMLEY:

Q. Bethlehem Steel Company pays your company for each of the bills which you render to them, doesn't it?

A. That is correct.

Q. And it pays by check, doesn't it?

666 A. Yes, sir.

Q. Daily?

A. Daily.

Q. In answer to a question you said something about some clerk calling up another clerk to get an account number in an instance where a forced R–115 did not show the account number. Did I understand you to say that one of your clerks called up one of the Bethlehem Steel Company clerks to get that number?

A. That is correct.

Mr. BROMLEY. That is all.

The COURT. I think the testimony before was just the reverse of that.

Mr. BROMLEY. That is what I thought.

The COURT. The testimony from this witness or a prior witness.

Mr. BROMLEY. From this witness.

The COURT. He testified it came from the company. The testimony is that it came from you to the company?

Mr. BROMLEY. No, sir.

The COURT. From the railroad to the company?

Mr. BROMLEY. The call came from the railroad to the company, but the number came back from the company to the railroad.

The COURT. I thought he testified to the contrary before.

667 By Mr. BROMLEY:

Q. You are not making any mistake about this now? You understand we both thought you said just the opposite on your direct examination. What is the fact now as to how your railway company gets the Steel Company account number on that forced billing?

A. When a forced billing comes over the clerk calls up——

The COURT. Whose clerk?

The WITNESS. The South Buffalo Railway Clerk will call up the Bethlehem Steel clerk, and he will describe the movement of the car, and he will give him the account number.

Q. Who will give the account number?

A. The Bethlehem Steel.

Q. Will give the railway man the account number?

A. That is right.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. Prior to your change of system about two months ago, do I understand that then as now you rendered this daily statement which you described?

A. Yes.

Q. But you rendered the additional statement not every ten days but every month?

668 A. Every month. We accumulated those bills for the ten-day period and entered them on these separate sheets, your account number, and then the total at the end of the month, we will say the 10th, 20th, and the last of the month, and we would total all those cars up and they will naturally—they will agree with the amount of cars we billed on the blanket billing.

Q. But relative to that statement you did not deliver anything to Bethlehem Steel Company at the end of the 10th day or the 20th day or the last day of the month, did you?

A. No. That was in the form of accumulation in the office.

Q. You simply, as I understand it, posted those shippers' orders on the account sheet at the end of the 10th day and the 20th day and the last day of the month?

A. That is right.

Mr. CRAIG. That is all.

Re-cross-examination by Mr. BROMLEY:

Q. I am afraid I do not understand it. At all times without regard to whether you did something at ten-day intervals, or one-

day intervals, you sent a daily bill to the Bethlehem Steel Company, didn't you?

A. As far as the blanket billing is concerned; not the distribution.

Q. That is what I want to clear up. You always send
669 them daily bills?

A. Daily blanket bills every day.

A. Daily blanket bills every day.

Q. Railways have to bill shippers every day?

A. That is correct.

Q. And shippers have to pay within 96 hours?

A. That is correct.

Q. So that the only change made was not only in the daily billing——

A. The daily billing we made the same.

Q. But in this summary of account numbers?

A. Yes, sir.

The COURT. It was a matter of bookkeeping with your company?

The WITNESS. That is right.

Mr. BROMLEY. That is all.

Mr. STRANGE. Mark this for identification.

(Order in Ex Parte No. 128, Interstate Commerce Commission, marked as "Plaintiff's Exhibit 154" for identification.)

ROBERT S. BOOTH, a witness called by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. STRANGE:

Q. You are Mr. Robert S. Booth?

A. That is correct.

670 Q. Mr. Booth, by whom are you employed and in what capacity?

A. I am employed by the Interstate Commerce Commission as assistant director, Bureau of Service.

Q. How long have you occupied that position?

A. Since June 1, 1942.

Q. In what capacity were you employed prior to that time?

A. Well, I have been with the Commission since January 1919. I was inspector with the Bureau of Locomotive Inspection until December 1936, and I was transferred to the Bureau of Service as a service agent.

Q. And you are now assistant director of that bureau?

A. Yes. I was made assistant to the director in 1941, I guess, and then in 1942 made assistant director.

Q. Will you state briefly what your duties were composed of when you were a service agent in that bureau?

A. I had a regular territory in the Washington zone, and our duties were to keep in touch with the railroad situation throughout our territory and perform various special investigations and work as it might be assigned from time to time.

Q. Did you have occasion at any time to investigate operating matters on the South Buffalo Railway Company?

A. Yes, sir; I participated in the investigation conducted by the Bureau of Service.

Q. I hand you here an order of the Interstate Commerce
671 Commission entered November 7th, 1938, in Ex Parte No. 128, marked for identification as "Plaintiff's Exhibit No. 154." Will you see if you recognize that document?

A. I do recognize that as the order from the Commission issued on the date described by you, the 7th of November 1938.

Q. What connection did that order have with your investigation?

A. Well, this Ex Parte 128 is entitled "Investigation of South Buffalo Railway Company."

Q. And was it pursuant to that order that you conducted your investigation?

A. Yes, sir.

Mr. STRANGE. May it please the Court, at this time we wish to offer the order of Interstate Commerce Commission, dated November 7th, 1938, in Ex Parte No. 128 in evidence.

Mr. BROMLEY. I object to it as immaterial.

The COURT. What difference does it make if an order of investigation was made? It is a question of what the investigation disclosed, is it not?

Mr. STRANGE. If your Honor please, the question may arise with regard to the authority and circumstances under which Mr. Booth went to Buffalo and discussed matters with the repre-
672 sentatives and employees of the South Buffalo Railway Company, and as we view the matter it may throw some light on the scope of the authority of the South Buffalo Railway Company in connection with certain statements or admissions made to Mr. Booth.

The COURT. No, I do not think it is competent at this time. This man has testified to what his duties were, and he also testified he made an investigation of the South Buffalo Railway Company. If his authority is questioned, then the question on the admission of this order may come up again. As it appears now he is competent to testify to declarations that were made by officers in the scope of their authority. I will decline to receive it just now. I suppose there is no question about it, anyway, because Ex Parte

No. 128 has been referred to as an investigation of the South Buffalo Railway Company.

Mr. STRANGE. For the purposes of the record may we note an exception?

The COURT. Yes.

By Mr. STRANGE:

Q. Now, Mr. Booth, who participated in the investigation that you have just referred to?

Mr. BROMLEY. Objected to as immaterial.

The COURT. Overruled.

673 Mr. BROMLEY. I do not see what difference it makes, who participated in it.

The COURT. It tells, I suppose, who was present when something took place.

Mr. BROMLEY. All right.

The COURT. Objection overruled.

By Mr. STRANGE:

Q. Proceed.

A. Assistant Director, C. C. Wall, was in charge of the investigation and the service agents from the Bureau who participated were service agent Adelbert Gorman, service agent John L. Strong and for part of the time service agent George M. Jackson, and myself as a service agent.

Q. Where is Mr. Wall now?

A. Mr. Wall is dead.

Q. Where is Mr. Strong?

A. He is also dead.

Q. What about Mr. Gorman?

A. Mr. Gorman is retired by age.

Q. When was it that you conducted this investigation?

A. We came to Buffalo in late December 1938, the latter part of December 1938, and all of January, most of February to March 21, 1939. I have the exact dates here if you want them that I was up here.

674 Q. But at any rate you were here in part of December 1938, January 1939, February 1939, and part of March 1939?

A. That is correct.

Q. During the course of your investigation did you have occasion to examine into the question of coal shipped to the Bethlehem Steel Company?

A. Yes; coal was one of the in-bound items received in volume, and we naturally made an investigation of the receipt of that coal and the handling of cars, and so forth.

Q. What did you find as to the length of time that coal was held for South Buffalo Railway?

Mr. BROMLEY. I object to that as incompetent, because a conclusion.

The COURT. Sustained.

Q. State what, if anything, your investigation disclosed with regard to the handling of this coal consigned to Bethlehem Steel Company and handled by the South Buffalo Railway Company?

Mr. BROMLEY. The same objection.

The COURT. Sustained.

Q. Well, in your own language, Mr. Booth, will you state what your investigation disclosed with regard to the handling of coal consigned to the Bethlehem Steel Company?

Mr. BROMLEY. The same objection.

675 The COURT. Sustained.

Mr. STRANGE. May it please the Court, there is a certain segment of the investigation that dealt with the handling of coal by the South Buffalo Railway Company consigned to the Bethlehem Steel Company and we are wishing to elicit from the witness merely a statement as to what his investigation disclosed with regard to that handling.

The COURT. The question calls for a conclusion. I will let him state the fact. The books of the Company can be produced here or a statement of the officers made to the investigators.

By Mr. STRANGE:

Q. Mr. Booth, in your investigation what statement, if any, was made to you with regard to this coal consigned to Bethlehem Steel Company?

Mr. BROMLEY. I object to that as incompetent, because no proper foundation.

The COURT. Sustained. A proper foundation is not laid for it.

Q. Whom did you discuss this question with, if any one?

A. Well, we had——

The COURT. No; he asked whom did you discuss it with.

The WITNESS. You mean coal?

By Mr. STRANGE:

676 Q. That is right.

A. I discussed it with John L. Ensinger.

The COURT. He is asking about you. You have spoken of a number of individuals. You can only testify to your knowledge of what was said by the people with whom you talked, with whom did you discuss it or was it discussed in your presence.

The WITNESS. With John L. Ensinger and with the assistant general superintendent St. Clair.

The COURT. All right.

By Mr. STRANGE:

Q. What, if anything was said to you by Mr. Ensinger, or Mr. St. Clair, or both, with regard to the handling of this coal consigned to Bethlehem Steel Company?

Mr. BROMLEY. I would like the time and the place and which one, if your Honor please.

The COURT. Yes, it should be separated. That is true.

Q. What statement was made by Mr. St. Clair to you with regard to that situation, if any, and state the time and the circumstances under which such statement was made, if it was made?

A. I couldn't tie the time down as to any of the conversations we had, but it was in December 1938 or January or February or March 1939 that we asked—I with the other service agents,
677 Strong and Gorman, asked Mr. St. Clair about the delay to cars of coal. In other words cars which were not placed promptly, and he stated that they undertook to hold about three days' supply of coal on hand in cars to protect against any shutdown of the mines or undue in transit.

Q. Who was it that made that statement?

A. Mr. St. Clair, the Assistant General Superintendent.

Q. Was anything further said with regard to that situation?

A. Well, I don't think offhand of anything further. We prepared an exhibit showing the existence of that situation which was presented in the Commission hearing.

Q. Now, Mr. Booth, did your investigation involve the question of the charging of demurrage by South Buffalo Railway Company on cars consigned to or by Bethlehem Steel Company?

A. Yes, we made an investigation of the assessment and maintenance of demurrage records by the South Buffalo Railway.

Q. Over what period of time did that examination extend?

The COURT. He has already stated.

Mr. STRANGE. He stated when he was there.

By Mr. STRANGE:

Q. Let me ask you this: Will you state briefly how you conducted your investigation insofar as these demurrage accounts are concerned?

678 A. Well, we familiarized ourselves with the method of maintaining these demurrage records and we went into that question quite thoroughly, I would say, from almost every angle, so as to be sure that we did understand fully just what the system was, and then we prepared various exhibits showing the results of this investigation, the number of cars involved, the amount of demurrage assessed, and items such as that.

Q. What period of time was covered by the records that you examined?

The COURT. On the question of demurrage?

Mr. STRANGE. Demurrage; yes, sir.

The WITNESS. Why, two years, I think, was the period——

The COURT. Two years?

The WITNESS. Two years.

679 Q. Well, between what periods?

A. I don't have the details here.

Q. Approximately?

A. Thirty years—1937 and 1938. I am quite sure that is correct.

Q. Was there any period during that time in which you concentrated on in that part of your investigation?

The COURT. Concentrated, on what?

Mr. STRANGE. On demurrage.

The COURT. That is what you are speaking about?

Mr. STRANGE. Yes. I mean, he stated now that his examination covered the period of two years. Now I want to know if, during that two-year period, there was any lesser time that was concentrated on.

A. Well, I don't know exactly what you mean by "concentrated" but we simultaneously made an investigation of switching and the demurrage and the switching within the plant was closely tied together and one affected the other, and so we took one particular month, October 1938, and had more detailed information, both as to demurrage, details of demurrage, and switching for that month than for any other period.

Q. During October 1938, state what the extent was of your examination of the demurrage records on cars consigned to or consigned by Bethlehem Steel Company?

680 A. Well, we made a complete copy of the October 1938, demurrage records, because we had to refer to them so constantly, and we finally concentrated throughout the record and we found it was almost a question of necessity to make a complete copy of the demurrage records for that particular month.

Q. During the time covered by your investigation of this demurrage and including October 1938, what did you find, if anything, with regard to cars owned by Bethlehem Steel Company and used by Bethlehem Steel Company, having demurrage charged on them by the South Buffalo Railway Company?

Mr. BROMLEY. I object to that as incompetent, because a conclusion.

Q. Did you have any conversation with anyone in connection with your investigation relating to the question of whether or not demurrage was charged by the South Buffalo Railway Company on cars owned by the Bethlehem Steel Company and used by that Company?

A. We discussed the matter with General Agent A. J. Ensinger.

Q. What did he say in that connection?

Mr. BROMLEY. When and where, please?

The COURT. About when was this?

The WITNESS. That was in the early part. I would say that was probably in January.

681 The COURT. 1938?

The WITNESS. January 1939. We started in December 1938, and we went home for Christmas and came back afterwards. I would say that was about January. We found that——

The COURT. What you found is not the question you are asked now. What was said with reference to the charge of demurrage on the cars owned by the Steel Company?

A. Well, there was not any demurrage assessed on them.

The COURT. You said so, or what is it? You are supposed to get your information from Ensinger. Ensinger said? The books are the best evidence on the other question. What Mr. Ensinger said. You talked with him in January. What did he say on the subject of this demurrage, if anything?

The WITNESS. Well, I don't know whether I can explain, your Honor, just—the reason we talked to him was on account of information that we had developed, and when we developed that information we discussed the matter with him.

The COURT. All right.

The WITNESS. And he confirmed our——

The COURT. No, no. You cannot say "he confirmed." That is your own conclusion about what the result was.

The WITNESS. Well, he admitted that they did not assess——

682 The COURT. No, no; not "admitted." That is another conclusion—what he said.

The WITNESS. Well, I could not quote what he said.

The COURT. Well, the substance of what he said. Not your conclusion.

The WITNESS. The substance of what he said was that they did not assess demurrage on Bethlehem Steel Company cars when they were used in the Bethlehem Steel Company service. He also called attention—I don't know whether you want that or not, but other than Bethlehem Steel Company——

Q. What was that? Just repeat that statement.

A. He also called attention to the fact that they did assess demurrage when those cars were used in the service of some other Company.

Q. The Bethlehem Steel Company-owned cars?

A. Yes.

Q. Now, in your conversation with Mr. Ensinger, was the question raised with regard to charging of demurrage on foreign

owned cars consigned to or consigned by Bethlehem Steel Company?

A. Yes.

The COURT. Consigned by the Bethlehem Steel Company?

Mr. STRANGE. Either consigned to Bethlehem Steel Company or consigned by Bethlehem Steel Company.

683 The WITNESS. Shipped by Bethlehem Steel Company.

Q. Well, shipped by Bethlehem Steel Company?

A. We discussed demurrage matters with Mr. Ensigner on a very large number of occasions, because it was quite complicated and we had to secure his assistance, which he gave to us freely. There was hardly a day, I would say, that we did not discuss some feature of the records with him. We were working right in a few feet of him most of the time, in his offices, in the office assigned to us.

The COURT. Now he asked you what was said on this subject.

Q. Now, with regard to demurrage applied or charged to Bethlehem Steel Company on these foreign-owned cars, what was said, if anything, with regard to when demurrage first applied on those cars and when they were released from demurrage?

A. Why, he advised us that they had an understanding with the Bethlehem Steel Company that the Steel Company would assume detention or demurrage on cars from interchange to interchange.

Q. Well, now, during the conversations or discussions on this subject what, if anything, was said with regard to the charging of demurrage on these cars when they were not accessible to Bethlehem Steel Company for loading or unloading?

684 A. Well, when we would discuss these questions with him we would invariably have detailed information there to cite to show how a particular car was held, so that there would not be any—so that he would understand what we were talking about and we would understand his expressions to us. And we called his attention on various occasions to the fact that they made no provision—these demurrage records would be more or less continuous, you might say, when one ceased the next one would pick up immediately without any lapse of time in there for switching, and so forth.

Q. In other words, insofar as the car being on demurrage is concerned, Mr. Ensinger stated that, under this agreement, they were on demurrage from in-bound interchange to out-bound interchange?

A. That is correct. That was his explanation for the method of maintaining those records.

Q. Now may I ask if, in that conversation or conversations, it was brought to Mr. Ensinger's attention that under such an under-

standing cars would be on demurrage when they were not accessible to Bethlehem Steel Company for loading or unloading? Was that brought to his attention?

A. I don't particularly remember calling his attention that way, but we would take a specific car there and
685 show the movement and show him the demurrage record, because that was what raised the question in our mind, the reason we asked him the question as to whether that was—what they had intended to do to maintain the demurrage record in that manner and keep it on continuous demurrage, you might say, regardless of where the car was located within the plant or in the interchange, or coming from or going to the interchange.

Q. What, with regard to the understanding, applied to cars after they were loaded and until they arrived at out-bound interchange?

A. Well, they were released at the out-bound interchange, the out-bound cars were released at the out-bound interchange.

Q. And that situation was called to Mr. Ensinger's attention in these conversations?

A. Yes.

Q. Now, in the course of your investigation as to this phase, this demurrage matter, what records did you examine of the South Buffalo Railway Company?

A. We examined any number of records; the demurrage records, switching records, correspondence.

Q. Did you examine the car record books of the South Buffalo Railway Company?

A. Yes, sir; all the car records of various kinds, I would
686 say we examined all of them, at least to some extent.

Q. What do those car record books disclose?

Mr. BROMLEY. Objected to as incompetent.

The COURT. Sustained.

Mr. STRANGE. May it please the Court, we can call on them for production.

The COURT. Of course, the books are the best evidence. The witness cannot testify to what was disclosed—your witness. The books are the best evidence.

Mr. STRANGE. If you desire, we will call for the books.

Mr. BROMLEY. What books?

Mr. STRANGE. The car record books for 1938 and 1939.

Mr. BROMLEY. You can call for them. There are no such things.

The COURT. What do you mean, there are no such things? What do you mean?

Mr. BROMLEY. There are no such things as car record books.

The COURT. Well, car record books of demurrage charges.

Mr. BROMLEY. There are demurrage records; yes, sir. Is that what you want?

Mr. STRANGE. No; that is not what we want. We want the books, the records of the South Buffalo Railway Company, which disclose the length of time that the cars consigned to Bethlehem Steel Company—between the time of arrival to the time of release, in other words.

687 The COURT. On the question of demurrage?

Mr. STRANGE. Very definitely so.

The COURT. That is what he is asking about.

Mr. STRANGE. Well, I mean, it might be one of the books relating to demurrage.

The COURT. He cannot testify as to the contents of any books until you subpoena the books here, if you have them, if there are such books lost or destroyed. But it cannot be shown, over the objection of Counsel by oral testimony.

Mr. STRANGE. May it please the Court, for the moment, we will pass on and not repeat our request for production.

By Mr. STRANGE.

Q. From the books and records of the South Buffalo Railway Company that you examined can you state what lengths of time the cars included in your investigation, or covered by your investigation, remained between the interchanges?—That is, the time that elapsed between in-bound interchange and out-bound interchange, the average length of time of these cars?

Mr. BROMLEY. I object to that as incompetent.

The COURT. Sustained. The books are the best evidence.

Mr. STRANGE. Yes, sir; the books are the best evidence,

688 but we wanted to avoid the hauling in of a lot of demurrage records.

Well, that is all, may it please the Court, except we may wish at a later period to call for the production of these books.

The COURT. That is all right. Cross-examine.

Mr. BROMLEY. Now I move to strike out all of this testimony, as immaterial. What materiality can the propriety of railroad practices, which were under investigation by the Interstate Commerce Commission, and have been for years and years, and which some day, it is hoped, will be decided, as to whether proper or improper—what materiality can the propriety of practices on the part of this Railroad have on a commodities' lawsuit? I submit none, your Honor. It gets us into a field in which we have litigated for nearly ten years already, on whether or not we are entitled to charge demurrage on one basis or another. And it leads us so far afield from any possible materiality to the question presented by this case that I submit it is entirely irrelevant.

The COURT. Well, of course it is only concerned with that one question; its only relevancy must be connected with the operating company or the corporation or the company in inter-
689 interest, of course. The fact that the Railroad may have violated the regulations with reference to demurrage is not of itself any proof of the cause of action laid here. The question who profited by it, to show the possible interest of the Railroad, or interest of somebody else. The question of how these cars, standing alone, over an extra length of time, whether they did or did not charge demurrage as they ought to charge it, that, standing alone, is not of any moment here, is it?

Mr. STRANGE. May it please the Court, we wish, among other things, to show by this evidence that, insofar as the charging of demurrage is concerned by the South Buffalo Railway Company to Bethlehem Steel Company, no regard, or little regard, was had to the ownership of these tracks. We expect to produce a tariff which discloses when demurrage should have been charged and when not; and the identity of the tracks has much to do with that.

The COURT. I think it is competent. It has a bearing, with that in mind. I will overrule the objection. Deny the motion to strike out the testimony.

Cross-examination by Mr. BROMLEY:

Q. What Mr. Ensinger said to you about coal was that
690 the Bethlehem Steel Company kept a three-day supply in the Buffalo district, wasn't it?

A. Mr. St. Clair.

Q. Was it Mr. St. Clair?

A. Yes, sir; Mr. St. Clair.

Q. Is that what he said to you?

A. That they undertook to maintain a three-day supply of coal on hand, yes, to protect against shut-down of the mines or undue delay in transit of this coal they were moving in by rail.

Q. Mr. St. Clair is dead, is he not?

A. Yes, sir.

Q. So in Mr. Ensinger, is he not?

A. Yes, sir. So is Mr. Benning.

Q. Did you hear my question, that what Mr. St. Clair said to you was that Bethlehem Steel Company undertook to maintain a three days' supply of coal?

A. No; I didn't say Bethlehem Steel Company.

Q. Well, that is what I asked.

A. He said that they, the South Buffalo Railway, undertook to hold three days' supply of coal. I didn't say Bethlehem Steel.

Q. I am including specifically as to whether or not Mr. St. Clair said to you that it was Bethlehem Steel Company that undertook to keep a three days' supply of coal?

691 A. No. South Buffalo Railway. He was an employee of the South Buffalo Railway. He was speaking for his Company, that they undertook to maintain a three days' supply of coal on wheels to protect the coke ovens in case of interruption.

Q. You prepared some figures to show how much this amounted to and where it was located, didn't you?

A. Exhibit 34, I think it was.

Q. Yes. You remember Exhibit 34, don't you?

A. Yes, sir.

Q. Without regard to Exhibit 34, you prepared figures in order to find out where this so-called three-day supply of coal was located, didn't you?

A. Where it was located within the property, you mean?

Q. What kind of coal it was and where it was and how much of it there was?

A. Well, we got that—that was available right from the daily coal report.

Q. Yes. And you remember, do you not, that that supply of coal included reload coal?

A. Not the three days' supply didn't.

Q. Yes, the three days' supply.

A. No; I am quite sure it didn't. I would have to check into that, though, further, but I am quite sure of that because the

692 Railroad was not involved in the reload coal at all.

The COURT. What do you mean, "the reload coal"?

The WITNESS. That was coal that had been brought in by boat and unloaded on the ground, was stocked, and then later that was picked up and moved to the car dumper. But the Railroad was not involved. The only thing that the Railroad did in connection with that was to move the empty cars.

Q. Why, certainly, that was coal in the possession of the Bethlehem Steel Company, was it not?

A. Yes.

Q. And, likewise, don't you remember that Mr. Ensinger, in his conversations with you, not only called your attention to reload coal but also called your attention to the fact that when he made that statement he was counting coal in the possession of the Pennsylvania Railroad at its Ebenezer yard?

A. Coal in transit; yes, sir, that was shown in there.

The COURT. Coal in transit was not on the South Buffalo Railroad, you mean?

The WITNESS. This coal report showed, in addition to what was on the South Buffalo, the coal in transit on the trunk line.

Q. And it also showed, in addition to that, coal in the
693 possession of Bethlehem Steel Company which was not reload coal but had been delivered to it, did it not?

A. I don't know whether I could answer that right off-hand or not.

Q. Well, it may have, may it not?

A. Sir?

Q. It may have, may it not?

A. I don't think so, because when it was delivered the Railroad was through with it then; it was entirely up to the Bethlehem Steel Company that they move it to the unloading point themselves.

Q. Didn't it include home coke?

A. No; I don't think there was any coke coming in at the time of our investigation. They were making their own coke.

Q. That is home coke, is it not?

Mr. STRANGE. May it please the Court, may the witness refresh his recollection, if he cares to do so, from the Exhibit 34, which Counsel has asked him about, if he cares to do so?

Mr. BROMLEY. Wait a minute. I object to that. I am asking him about his conversation with Mr. St. Clair.

Mr. STRANGE. Reference was made to this Exhibit 34 as having been filed with the Interstate Commerce Commission.

694 The COURT. It depends on what the question is. If he recalls these amounts at that time.

The WITNESS. I might say here that when I spoke of the conversation, that is not an isolated conversation. We tried to get familiar with the whole lay-out down there and went over the property and so forth. So we did not lay too much stress on one or two particular conversations, because we had many of them. We also made many observations. Mr. St. Clair went over the property with us and explained the operations, so forth.

Q. So, when you are talking about this three days' coal supply you are really relying on your recollection of your analysis and summary of our records, are you not?

A. Of our observation and the information that we secured from your records.

Q. Yes.

A. And we certainly would not include reload coal in that, because it was an entirely different proposition.

Q. Yes. You mean when you analyzed our records for the purpose of determining whether or not there was a three-day supply, you would not prepare any exhibit or any summary that would include reload coal, would you?

A. No. This home coke does appear on this coal report.

Q. And in your testimony as to the three days' supply
695 of coal whether there was or was not such a thing, what you are relying on, chiefly, is your recollection of what it showed on such things as the summary which you now hold in front of you, open; isn't that right?

A. No. We have a detail here to back that up, too, by car numbers, and so forth. And we also have a report that shows the number of cars on hand that was submitted with our exhibit. 189 cars of coal held in South Buffalo——

Q. Do not read it to me, please. I object to that.

A. Numer of cars unloaded over a certain period, and the number, this number, when unloaded, and number at the end of the period, so forth. So that somewhere in the neighborhood of 200 cars is what we consider——

Mr. BROMLEY. I don't want the figures. I move to strike out this testimony on the ground it is now apparent it is based not on a conversation but on a summary of the records.

The COURT. That is true. Not on conversation. Strike it out. He is asking about the conversation with Mr. St. Clair, the present question is:

Mr. BROMLEY. I was asking, your Honor, to strike out the testimony with respect to alleged conversation with Mr. St. Clair,
696 on the ground it now appears that what he is testifying to is really a summary of records and not a conversation at all.

The COURT. Well, I assume that he is referring to the summary for the purpose of refreshing his recollection of what St. Clair said. That is the only purpose of it.

Mr. BROMLEY. Well, I think he has testified on cross-examination that it is not what Mr. St. Clair told him but what he found from our records.

The COURT. Well, I will strike it out as hearsay, for the present.

Mr. STRANGE. What is the extent of your ruling, may it please the Court, with regard to the striking?

The COURT. I want to get back to an understanding of just what the question is: He is talking about a conversation with Mr. St. Clair. The witness has a right to refresh his recollection, if he don't recall, in giving his answer. What the conversation was with Mr. St. Clair. We will strike out the rest of it, for the purpose of clarifying if for no other purpose.

Mr. STRANGE. May I point out that Counsel for the defendant first introduced the question of Exhibit 34 and as to what was contained therein.

The COURT. Well, that is in the testimony. You may
697 inquire as to what St. Clair said, if anything further, with respect to cars.

By Mr. Bromley:

Q. Isn't it a fact, Mr. Witness, that Mr. St. Clair never told you that the Railway kept three days' supply on hand for the Steel Company, but that was your conclusion, from the records which you looked at?

A. No; that is exactly what he did tell us, that they undertook to maintain three days' supply of coal on wheels.

Q. Well, then, did you go to some coal reports and discuss with him the coal reports?

A. We discussed them at the time we had already looked at the coal reports and found this number of cars of coal and certain other commodities, too, that were delayed; and we were looking for an explanation for that delay and we asked Mr. St. Clair; and that was his explanation of coal.

Q. When you talked with Mr. St. Clair did you have the coal reports before you?

A. I would say yes.

Q. And, on the coal reports which you had before you, you have just told me a minute ago that there is included in the total home coke, have you not?

A. Not any total of the three days' supply.

Q. Well, look at the coal report, if you have it. Isn't that included in the total?

698 A. There is no total on it. The home coke is the last item on there, the various kinds of coal; and the last item is home coke.

Q. All right. But it is included along with all the other items of coal, is it not?

A. There is no total on there.

Q. No. But, I say, it is included along with all the other items of coal, is it not?

A. Yes; there are five items of coal and then the sixth item is home coke.

Q. You know that home coke is coke which Bethlehem Steel Company makes itself, and which was in its possession as of the time of the report which you are looking at? You know that to be the fact, don't you?

A. Well, it might or might not be in its possession. It might be held in one of the South Buffalo Railway yards.

Q. So you could not tell, from looking at the report, in whose possession it was, could you?

A. Not unless you looked at other reports; no.

Q. Now, you also know and have known for quite a few minutes, that reload coal is included in that report, isn't that right?

A. No.

Q. Don't know it?

699 A. I am quite sure that reload coal was not included in there.

Q. Will you take another look?

A. Yes, coal reload.

Q. It is not only included there once but it is included there three times?

A. "On hand yesterday, received, unloaded, on hand this morning."

Q. Look down the column, not across it, Mr. Witness. Do you see two or three items of re-load coal in the vertical columns?

A. No. Poco. reload and boat; under the "reload" is "boat."

Q. How many items? At least two items are re-load coal?

A. Well, this "boat" happened to be blank on both of these, right there [indicating]; both blank on the next one, and both the re-load—well, here is one "Re-load, Poco." and "Re-load Ellsworth."

Q. You know that re-load coal is not in the possession of the Railroad at all, but is in the possession of the Steel Company, don't you?

A. Yes, sir. The re-load coal, in our consideration, we did not consider that as being coal on hand.

Q. Now look up in the left-hand corner. Do you see something about coal in transit?

700 A. Yes, sir.

Q. And do you see something about the number of cars of coal held at Buffalo?

A. Yes.

Q. What? I did not hear you.

A. Yes, sir.

Q. You know that has a reference to coal that is held by the Pennsylvania Railroad in Buffalo, in its Ebenezer yard, don't you?

A. At Buffalo, so many at yard set to Buffalo, so many at yard City, and then so many back on scales.

Q. I was referring only to the number of cars held at Buffalo.

A. Yes, they show the number at Buffalo.

Q. You know that refers to cars of coal consigned to Bethlehem held by the P. R. R. in its Ebenezer yard in Buffalo, don't you?

A. I know that probably would be that.

Q. Yes. Now, having refreshed your recollection from this exhibit and seeing that it contains coal, not only in the possession of the South Buffalo but in the possession of the P. R. R. and the Steel Company, can you not now recollect that what Mr. St. Clair told you was that the Bethlehem Steel Company kept a three days' supply of coal in the district?

A. In the district, you say?

701 Q. In the district, yes.

A. No, we were not talking about district, but the Bethlehem Steel Company, we were speaking about the conditions on the South Buffalo Railway.

Q. Looking at those sheets you got before you now, can you by any possibility tell which, if any, of that coal was held by the Railroad, as distinguished from the P. R. R. or the Bethlehem Steel Company?

The COURT. You mean how many cars?

Mr. BROMLEY. Yes, sir.

The COURT. All right. Now, you are referring to a particular day?

Mr. BROMLEY. Any day, sir, any one of the days for which he has any reports of coal at all.

A. Well, yes.

Q. Can you tell from looking at it?

The COURT. Can you tell what was held by the South Buffalo as distinguished from that held by the Steel Company and the Pennsylvania, or any other outside?

Q. By looking at that report?

A. You cannot tell positively what was held by the Steel Company and what was held by the South Buffalo Railway.

The COURT. Why didn't you separate them, if you were trying to find out what each was?

The WITNESS. There is a yard check, another report that
702 showed the actual location of these cars, where they were held.

The COURT. Then you don't know how many were held by the Company and how many were held by the Railroad, separately?

The WITNESS. Yes; this information that was worked up at the time showed the cars held in the yard of the South Buffalo.

By Mr. BROMLEY:

Q. That was from a summary of what you thought our records showed, was it not?

A. No, that was from your yard check.

Q. Yes. Our yard check is our record, is it not?

A. Yes; daily record, South Buffalo record; that is correct.

Q. Did you attend the hearing at which Mr. St. Clair testified about this?

A. I attended hearings in 1940.

Q. You heard Mr. St. Clair testify about this very subject, didn't you?

A. I don't remember whether he did or not. I have not looked up to see if he testified.

Q. Don't you remember that he explained that he referred to coal in the district and specifically said that what he was talking

about to you was coal held by the Steel Company and by the Railroad and coke and reload coal? Did you hear him say that?

703 A. No; I don't remember that. I could probably refresh my memory if you want me to look at the testimony, but I have not——

Q. Did you testify before he did or afterwards, can you remember that?

A. No; I don't remember that. I have been out of touch with this case for good many years now and the last hearing that I testified was in 1940. I have not had occasion to review the testimony, except my own. I did look over it the other day before I left Washington, but, offhand, I don't remember any conflict between what Mr. St. Clair said and what we testified to and what our exhibits showed.

Q. Well, now, let us come to cars owned by Bethlehem Steel Company: The Bethlehem Steel Company did own or lease a large number of cars which it used on its own trackage, within its plant, and which the South Buffalo Railway, when ordered by the Steel Company, transported around its railroad; is that right?

A. That is correct.

Q. And you say that Mr. Ensinger told you that the Railway did not charge the Steel Company demurrage on cars owned or leased by the Steel Company; is that right? Is that what you said?

A. On cars owned by the Steel Company.

704 Q. They did not include leased?

A. They did not include lease. I think they had a few tank cars leased probably that—but their own cars, that was a large number of cars, in the neighborhood of 2,000, I believe, at that time.

Q. You know something about demurrage, don't you?

A. I know a little something about it. I checked a number of records and do not propose to be a demurrage expert.

705 Q. Well, at any rate, you know enough to know that at no time has there ever been any requirement that demurrage should be charged on industry-owned cars, loaded or unloaded, if they are standing on industry-owned tracks?

Mr. CRAIG. We object, may it please the Court. The tariff itself is the best evidence as to that.

The COURT. Overruled. It is cross-examination.

Q. Now, can you answer that question, sir?

A. Well——

Q. Can you answer that question?

A. I can't answer just exactly the way you ask it because during this emergency, for instance, the tariff was changed to provide

for the assessment of demurrage on private cars while on private tracks, during the war emergency.

Q. By that answer you refer to the wartime provision with relation to privately owned tank cars, don't you?

A. That is right.

Q. You know that I am not speaking about the war or tank cars, don't you?

Mr. STRANGE. May it please the Court——

The WITNESS. I know.

Q. You know that I am talking about 1937 and 1938, the same time you talked about, don't you?

Mr. STRANGE. That is the first time you have included
706 that in the question.

Q. You know that?

A. Your question didn't bring that out. You said there wasn't any provision now or at any time that they assess demurrage while on a privately owned track. That is the reason I could not answer the question.

Q. It is the fact that except for the wartime at no time has there been any requirement that a railroad should charge demurrage on industry-owned cars standing on industry-owned tracks, whether loaded or unloaded?

A. That is my understanding. I am not an authority on tariff, demurrage tariff or any other, but that is my understanding.

Mr. STRANGE. May I ask counsel if he means ownership of the cars and the tracks being in the same industry?

Mr. BROMLEY. Yes.

Mr. STRANGE. That was not included in your question.

Mr. BROMLEY. I will ask it over again.

By Mr. BROMLEY:

Q. As thus amended, can you answer the question?

A. That is my understanding, yes, sir.

Q. There is no demurrage?

A. They would not be subject to demurrage.

The COURT. There would not be any sense in charging de-
707 murrage for storage of a car owned by the company on its own tracks in its own confines; there would not be any sense in that unless they were short of cars?

The WITNESS. There would not be any inducement to own the cars if they were going to have to pay demurrage on them.

By Mr. BROMLEY:

Q. You also know that at no time has there ever been any requirement that outbound demurrage should be charged on empty industry-owned cars placed on industry-owned tracks for loading where the ownership is the same?

Mr. STRANGE. We make the same objectiton, may it please the Court. He is going into involved tariff questions now.

The COURT. Except as to the place of delivery, it is the same question as before, is it not?

Mr. BROMLEY. It is different to this extent: Where the railroad delivers an empty car for loading——

The COURT. You said a car owned by the company and on the tracks of the company for shipment outside.

Mr. BROMLEY. I think——

The COURT. The difference is whether it goes outside or whether it remains inside. Objection sustained. I think it is a question of law anyway.

By Mr. BROMLEY:

Q. You say, however, as I understand you that the railway charged demurrage on these cars if they were used by industries other than Bethlehem?

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A. That is correct; yes, sir.

Q. Well, you testified about that in the I. C. C. hearing, didn't you?

A. Yes, sir.

Q. I ask you whether or not on June 14, 1940, you did not testify as follows:

"By Mr. KUNKEL:

"Q. Mr. Booth, I asked you yesterday this question: 'Now, on the private cars owned by the Bethlehem Steel Company, do those cars appear on the demurrage records of the South Buffalo Railway?' Do you now desire to elaborate on the answer which you gave to that question?

"A. Yes, I do. They did not appear on the demurrage records of the South Buffalo Railway, so far as the Bethlehem Steel Company was concerned, but those cars are also used in service between the Bethlehem plant and some other plants, such as the Buffalo Sintering and the Buffalo Slag, and in those instances, they do not appear in the demurrage records of the outside industries other than the Bethlehem Steel Company. I thought we ought to have that in the record."

Do you remember that?

A. Yes, but that is an error, that "not". I remember that very specifically. I just went over that testimony a few days ago and that "not" was put in there. That was what we were trying to correct. He hadn't asked me specifically the day before, and then the reporter put a "not" in there, which should be eliminated.

708

Q. Well, did you ever eliminate it before this trial?

A. It was eliminated from the Commission's record; yes, sir.

Q. When did you do that?

A. Well, shortly after the hearing in 1940.

Q. Well, did you ever notify the South Buffalo Railway that you were changing your testimony?

Mr. CRAIG. I object to that. I do not know that there is any obligation on his part to notify them.

The COURT. Sustained.

Q. Can you keep in your mind what I have read to you, Mr. Witness?

A. Yes; I read that three days ago. I remember that very distinctly because the way that reads is not a fact. You may recall that there were lots and lots of errors in that testimony.

Mr. BROMLEY. I was not in it, so that I don't recall it.

The WITNESS. You weren't, but some of your associates probably recall. It was one of the worst reporting jobs I have ever seen.

By Mr. BROMLEY:

710 Q. What is your position, that demurrage should be paid by outside industries on Bethlehem Steel cars?

A. I was not taking any position. I was saying that it was paid by outside industries on Bethlehem Steel cars.

Q. And that it was not paid by Bethlehem Steel Company; is that your position?

A. Yes, sir.

Q. But you don't say whether that was wrong or right; is that correct?

Mr. STRANGE. May it please the Court, we object to that question.

The COURT. Are you referring to the testimony?

Mr. BROMLEY. I will withdraw it.

Q. Is it your position that that is wrong or right?

Mr. STRANGE. We object.

The COURT. Overruled. What do you mean——

Mr. BROMLEY. Either one.

The WITNESS. That is not within my province to answer, because I do not have authority to interpret tariffs. I never have, and I don't interpret them. That is a function of other people in the Commission.

Q. After the time at which you made this investigation you investigated the facts further, didn't you, and found out that the railway company was charging the Steel Company demur-

711 rage on Steel Company owned cars where standing on railway tracks?

A. I don't know that officially. I know that unofficially, that after our investigation they did change the practice and assess demurrage on Bethlehem Steel owned cars while they were on South Buffalo Railway tracks, but I haven't participated in the

investigation since that change was made, and that is more or less hearsay information when I say that I know it.

Q. But you got this information as long ago as 1939, didn't you?

A. In the September hearing there I was asked the question along that line, September 1940, and——

Q. You testified that the Railway was charging as of 1939 demurrage on Company-owned cars, while standing on Railway tracks; do you remember?

A. No, I don't think you will find I testified to that. I testified it was my understanding that that was being done, but I didn't investigate personally to find out.

Q. That was your understanding that that was being done?

A. That was my understanding.

Q. The next subject matter that you testified to, as I understand you, was that on foreign-owned cars consigned to or by Bethlehem Steel Company, demurrage was charged for the whole length of time between the time they left interchange and
712 the time they got back, no matter how long it was, and no matter what had been done with them in the interim; is that right?

Mr. STRANGE. May it please the Court, his testimony was that Mr. Ensinger told him that that was the practice.

Mr. BROMLEY. All right. I will withdraw the question.

Q. Do I understand you to say that Mr. Ensinger told you that back in 1937 and 1938 the South Buffalo Railway did charge the Steel Company demurrage on foreign owned cars, and that they charged demurrage for the whole period of time which elapsed between the time that the Railway pulled the car from interchange and took it back again, no matter what happened in the interim; is that right?

A. Mr. Ensinger told us that they had the understanding that the Steel Company would assume demurrage for that whole time. They were not on one continuous demurrage record during that time that might be broken up into a series of records. Previously they had been on one, before our investigation they had been on one continuous record from the time the car was received until it was released, but that was changed some time before the Commission's investigation was started, and they still—practically all of the over-all time was included, but there would be
713 one, two, three, four, or as many as ten individual demurrage records for that over-all time.

Q. But the Railway Company made the Steel Company or agreed with the Steel Company, and the Steel Company, according to your conversation, paid demurrage for the whole time; is that it?

A. Yes, that is correct.

Q. That was an overcharge, wasn't it?

A. It would appear on the face to be an overcharge, yes, although that is not in my province to say whether it is an overcharge or not, but it had the appearance of being an overcharge.

The COURT. It appeared on the books, didn't it? Wouldn't it appear on the books what the charge was?

The WITNESS. Yes, the demurrage record would show whether the car accrued debits or credits or money.

By Mr. BROMLEY:

Q. Do you know whether the Interstate Commerce Commission made any objection to that or not?

Mr. STRANGE. May it please the Court, we object to that.

The COURT. Sustained.

Q. Is there anything wrong about that?

Mr. STRANGE. We object as calling for a conclusion.

The COURT. Wrong about what do you mean, Mr. Bromley?

Mr. BROMLEY. Charging continuous demurrage instead of doing something else; I do not know what else.

714 Mr. STRANGE. That goes back into the question of the construction of the tariff.

The COURT. Objection sustained. I think he has already answered it. I think you have already covered that point sufficiently. If they charge from the time it came in to the time it went out it is a reasonable charge, is it not?

Mr. BROMLEY. I should like at least to have a statement from counsel as to whether they contend that that was an improper practice.

Mr. STRANGE. May it please the Court, we will introduce a tariff which will disclose that it was an improper practice.

Mr. BROMLEY. Because it was an overcharge?

The COURT. In other words, the Railway charging too much?

Mr. STRANGE. No, sir. The sum total of it, the result of it is that they charged too much, but that comes about by virtue of the fact that certain provisions of the tariff are not into consideration, which, if they were taken into consideration, would reduce the net amount ultimately paid.

The COURT. Ultimately paid by whom, do you mean?

Mr. STRANGE. By Bethlehem Steel Company to South Buffalo Railway Company.

The COURT. All right.

715 (Last question read.)

The COURT. I will let him answer whether there was anything wrong about that kind of a charge.

The WITNESS. I don't believe I am competent to answer that, your Honor. That is a job for the Examiners of the Commission to decide.

The COURT. You are an expert on the tariff, aren't you?

The WITNESS. I never have in the course of my work expressed an opinion or interpreted a tariff, because that is a very ticklish subject, and it is done in writing and not verbally, either done in formal hearings or written letters, to the Commission.

The COURT. I assume you would make some report, wouldn't you, of a certain condition there which you were advised or thought was irregular or illegal? You would report on this particular condition?

The WITNESS. Yes, sir; we report the facts and then it is up to somebody to decide from the facts. There were any number of questions.

The COURT. All right.

Mr. BROMLEY. That is all.

Mr. STRANGE. That is all.

By the COURT:

Q. Going back to this last inquiry, assume that the Railway Company was charging more as demurrage than it was en-
716 titled to as against the Bethlehem Steel Company, the result would be a benefit to the Railway Company?

A. It should; yes, sir. That would be a fair assumption.

The COURT. That is all.

Mr. STRANGE. Mark this for identification, please.

(Extracts from freight tariff No. 4–R, marked as "Plaintiff's Exhibit No. 155" for identification.)

Mr. STRANGE. Your Honor, we at this time wish to offer extracts from freight tariff No. 4–R issued by B. T. Jones, Agent, carrying No. I. C. C. 3072, issued October 15, 1937, effective November 26, 1937, and extracts from Supplement No. 11 thereto, issued August 25, 1938, effective October 1, 1938, such extracts being duly certified by the Secretary of the Interstate Commerce Commission to have been in effect from October 1, 1938, to October 31, 1938, inclusive.

The COURT. What dates?

Mr. STRANGE. The certification is that these extracts were in effect from October 1, 1938, to October 31, 1938, inclusive, and these tariffs covering car demurrage rules as charges.

The COURT. What is the number of that?

Mr. STRANGE. I. C. C. No. 372. The supplement carries the same I. C. C. number.

717 Mr. BROMLEY. This seems to be a certification of pages or parts of pages of a tariff. I cannot possibly tell whether he has got all in here that he ought to have or whether he has not. It is so complicated that I cannot even understand it now.

(Discussion off record.)

Mr. BROMLEY. Page 2 is a part of the certification and not a part of the tariff?

Mr. STRANGE. It is part of the tariff which is certified to. In other words, it is included within the certification and it is part of the tariff.

Mr. BROMLEY. That is a part of page 15 of some tariff; is that it?

Mr. STRANGE. That is right.

Mr. BROMLEY. These are just parts of pages?

Mr. STRANGE. That is right.

Mr. BROMLEY. Page 50?

Mr. STRANGE. Page 50.

Mr. BROMLEY. And more extracts, page 6?

Mr. STRANGE. That is right.

Mr. BROMLEY. Page 13?

Mr. STRANGE. Right.

Mr. BROMLEY. Page 14?

Mr. STRANGE. Right.

Mr. BROMLEY. Page 14 continued?

718 Mr. STRANGE. Right.

Mr. BROMLEY. What is the next one?

Mr. STRANGE. Page 15.

Mr. BROMLEY. The next one?

Mr. STRANGE. Page 16.

Mr. BROMLEY. I would like to have an opportunity to check them over and reserve my objection.

The COURT. Very well.

(Plaintiff's Exhibit No. 155, previously marked for identification, was received in evidence.)

Mr. STRANGE. The certified extracts cover demurrage on cars delivered to or removed from tracks other than public delivery tracks, or, in other words, cover the movements to and from tracks such as the Bethlehem Steel Company owned. There are large parts of the tariff that cover delivery to and from public delivery tracks. We have not included excerpts of the amount of demurrage, that is, those provisions of the tariff providing the per diem for the daily demurrage charge, because for our purposes we are not here bringing into question the actual amount of daily charges, but rather that the tariff has not been complied with, in amounts, regardless of what the sum is, when they should not have been charged on the one hand in the case of foreign-owned cars,

719 and when they should have been charged as in the case of private owned cars on South Buffalo Railway's tracks.

The COURT. The question is, what was the extent of this? If there were instances where the tariff regulations were not complied with, that is one thing. If they amounted to a large amount from which the company benefited, that is another thing.

Mr. STRANGE. If the Company wishes to introduce those other parts of the tariff relating to the actual per day charge on a car as provided by the tariff, of course, that is their privilege. We would certainly offer no objection to any other part of the tariff that they may wish to introduce.

The COURT. I was looking at it from the plaintiff's angle. Your claim in connection with this question of erroneous charge is that the corporation benefited by that, to show an interest in the Railway?

Mr. STRANGE. Primarily insofar as Mr. Booth's testimony was concerned and these tariffs are concerned, we want to show that the South Buffalo Railway Company made no charge whatsoever to the Bethlehem Steel Company on the Bethlehem Steel Company cars, regardless of whether they were on the South
720 Buffalo tracks or not, which we will contend will be in violation of the tariffs. And then, on the other hands, of charging South Buffalo Railway Company demurrage on foreign-owned cars from interchange to interchange, which likewise we will contend to be in violation of the tariff.

The COURT. Right there, supposing it were a violation, who would benefit by it?

Mr. STRANGE. I beg your pardon?

The COURT. Supposing it were a violation, who would benefit by it?

Mr. STRANGE. You mean as to the foreign-owned cars?

The COURT. Yes.

Mr. STRANGE. As to that, may it please the Court, we take the position that this situation merely illustrates the fact that as between the Bethlehem Steel Company and the South Buffalo Railway Company it makes no difference whether the demurrage is paid or not; that insofar as the corporation is concerned, I should say it makes little difference as to whether the South Buffalo Railway Company received demurrage from the Bethlehem Steel Company or not. It is just taking money out of one pocket of the corporation and putting it in another, if I may use that figure.

The COURT. The question is how it gets it back. That is the question in my mind.

721 Mr. STRANGE. It never leaves the corporation. It is paid by one Company wholly owned by the corporation to another

company wholly owned by the corporation, and it is ultimately as we have shown by the financial record incorporated.

The COURT. Speaking about demurrage, say on out-bound cars, cars delivered from the line-haul roads and kept by the Railway Company, or kept, say, by somebody, in excess of the period allowed, how is the cost more?

Mr. STRANGE. The tariff provides in substance that no demurrage should be charged a shipper or a consignee on cars that are not accessible to such consignor or consignee for loading or unloading as the case might be unless such inaccessibility results from the fault or from a cause for which the consignor or consignee is responsible. Now, when you have got an over-all agreement which ignores that situation, then we say that is an incident from which an inference may be drawn, that it makes very little difference as to whether demurrage is or is not paid.

The COURT. In other words, the Railway Company did this for the benefit of the corporation? There were these cars shipped in on which they were liable to demurrage. As you say the law is that the time of demurrage should not be charged to the
722 consignee until the delivery?

Mr. STRANGE. So far as the Bethlehem Steel Company is concerned, not only did it remain on continuous demurrage, that is, demurrage accounts were running consecutively, as Mr. Booth said, it would go off the in-bound demurrage and go on out-bound demurrage immediately. When a car was delivered to the Bethlehem Steel Company for unloading it would come off in-bound demurrage and then immediately go on out-bound demurrage, which the tariff certainly does not provide. In other words——

The COURT. Which the railroad should pay?

Mr. STRANGE. Which the consignor would pay so far as the demurrage was concerned.

The COURT. On the outgoing cars, after delivery I am speaking about.

Mr. STRANGE. After delivery the demurrage records, according to this agreement that Mr. Booth has testified to, the demurrage still continued to run against the Bethlehem Steel Company and continued on until that car got to out-bound demurrage.

The COURT. And was not charged by the railroad?

Mr. STRANGE. The Railroad Company was charging the Bethlehem Steel Company all the time every day between the interchange.

723 The COURT. You mean where they were charging for all the time, that the consignee or the Bethlehem Steel Company should be required to pay part of it?

Mr. STRANGE. Well, in the illustration I am giving there would be no consignee and Bethlehem Steel Company. The Bethlehem

Steel Company would be the consignee of all the cars to which I refer, or it would be the consignor of all the cars.

The COURT. Where would it benefit?

Mr. STRANGE. In the last analysis so far as dollars and cents are concerned as a bookkeeping proposition, the advantage would be to the South Buffalo Railway Company on the arrangement with regard to demurrage on foreign-owned cars, and it would be in favor of the Bethlehem Steel Company with regard to the non-payment of demurrage on privately owned cars, that is, cars owned by the Bethlehem Steel Company.

The COURT. I see. All right. It is half-past twelve, and we will take a recess until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock P. M.)

724 After Recess, 2 P. M.

Appearances: Same as before noted.

Mr. STRANGE. May it please the Court, we at this time wish to offer or read, as the Court may desire, certain parts of the deposition of W. R. McLean, that were taken at Washington, D. C., and beginning December 5, 1944. The whole, entire deposition is a rather lengthy document. The direct examination covers some 350 pages or thereabouts and the cross-examination extends it to about, well, very nearly 900 pages.

Now, the part which the plaintiff wishes to introduce will now cover hardly more than 75 pages; and, as we have been advised by Counsel for the defendant, they will introduce a very few pages of cross-examination.

For the Court's information, we will say that part of the McLean deposition, which we are offering, is based upon his observations, his personal observations and the matters disclosed to him while he was on and about the South Buffalo Company's yards in the process of the making of his investigation. And that part which we are not offering includes what was referred to in Counsel's opening statement—Counsel for the defendants' opening
725 statement—as involving all these multitude of records, and I think involving 175,000 items or thereabouts.

Does the Court desire that we read the deposition?

The COURT. Well, it depends on two things: Whether it is clearly indicated or whether the pages can be separated to show just what is offered as an exhibit; or, again, whether there would be objections to the parts, reception of parts of the deposition, which would necessitate its being read.

Mr. STRANGE. Well, there are quite a few.

The COURT. What I am anxious to do is, if it is simply a question of getting it before the Court, the 75 pages, why, they could

be presented at once, I mean, finally, in the record, to me because I would read it over anyway. Unless there is objection I think it would be just as well put in merely as a deposition. I say, that depends on whether you can cull it out so as to present it in that way; also as to whether there are objections to the testimony, which would have to be raised on reading the testimony.

Mr. BROMLEY. May it please the Court, there are no special objections. The whole thing is immaterial, in my view, and
726 I think a blanket objection on that ground would satisfy me.

Mr. STRANGE. The objections made at the time of the taking of the deposition were many. And it is our understanding, in the event the deposition is offered, rather than read, that those objections appearing on the page at that part of the deposition offered would be waived, Mr. Bromley?

Mr. BROMLEY. I do not think the objections to this part of it were many. In any event, I do not now desire to stand on any objections as to form of questions so far as these few parts which you will cull out are concerned; merely on the objection of immateriality, which was reserved to the trial anyway.

Mr. STRANGE. The objections on the face of the deposition go further than as to the form of the question; they go to matters of hearsay, matters of conclusion and matters of generality.

Mr. BROMLEY. Well, insofar as they are objections not required to be made at that time, I still stand on them.

The COURT. That will compel us to read the testimony.

Mr. BROMLEY. Beg pardon?

The COURT. That might compel us to have the testimony read.

Mr. BROMLEY. I do not think so, because I think the only
727 objections I made at that time were to form of question, objections which I had to make or else waive them. I did not intend to make any others, and should not have made any others. If you will show me an example of what you are thinking about, I will tell you.

Mr. STRANGE. Yes, indeed. May we go off the record while I am showing these?

The COURT. Yes.

(Discussion off the record.)

Mr. BROMLEY. May it please the Court, in connection with these isolated sections which he is reading from the direct would it meet with your Honor's approval if I read the cross-examination relative to those sections following their reading instead of waiting?

The COURT. Yes.

Mr. STRANGE (reading):

W. R. McLean

"W. R. McLEAN, a witness of lawful age, was thereupon duly sworn and, being examined by counsel, testified as follows:

Direct examination By Mr. CRAIG:

Q. Will you please state your name and address?

A. W. R. McLean, business address, Interstate Commerce Commission, Washington, D. C.; residential address,
728 828 Richmond Avenue, Silver Spring, Maryland.

Q. What is your occupation, Mr. McLean?

A. I am Principal Statistical Analyst; Bureau of Transport Economics and Statistics, Interstate Commerce Commission.

Q. In general, what are your duties as such?

A. My activities are all confined to the railroad operations and the analysis of those operations.

Q. How long have you held your present position?

A. Since March 1937.

Q. Will you please trace your personal history insofar as it relates to your work and experience with railroad operations.

A. I went to work for the Southern Pacific Company in 1917. During the following 19 years and nine months I was on 19 different positions with that company. In my early work I started out as secretary to a section foreman. I became a roadmaster's clerk. Then I worked with electric suburban train service for five years. Then I finished a year of high school and went to the University of California for five years. During this time I majored in transportation.

Then I became a brakeman for four years, during which
729 time I took a leave of absence and did one year of graduate work in transportation at the Harvard Business School. After I had finished that work I went with the General Office of the Southern Pacific. I spent several months in making an analysis and tracing the movement of all of the Pacific Fruit Express cars on the Southern Pacific Lines for use in connection with a new financial agreement with the Union Pacific Railroad which owned half of the Pacific Fruit Express, along with the Southern Pacific Company. The results of this study were used in negotiations between the two companies.

After that I spent a little time in studying the operating characteristics of certain matters which came before the Interstate Commerce Commission, or the regulatory bodies of California, Oregon, Nevada, and Arizona.

It was my duty there to make a study of the situation which existed with respect to each of these particular proceedings, and to prepare my testimony and present it before those bodies.

After that I became assistant mail and express traffic manager for the Southern Pacific. This position I held for about eight years. That particular position was two-thirds of an operating character and about one-third of a traffic character.

730 I was primarily responsible to the mail and express service manager for the handling of the express traffic on the Southern Pacific Railway: I was secondarily responsible for the United States mail traffic. I put it that way because there was another man who occupied the same position and title I did. He had primary responsibility for the mail, secondary responsibility for the express traffic. In addition to that, I was responsible for the handling of the milk and cream traffic, which aggregated about one-quarter of a million.

I made the rates on that traffic, and kept a rather watchful eye over the service that the company was rendering to make and cream shippers in general.

In addition to that I watched the mileage of head-in cars very closely on all trains for the purpose of making certain that we had sufficient head-in cars to take care of the traffic, and at the same time to make certain that they were not running head-in cars which were not necessary and thus accumulating unnecessary head-in car miles.

I participated in every timetable meeting which the Southern Pacific had between 1929 and 1937.

I attended the meetings as traffic representative of the

731 Railway Mail and Express Department, and attended and participated in the debates which preceded the issuance of each of these timetables with regard to such matters as to what stations the train shall stop at, what dead time they would have here, there, and the next place, and the usual operating questions which have to be taken care of prior to the time that current timetables are issued. I spent some time in the laying of plans for the head-in facilities of the present Los Angeles Union Station.

I believe that, in general, covers the high lights of my work prior to coming to the Washington Interstate Commerce Commission.

There are some details which do not occur to me at the moment, and which I can look up if there is any occasion to do so.

I might also say that I have had considerable experience in conducting studies of motor traffic operations by motortruck on behalf of the Pacific Motor Truck Company, which was a subsidiary of the Southern Pacific Company. From time to time I was asked to make certain studies from local stations.

I also worked out several arrangements under which the trucks of the subsidiary went out and picked up milk and cream
732 and brought it to the station under the through tariff.

Q. Will you tell something of your work with the Inter-State Commerce Commission?

A. My first major assignment, when I came to the Interstate Commerce Commission, was to revamp and reorganize the publication which is now known as the Comparative Statement of Railway Operating Statistics, which includes the Commission's published figures on about 88 of the largest railroads in the country.

I then got into some cost-finding work in connection with the switching cases. I spent quite a little time working on the Sioux City case.

Q. Just a moment. Do you recall, or do you know the citation of the Sioux City case?

A. Yes.

Q. Will you state that, please?

A. Sioux City Terminal Railway Switching, 241 I. C. C. 53. This was subsequently reconsidered in 241 I. C. C. 623.

Q. Will you tell something of the work in connection with that case?

A. The Sioux City Terminal case involved switching of about 3,000 cars during the test period."

Mr. STRANGE. May it please the Court, for the next five pages the witness continues to recite his experience. Would you care to have that read or allow the reporter to insert it?

The COURT. His competence is not in question. All right.

733 Mr. BROMLEY. Before you go on, I would like to read one or two questions on cross-examination, with your Honor's permission. Beginning at line 11, page 436, and ending at line 4, page 437:

"Q. Were you, yourself, ever employed by what is known in the business as an industrial switching railroad?

A. No. My railroad work as an employee of the railroad company, a very small amount of it, which could be measured in weeks, was with the Union Pacific, the Northern Pacific, and Great Northern, and almost 20 years of it, in which I held 19 different positions, with the Southern Pacific Company.

That contains a complete list of all the railroad companies that I was ever connected with or ever worked for.

Q. None of the switching situations which you say you investigated for the Interstate Commerce Commission had to do with the activity of an industrial switching railroad engaged in connection with heavy industries; did it?

A. Well, the Sioux City Terminal Company was a railroad similar to the South Buffalo Railroad Company, but if you are referring to heavy industries such as the steel-manufacturing industry, I would say that the Sioux City Railroad Company was a livestock packing company railroad; that is, handling
734 livestock packing commodities, serving packing houses in the Sioux City terminal.

I have not made any study of switching-terminal railroads which was similar to the South Buffalo Railway Company in that it served a large steel mill."

Mr. STRANGE. As to Mr. McLean's direct, on his experience, can the record show that we read through page 12? I stopped in page 7. But the remainder of the pages deal solely with a recitation of his experience, and we would like to be in the record. In other words, may we be relieved from reading from page 7 to 12 and have pages 7 to 12 nevertheless transcribed in the record? They deal exclusively with his experience.

The COURT. If that is agreeable to Counsel.

735 Mr. BROMLEY. Yes, your Honor, it is.

(Pages 7 to 12 of Mr. McLean's deposition read as follows:)

"Q. Will you tell something of the work in connection with that case?

A. The Sioux City Terminal case involved switching of about 3,000 cars during the test period. I found it necessary to mentally switch in exact detail 1,004 refrigerator cars. I traced every movement of every car from the time the test began, or from the time that the car was received from the line-haul carriers until the test ended, or until the car was delivered to the line-haul carrier.

I went to such details with respect to refrigerator cars because it was an important part of the case.

I circled around what work was performed by the Sioux City Railway on these refrigerator cars.

I did not have to go to that length with the livestock cars, because it was simply a movement from the interchange, from the livestock dock and back, in other words, a movement from the interchange to the livestock dock, and then from the livestock dock back to the interchange.

736 I satisfied myself that the testimony was accurate and dropped it there.

I did some work on the other cars not within the livestock car group, but not as much work as I did on the refrigerator cars.

By Mr. BROMLEY:

Q. I would like to know how long the test period was to which you refer?

A. In that particular case it was 29 days.

Q. Did you select that time?

A. No. That was selected by the Sioux City Terminal Railway, and all of the data was gathered and submitted to the Interstate Commerce Commission at the first hearing.

The period was not selected by the Commission, nor by any of the staff of the Interstate Commerce Commission.

By Mr. CRAIG:

Q. Mr. McLean, I want to ask you this question: From what information did you trace the movements of the refrigerator cars?

A. Subsequent to the first hearing, the Commission asked the Sioux City Terminal Railway to supply the working papers which supported the exhibit which had been put into the record of the first hearing.

There was testimony on the first hearing that an extra man had been put on every switching engine, and that he had
737 made a record of the movement of every car from the place picked up, and the time, and the place at which it was moved to, or to which it was moved to, and the time. After the working papers had been submitted to the Commission, I traced all of these movements from the original, basic record.

Q. Is there anything more that you can say about the Sioux City case?

A. No, I do not think there is anything more.

Q. Will you tell us, generally, about the other cases, any other cases of which you recall in which you have worked?

A. I worked on Des Moines Union Railway switching case, 231 I. C. C. 631.

Q. Any other?

A. On the reciprocal switching at Richmond, Virginia, case, 222 I. C. C. 783.

Q. Any other?

A. On a case known as Switching Charges of Jamestown, New York, 238 I. C. C. 383.

I worked on a case entitled 'Switching at Richmond, Virginia,' 245 I. C. C. 293.

Those are the switching cases that I worked on.

I worked on a couple of other cases which went to line-haul movements, and in which the switching was only an incidental part of the principal job there.

738 Q. Will you give us reference to those cases, please?

By Mr. BROMLEY:

Q. Before you go to that question, did I understand you to say that the Richmond, Virginia, Reciprocal Switching is a proceeding different from the Richmond, Virginia, switching case?

A. That is correct.

Q. How?

A. They are two different proceedings. I might say that the second proceeding related to and grew from dissatisfaction on the part of the parties with the Commission's findings in the first proceeding.

Q. Was the subject matter of the two proceedings the same?

A. That is correct, identically the same.

By Mr. CRAIG:

Q. Now, will you give us references to those two other cases to which you referred?

A. I spent some time on the Petroleum Rail Shippers Association versus the Southern Railway, 243, 589.

Q. Do you mean 243 I. C. C. 589?

A. That is correct. 243 I. C. C. 589.

My work on that case was restricted to material which appears on eight pages dealing entirely with the railway operations.

739 The great mass of that case dealt with other matters, and I had nothing to do with the consideration of the other matters.

Q. When you speak of eight pages, do you mean eight pages of the report on that case?

A. Eight pages of the Commission's report on that particular case.

Q. Will you state if you were connected with the Alden Coal Company case?

A. Yes, I spent more than a year on the Alden Coal Company case.

Q. Will you give us the citation on that case?

A. I will look for it here. I do not seem to find it at the moment.

Q. Perhaps I can help you. Does the figure 256 I. C. C. refresh your recollection?

A. I think I can locate it in just a moment. Yes; Alden Coal Company versus Central Railway of New Jersey, 256 I. C. C. 401. I spent more than a year on that case during which time I analyzed all of the evidence which was put into the record with respect to the operations and the cost of operations of the movement of Tidewater anthracite from the Pennsylvania fields to the Hudson River and points on the major coal-carrying railroads.

Q. In general, what did you do in the switching cases

740 to which you referred?

A. Well, I analyzed all of the evidence which was offered in each of the cases dealing with operations and with costs of those operations. And I either accepted or rejected—and stated the reason why I accepted or rejected—and then turned

my work over to others in the Interstate Commerce Commission who handled the matters beyond the stage at which I handled them.

Q. Will you state whether or not you have had occasion to investigate matters pertaining to operations and affairs of the South Buffalo Railway Company?

A. Yes, sir. In June 1943, I was asked to make an investigation, first, in general, I was asked to examine whether or not an investigation could be made. That was the primary thing.

Q. You were asked by whom?

A. By the Interstate Commerce Commission, by the Commission itself.

Q. In what connection?

A. I was asked to determine whether or not I could make analysis of the South Buffalo operations at Lackawanna, New York. And after spending a few months out there——

Q. (Interposing.) Just a minute, if I may interrupt you.

A. Yes.

741 Q. This was in connection with some case before the Interstate Commerce Commission?

A. Yes.

Q. What was that?

A. In connection with a proceeding known as the Ex Parte 128 investigation of South Buffalo Railway Company.

At that time I was asked to determine whether or not I could make an analysis of South Buffalo Railway operations.

Q. Did you do so?

A. Yes. And after spending a few days, perhaps four or five or six or ten days, I forget just the length of time, I returned to Washington, and about two weeks after I returned to Washington I reported that I could make such analysis on one particular basis; that I could not do the work on any other basis, and that concluded that particular assignment.

Q. Then what happened?

A. About the early part of July, a week or two weeks after I had made my report on the first assignment, I was told to go ahead and make the investigation of the South Buffalo Railway on the basis that I had said was the only one I felt that I could adopt and carry through.

Q. What did you do then?

742 A. Then I started to——"

Mr. STRANGE. Then next beginning on page 77, with the first question on that page:

"Q. Mr. McLean, before the noon recess you testified concerning the work that you did, and which was done under your

supervision in procuring data from the records of the South Buffalo Railway Company?

A. Yes.

Q. I will ask you now, Mr. McLean, during the time you were in Lackawanna and Buffalo, and at the times which you have mentioned, if all of your time was consumed in that work?

A. No.

Q. It was not?

A. No. It was——

Q. (Interposing.) Just a moment, if I may interrupt.

A. Yes. That is, I suppose you are referring to whether I devoted all of my time or whether all of my time was consumed in supervising the work of the clerks and Mr. Boyd. If you are referring to my activities as a supervisor, I did not spend all of my time doing that particular work.

Q. Mr. McLean, in concluding my question, also, not only your supervisory work, but the work that you did on this?

743 A. Yes, I devoted a substantial proportion of my time to making observations of the South Buffalo Railway operations.

Q. Mr. McLean, will you tell us, generally, what you did?

A. I walked over substantially all of the South Buffalo Railway at least once, and some parts of the South Buffalo Railway I walked over or observed a great many hours.

I distinguished that for this reason, I walked to Seneca.

Q. What is Seneca?

A. Seneca is the extreme south section of the South Buffalo, where the Bethlehem Steel Company plants are located which are referred to as the 'Seneca Plants'.

On the other hand, I spent somewhere between 50 and 100 hours in making observations of the blast furnace area, and I would not make any attempts to state how many times I walked along certain of the South Buffalo tracks in that area. It would probably run into the dozens.

Q. Can you state whether or not you were present in any of the yards of the South Buffalo Railway Company?

A. Yes. I have been in every yard of the South Buffalo Railway; some of them several times.

Q. Can you state whether or not you traversed the main line of the South Buffalo Railway Company?

744 A. Would you mind stating that question again?

Q. I asked you if you could state whether or not you traversed the main line of the South Buffalo Railway Company?

A. Yes, I have been over it, over every foot of it, in fact.

Q. Can you state whether or not you rode any of the South Buffalo trains?

A. Yes. I had the occasion several times to ride South Buffalo Railway trains, in some cases by myself, in one case accompanied by Mr. Handwerk.

Q. Who is Mr. Handwerk?

A. Mr. Handwerk, I believe, is the general agent of the South Buffalo Railway Company.

Q. Mr. McLean, while you were in the yards and traversing the main line covering the trackage on foot, did you do anything other than merely cover the distance?

A. Oh, I made a great many notes. As a matter of fact, I filled the greater part of ten notebooks, not every page in every book, but I filled substantially more than one-half of each of these ten notebooks. Each of these ten notebooks is filled to that extent with notations which I made at the time of the observation.

Q. Concerning what?

A. Whatever happened to come before me and whatever
745 I happened to observe.

In some parts, as you will note, I notice my observations of the blast furnaces from the time the locomotive moved the empty ladles into the track, and until the time they moved it out, whatever that happened to be.

Wherever I happened to be, I noted it down at the time, and it is in here in chronological order.

Q. Will you state whether or not the notes you made are in connection with the operation of the South Buffalo Railway Company?

A. What is that again, please?

Q. I asked you to state whether or not the notes you made were in connection with the operations of the South Buffalo Railway Company?

A. In substantially all of the cases, but not all of the cases are in connection with the South Buffalo Railway.

I have some other notations in there. For example, I observed the operations of the South Buffalo from the beginning to the end of ten different casting cycles. Now, after the South Buffalo had placed the ladles in position and before they moved them there were certain operations that took place in the blast furnace, and I recorded the time that those operations took place.

746 I had occasion to come to Washington a couple of times or so, and I made notations as to the time we left to go to Washington, and the time I came back, so there are a few notations in there that cover other operations than those of the South Buffalo Railway, but in the great mass they certainly cover the operations of the South Buffalo Railway.

Q. Can you state whether or not you have those notations or notebooks with you?

A. The notebooks, yes. They are in front of me right now on the table.

Q. Mr. McLean, I will ask you if you can give us a general description of the flow of railroad traffic in the handling of freight and commodities as it relates to the property and operations of the Bethlehem Steel Company at and about Lackawanna, New York, and west of the Hamburg turnpike?"

747 "By Mr. CRAIG:

Q. You may proceed.

A. The traffic of an inbound nature which the line haul carriers deliver to the South Buffalo Railway enroute to the Bethlehem Steel Company is received at one of the interchanges with the railroad either in this District 1 or in District 3.

The cars delivered to the South Buffalo by the line haul carriers en route to steel company's property. I mean the Bethlehem Steel Company's property west of the Hamburg Turnpike are moved from District 1 to South Yard, and from District 3 either to South Yard or to the South End Yard.

The distinction between the two points, that is, between South Yard and South End Yard is that the South Yard is one of the largest, if not the largest classification yard in South Buffalo, and is located directly across the street from the South Buffalo Railway Company's office, whereas the area referred to as the South End Yard is about directly west of South Hamburg Turnpike bridge, and at a point where the line from South Yard and the line which comes down from the coke yard, and the line which comes down through Pocohontas Yard, and Whirley Yard, form a junction and continue on in a southward direction
748 to the Federal Portland Cement plant, the area in the vicinity of that junction is referred to as the South End, or South End Yard.

Some considerable traffic moves from District 3 to the South End, and some of the traffic moves from District 3 to the South End and in a reverse direction moves northward to the Bethlehem Steel Company car dumper, but inbound commodities are assorted either in the South Yard or in Yards contributory to the South End Yard and gradually find their way into the plants or the tracks on which they are unloaded.

In addition to the inbound commodities which go to the Bethlehem Steel Company, there is a substantial volume of traffic which originates at one steel company unit or another, and which is outbound traffic as to that unit, but which goes to another Bethlehem Steel unit, and which, as to the latter unit, is inbound traffic.

The commodities, after they are unloaded at the various points, became part of the material which moves, in process, portions of it, on South Buffalo, and portions of it on Bethlehem Steel Com-

pany narrow gauge railway, and portions of it by other
749 means of conveyance until after it passes through all the steps of manufacturing processes, ultimately finds its way into other cars which are delivered in outbound connection terminal or outbound inter-terminal service, or are moved out in boat service, if they are water carried, or which may actually be trucked out by highway.

Q. What, if you know, are the principal commodities which are received at interchange consigned to the Bethlehem Steel Company?

A. The principal commodities that have been moving in highest volume in the railroad service, at least, at the time I was there, consist of coal, coke, a substantial amount of scrap iron in-bound.

There were many other commodities, but offhand I do not think of any commodities which approached in volume the coal and coke and scrap.

Out-bound——

Q. (Interposing.) Just a minute. Where does that coal——

A. Go to?

Q. Yes, where does the coal go?

A. The coal ultimately goes to the Bethlehem Steel Company coal-dumper.

Q. Where does the scrap go?

A. It finds its way into one of the open hearth furnaces, or is unloaded onto the ground for ground storage.

750 Q. How many open hearth furnaces are there?

A. Three.

Q. What about the coke?

A. Most of the coke goes up to the high-line, and is fed into the blast furnaces, although there are some coke movements to other points. But the great volume of the coke goes up on the high-line.

Q. I will ask you whether or not these commodities which you have named are transported to the blast furnaces?

A. May I hear that question again?

Q. I will ask you whether or not, Mr. McLean, these commodities which you have named are transported to the blast furnaces?

A. Well, the coke, most of the coke does go over on the high-life directly above or directly alongside of the blast furnaces, or is unloaded into the bins.

Very little of the scrap and very little of the coal, if any, goes to the blast furnaces.

To my knowledge scrap iron is not used at the blast furnaces. It may be, but I do not know of any scrap iron that is used in

the blast furnaces, only coke and other commodities that do not move in railroad service.

751 Q. Will you now state whether or not, if you know, the general transportation and operation at the blast furnaces?

A. Well, I know quite a bit about the transportation situatiton in and around the blast furnaces. You just want a general answer to that?

Q. Yes.

A. To the present question?

Q. Yes.

A. In South Buffalo, I would say that South Buffalo, they place empty slag ladles and empty metal ladles on the ladle tracks prior to the casting of the furnace. And after the cast they remove those ladles. In addition the South Buffalo handles a somewhat smaller number of cars in that area. The great mass of that movement consists of metal ladles, although it does handle some coke, the South Buffalo.

Q. Some coke?

A. Yes. It handles some coke.

It handles some scrap that comes out of the blast furnace area, but the great mass of the movement is concerned directly with the movement of empty and loaded ladles.

Q. Anything other than hot metal?

A. Hot slag and hot metal, those two commodities com-

752 pose the heavy traffic in that area.

Q. What happens to the slag, if you know?

A. Most of the slag is moved out to Lake Erie and dumped on the edge of the Lake.

However, at times a portion of it is dropped or dumped at a somewhat lower elevation south of Smoke's Creek, and west of Pocohontas Yard.

Q. What happens to the hot metal, if you know?

A. The hot metal, during the test period, the first ten days of June 1943, in every instance, and in the observed instances from July to November, moved through to the foundry, or to one of the three open hearth furnaces.

There is a Pig Casting Machine. And I was told by many, many employees that under certain occasions movements were made to the Pig Casting Machine, but I did not happen to observe any movement to the Pig Casting Machine.

Q. Mr. McLean, if you know, what about the movement from the open hearth furnaces?

A. Substantially all the movement from the open hearth furnaces were billets moving over the narrow gauge railway of the Bethlehem Steel Company.

There is a movement from the open hearth furnaces of the slag which goes down to a scrap reclaim plant.

753 There is another, in fact, quite a goodly amount of movement of the refuse which goes up Lake Erie to be dumped in the Lake at a point north of Smoke's Creek. I have in mind that there is quite a detailed movement, but most of the railroad movement which was a South Buffalo movement from the open hearth, consisted of residue.

The valuable products of the open hearth furnaces substantially all moved away from the open hearths on the Bethlehem Steel Company's narrow gauge equipment.

Q. What did you say as to where the billets go?

A. They move to one of the processing mills.

Q. What is the transportation movement from the processing mills?

A. I would like to go back and restate my last answer. I used the term 'billets.' I believe that the Bethlehem Steel Company people referred to it as ingots.

There is a movement of billets in substantial volume which move from processing mill No. 1 and processing mill No. 15 across the Hamburg Turnpike to the bar mill in South Buffalo equipment.

But I believe that the metal in the form that it leaves the open hearth furnaces is referred to as ingots.

Q. Continue with the current question as to transportation movement.

754 A. There is an important volume of billets and slabs which move from mills in District 2 of the bar mill and the strip mills in District 3.

There is a somewhat smaller movement of partly processed material from the mills in District 3 back to those in District 2.

There is also a pretty large movement between mills within District 2.

There is a small movement, or was during the test period, a small movement from District 2 and from District 3 to the fabricating shop in District 1.

Q. Will you follow from that point on?

A. When the material has been processed, it finds its way into cars which move in outbound connection terminal service or outbound interterminal service to the interchanges of the connecting railroads, connecting line haul carriers, or it moves in local service on the South Buffalo down to the boat dock, or it moves out in highway service, or highway transportation.

I believe that covers my general description."

Mr. STRANGE. Now, that is reading down on page 87, the last.

755 Mr. STRANGE. Beginning on Page 94 at the second question appearing on that page:

"Q. And now, Mr. McLean, will you locate for us the blast furnaces west of the Hamburg Turnpike?

A. The blast furnaces are in the north and south line which parallels on the east of the Ore Dock, which, in turn, parallels on the east, the ship canal. The blast furnaces, from their extreme limits on the north to their extreme southern limits, are in the neighborhood of 3,000 to 3,500 feet.

Q. How are they designated?

A. From the north they are designated by the letters A, B, C, F, G, H, and J.

Q. Will you state whether or not there are metal loading tracks in the respective furnaces?

A. Yes. There are two tracks which enter the building at furnaces C, F, G, H, and J and which require use for metal loading. There is one track on the east side of furnace A, and on the east side of furnace B, which is used for metal loading.

Q. What owns those tracks, if you know?

A. The Bethlehem Steel Company owns the tracks used within the buildings.

The South Buffalo Company owns the tracks out-
756 side the building except with respect to one track which serves furnace C, the Bethlehem Steel Company owns that track all the way down to the clearance point.

Mr. BROMLEY. Out to where?

The WITNESS. To the Clearance Point.

By Mr. CRAIG:

Q. Will you state whether or not there are slag loading tracks in the respective furnaces?

A. Yes, sir. There are two slag discharge tracks at furnaces C, F, G, H, and J, one on the east side of the building, and one on the west side of the building.

There are two slag discharge tracks at furnaces A and B, one on the west side of the building and one which enters or approaches the south end of the building from the south side.

There are two slag discharge tracks at all seven furnaces; there are two slag discharge tracks there.

Q. Who owns these tracks you have been describing?

A. The Bethlehem Steel Company owns the loading portions of the tracks.

The South Buffalo Railway Company owns the portions of the tracks which were used to go to and from the loading
757 portions, with the exception of one track which serves fur-

nace F on the east side. The Bethlehem Steel Company owns all of that track.

Q. What, if you can say, if anything, did you observe in connection with the schedule of blast furnaces operations?

* * * * * * *

Q. Proceed.

A. I found hanging on the wall of the yard office of scale 9 and hanging on the wall of the weighmaster's office at scale 10, a schedule which indicated the times that all of the operating blast furnaces were supposed to cast, and the destination to which the metal on that particular cast was supposed to move.

Q. What, if anything, did you, yourself, observe in connection with the blast furnace operations as regards the schedule thereof?"

Mr. BROMLEY. I object to that question as immaterial.

The COURT. Overruled.

758 Q. Proceed.

A. Will you repeat the question?

Q. What, if anything, did you, Mr. McLean, observe in connection with the blast furnace operations as regards the schedule thereof?"

Mr. BROMLEY. Same objection.

The COURT. Same ruling.

"A. Well, I observed ten complete casts from the time prior to the placement of any ladles in or around the furnace by the South Buffalo engines, until after the ladles were removed, and in all ten cases the cast was approximately at the time of the schedule. In four instances the metal began to flow two minutes to 13 minutes before the furnace was due to cast.

And in six instances I found the metal beginning to flow from 14 minutes to 28 minutes after the furnace was scheduled to cast."

Mr. BROMLEY. Then I said: "What does this add up to, eight out of ten?"

Mr. STRANGE. The witness replied: "No, it means four out of ten cast a few minutes before they were scheduled to cast.

It means that six out of ten cast a few minutes after they were scheduled to cast.

759 So, in general, they cast just before or just after they were scheduled to cast."

Mr. BROMLEY. "What about the exact time, did any one of the ten cast on the schedule that you observed?"

Mr. STRANGE. "The Witness: No, not one of the ten did. One of them cast two minutes before it was scheduled to cast, another cast three minutes after the schedule. All of them cast from 13 minutes before until 28 minutes after they were supposed to cast.

By Mr. CRAIG:

Q. Describe, if you can——

The COURT. What do you claim, bearing on the question of time these casts had to be made? What does that show?

Mr. STRANGE. The point is, may it please the Court, that the South Buffalo Railway Company's locomotives were on hand to handle these casts and these ladles at the times disclosed by the schedule hanging in the Yardmaster's office. It shows a very close coordination between the requirements of the Bethlehem Steel Company and the service, the peculiar service, we contend, offered by the South Buffalo Railway Company.

The COURT. Well, I suppose they had to get them out of there, didn't they, by some method, to continue the operation?

760 Mr. STRANGE. Exactly, sir. And the answer to that proposition is one of the cardinal points in this case, we think. Undoubtedly if the Bethlehem Steel Company is going to operate as a steel manufacturing company, it must have this kind of a switching service. But the furnishing of that service is not a normal service rendered by a railroad to a shipper.

The COURT. You think they should furnish their own engines?

Mr. STRANGE. It should perform its own switching service in that regard; yes, sir. That is not a common carrier's normal function. One of the number of incidents from which we contend that an inference may be drawn that the two Companies are merely units of one large organization, controlled by the Bethlehem Steel Corporation.

The COURT. It might be a cheaper way, might it not? Depend on which is the cheaper way of doing it.

Mr. STRANGE. Well, not if it infringed upon the commodities clause.

The COURT. Of course, that is what we are trying to find out. There might be a reason, the fact that it was operated as cheaply by hiring somebody than by performing with their own engines.

Mr. STRANGE. Of course, the commodities clause, if applying to this case——

761 The COURT. Then you argue that the entire lay-out was switching inside of the property maintained by the Company?

Mr. STRANGE. I do not know that I would at this time go that far, but certain switching services that we contend were certainly not normal services to be rendered by a carrier to a shipper. Some of the other movements might be right and proper, but as to these we are here now referring to, we say that very close coordination between the services rendered by the Railroad Company and the peculiar needs of the Steel Company create a situation from which

an inference may be drawn that they are indeed two branches of the same over-all corporate structure.

762 "By Mr. CRAIG:

Q. Describe, if you can, South Buffalo switching operations in the blast furnaces area, and in connection with the operations of the blast furnaces, respectively?

Mr. BROMLEY. I make the same objection as before, incompetent and too general.

By Mr. CRAIG:

Q. Proceed.

A. The South Buffalo places empty slag ladles at the beginning of the casting cycle, by which I mean, simply the period of time that elapses from the time that the South Buffalo first commences to move to take the car to the plant, or the furnaces, and the time it removes the last ladle from the furnace.

The first move that I observed in all ten instances was the placement of the empty slag ladles in, in some instances the South Buffalo engines placed all of the slag ladles which would be required, with the one switch. In other instances they placed only a part of the slag ladles which would be required at the first switch, and placed the remainder of the slag ladles to be required at second or third switch.

763 In the instance of more than one switch being required, they placed the empty slag ladles always on the west side of the furnace, and always placed first on the west side. The ladles used on the east or south of the furnace were placed at a subsequent time.

Q. Relative to the time when the slag began to flow, when were the slag ladles placed?

A. Well, in the six out of the ten cycles, the first of the slag ladles were placed from three minutes to 14 minutes before the slag started to flow.

Q. What, if anything, did you observe in connection with the placement of metal ladles?"

Mr. BROMLEY. I object to that as immateral.

The COURT. What was the question? Repeat it.

Mr. STRANGE. The question was "What, if anything, did you observe in connection with the placement of metal ladles"

The COURT. Overruled.

Mr. STRANGE. (Reading):

"A. Well, the movement of metal ladles were different from the movement of slag ladles, in that, although the South Buffalo may have made two trips to the furnaces to place the portions of the metal ladles which should be required for the cast, in every

instance all of the metal ladles were in positoin before
764 any metal flowed, whereas in the case of the slag ladles, ladles were placed on the west side and slag began to flow into those ladles, in some instances, before the ladles were placed on the east side.

That would not be true with respect to the metal, or of the metal ladles, because all of the metal ladles were in position before any of the metal began to flow.

I found that in six of the ten cycles that I observed that the metal began to flow from 13 minutes to 27 minutes after all of the ladles had been placed.

Q. What, if anything, did you observe in connection with the removal of metal ladles?

A. Well, on the one occasion the engines arrived at the furnace exactly at the time that was shown in the schedule time for that particular furnace to cast.

Q. Pardon me—are you referring now to empty ladles or loaded ladles?

A. No: I am referring to the movement of loaded ladles, loaded metal ladles away from the furnace after the case has been completed.

Q. You may proceed.

765 A. In that instance, the engine arrived at the exact time that the furnace was due to cast, but the ladles were not ready to be removed, and the engine remained idle, sitting there idle for 30 minutes until they could couple onto the cars.

In another instance the engine arrived six minutes before the metal ceased to flow.

In another instance it was practically perfect, the engine arrived at the furnace just as the metal ceased to flow.

In the fourth instance the engine arrived after, well, two minutes after the metal ceased to flow.

In the fifth instance the engine arrived 18 minutes after the metal ceased to flow.

In the sixth instance the engine arrived 30 minutes after the metal ceased to flow, in fact, four engines arrived from 30 minutes to 39 minutes after the metal ceased to flow.

One engine arrived in another case, 63 minutes after the metal ceased to flow.

Q. Mr. McLean, will you tell us what, if anything, you observed in connection with the removal of the loaded slag ladles?

A. Four of the engines which handled the loaded slag ladle away from the furnace arrived from six to nine
766 minutes before the slag ceased to flow.

Six of the engines arrived from five to 56 minutes after the slag ceased to flow.

Q. What, if anything, Mr. McLean, did you observe in connection with the use of metal tracks in the respective furnaces?"

767 The Court. How did they charge for the use of those engines?

Mr. Strange. Insofar as the charges are concerned, the witness testified as to them but that testimony has been excluded, so to speak, or, that is, it is found in those parts of the deposition which we are not offering, because they are predicated on these voluminous records that the witness examined, 176,000 of them, which it had organized and arranged through this—by the use of a Business Machine, an automatic machine, and hence we are not in a position to advise the Court as to those charges on the basis of the parts of the deposition we are offering.

The Court. What is the method charged, the material basis or the basis of time?

Mr. Strange. There were charges provided for this type of movement.

The Court. If it is based on the question of time that is one thing; if it is based on the question of material transported, that is another thing.

Mr. Strange. So far as time is concerned, the deposition of Mr. Jacobs has been offered in evidence here, will indicate just exactly what the necessities are with regard to time.

Insofar as the charges are concerned, we—will the Court
768 indulge me for a moment while I look at tariffs here?

The Court. Of course, so far as the tariff is concerned, it would not make any difference what the time is, will it?

Mr. Strange. I am somewhat in the position of Mr. Booth this morning. I do not wish to be put in the position of interpreting this tariff from the South Buffalo Railway.

The Court. If you go on with the deposition it may straighten it out later on.

Mr. Strange. I will say this, that the South Buffalo Railway Company's tariff, I think, charges all local movements, P. S. C. N. Y. No. 106. Mr. Bromley, has that 106 been introduced in evidence, or you referred to it?

Mr. Bromley. We referred to it. It has been marked "Defendants' Exhibit D-4" for identification.

Mr. Strange. It has not yet been introduced in evidence.

769 Mr. Bromley. No, but I should not think that would prevent you from pointing out to his Honor that there is a charge of $6.60 per car for molten slag.

The Court. My question was, what bearing the question of time had on it, whether they were to spend a half an hour waiting

for a load or whether they got there just when the molten material was turned out. That is the point I had in mind.

Mr. STRANGE. What about the molten metal, Mr. Bromley?

Mr. BROMLEY. The molten metal is covered by the $6.60 charge.

Mr. STRANGE. Is that provided in this Public Service No. 106?

Mr. BROMLEY. It is provided in that tariff, $4.40.

Mr. STRANGE. Just simply as an intra-district move?

Mr. BROMLEY. Yes.

Mr. STRANGE. We wish to say, may it please the Court, that so far as the plaintiff is concerned we are raising no question with regard to whether or not compensation was paid for these services. Our position is that they are such services, paid for or not, as the case might be, that a railroad company would not normally furnish to a shipper.

The COURT. Well, of course, there seems to be no question about the nature of the services performed by the
770 railroad. It carried the slag and the molten material and transported it, but the question in my mind is a question, if the railroad was transporting it on the tariff basis whether this Mr. McLean has checked the time that the engine had to wait there, you say sometimes six minutes, sometimes ten minutes, sometimes thirty minutes, what difference does it make whether it waited 30 minutes or six minutes or was exactly on time if the railroad was charging only the rate based on the tariff? You might argue that the railroad might be doing something else and that they could employ that thirty minutes somewhere else working in some other place.

Mr. STRANGE. We can but say that the fact that the engine were at the blast furnaces and the open hearths at the times or very close to the times that the peculiar necessities of the shipper required are services normally outside of a railroad company.

The COURT. They would have to have somebody there at the time, wouldn't they, to take that material away?

Mr. STRANGE. You mean the Bethlehem Steel Company?

The COURT. Somebody would have to take it away, wouldn't they?

Mr. STRANGE. Undobtedly the Bethlehem Steel Company
771 necessarily would have to have that service performed.

The COURT. And performed quickly in the case of the molten material. Of course, I can see your argument that from the fact that the railroad was doing this, you say that it was not the normal way as you claim of the operation of the railroad company?

Mr. STRANGE. That is our position, whether or not paid for by the shipper.

The COURT. When you are reading the details of the time that they took with the molten material and the delay of the engine and those things, that I do not get the importance of. That goes to the time of the service and not the nature of the service.

Mr. STRANGE. The fact that the South Buffalo Railway has to accommodate the Bethlehem Steel Company's immediate requirements.

Mr. BROMLEY. I think it only fair to point out, may it please the Court, in connection with your question that the tariff also provides that if the locomotive has to stand by and wait for some reason other than its own, then there is another charge of $16.00 for that.

Mr. STRANGE (reading):

"Q. What, if anything, Mr. McLean, did you observe
772 in connection with the use of the metal tracks in the respective furnaces?"

Mr. STRANGE. Mr. Bromley, you interposed an objection at that point.

Mr. BROMLEY. No.

Mr. STRANGE (reading):

"A. In every instance I found a hopper and gondola on one of the metal loading tracks in the furnaces between the time that the ladles had been removed from the preceding cast and the time the next metal ladles were placed for the next cast.

773 Q. What, if anything, did you observe in connection with the metal output of the furnace between casts, or any respective casts?

A. I found there was a considerable fluctuation between the casts.

For example, I observed two consecutive casts of furnace C. On one of those casts it had an output of eight ladles. On the next cast it had an output of five ladles.

On two other casts which I observed of furnace G, but which were not consecutive, that is, they took place on different days, one cast was five ladles, and another cast was six ladles.

Q. I want to revert just a moment in connection with your observation of the use of metal tracks in the furnaces.

A. When the South Buffalo crew which is going to place the metal ladles in the furnace prior to the cast reaches the furnace, it finds this hopper and this gondola in the same position on one of the tracks where it has to place the ladle. So, it must remove these two cars, that is, the gondola and the hopper, and place them over on South Buffalo tracks. After that it can place the empty metal ladles inside of the furnace to be in a position to receive the hot metal.

774 Q. Can you state whether or not you saw that done?

A. I saw that done.

Q. How many times?

A. On at least ten, and I think probably a good many more times, yes, I saw the hopper and the gondola moved from the interior of the furnace to the outside, and placed on the outside on the tracks of the South Buffalo Railway Company, and on an equal number of occasions I saw the hopper and the gondola moved from the South Buffalo tracks outside to inside of the furnace."

Mr. STRANGE. That is the end of that part of the testimony. Moving now to page 103:

"Q. Mr. McLean, if you are able, state whether or not the maximum number of ladles which may be used are placed at each furnace before the metal began to flow?

A. Each of the——"

Mr. STRANGE. That break was the result of Mr. Bromley's objection, which he is not now pressing.

"Q. I will ask you again, Mr. McLean, if you are able to state whether or not the maximum number of ladles which may or may not be used are placed at each furnace before the metal begins to flow? Can you give that number?

A. Yes.

Q. Will you do so?

775 A. In every instance eight ladles were placed at furnace C, and furnace H, and six ladles were placed at furnaces B, G, and J.

However, that does not mean that all of those ladles were used subsequently at the time of the cast, but it does mean that that number of ladles was always placed in position to catch the metal before any metal began to flow in any one of the ladles.

Q. Can you state whether or not you observed anything in connection with furnace A?

A. Yes. Furnace A, I noticed, had usually six ladles placed; but on one or two occasions only five ladles were placed.

So I asked the yardmaster of 9 scale, who then was Mr. O'Hara, what the circumstances were which occasioned my observing five ladles placed at furnace A.

He said to me that on [redacted]sions he was short of ladles and he would call up the blower at the furnace, furnace A, and tell him that he was able to give him only five ladles at that time, but he would not be able to give him six ladles until a subsequent time. And on some occasions Mr. O'Hara told me, the blower said, 'I can get along with five,' so he spotted the five and he used the five.

On other occasions the blower said, 'No, I will have to
776 have six,' so he would simply hold off his cast until Mr. O'Hara could get six ladles together.

Q. I will ask you whether or not, Mr. McLean, you made a count of the number of metal-ladle loads placed at the blast furnaces during that period of operation of which you referred?

A. Yes. My records indicate that 115 metal ladles were placed at the furnaces.

Q. State whether or not you observed that yourself.

A. Yes. That is a fact. I observed the placement of 115 ladles.

Q. Are you able to state, of those 115, how many were used?

A. Yes.

Q. How many?

A. 101.

Q. 101. And by 'used' you mean what?

A. That they had some metal in them.

Q. What about the remainder of the ladles?

A. There were 14 which had no metal in them, and which were taken out of the furnace in which they were first placed and subsequently moved to a second furnace.

Q. In connection with the 101 ladles, which were used, I will ask you whether or not any of those ladles were fully loaded, or if all of them were fully loaded?

A. All, yes; all of those 101 ladles went to the scale.

777 Q. That does not answer my question. My question is whether or not all of those 101 ladles were fully loaded?

A. I did not look to see if they were fully loaded, but they were loaded sufficiently to cause the South Buffalo to take them to the scale.

Q. Were they fully loaded?

A. I did not find either the time or the opportunity to look at the top of the ladle in order to see. Moreover, I do not know what constitute 'fully loaded', but they went to the scale, and from the scale they went to their ultimate destination.

Q. Where was that?

778 A. Either one of the three open-hearth furnaces, or to the foundry.

Q. Will you state whether or not any of those ladles went direct from the scales to the points you have just mentioned?

A. In most cases they moved direct. In a few cases, however, they would be set out there and would lie around there for half an hour or so. Then another crew would take part of them to another open hearth.

Q. And what was done with them there?

A. The ladles reached the open hearths and they were emptied into the mixer.

Mr. CRAIG. I should like to ask that the last two questions and answers be read.

(The reporter read the last two questions and answers.)

By Mr. CRAIG:

Q. Can you say whether or not any of these ladles were returned to a blast furnace?

A. None of the 101 ladles. No, wait a minute. Perhaps you had better explain that question.

Q. Any of those ladles——

Mr. STRANGE. Then Mr. Bromley interposes.

Mr. BROMLEY. (Reading.) "Do you mean loaded or emptied ladles?

779 The WITNESS. The ladle they moved from the scales to—let me put it this way—none of the 101 ladles returned to the blast furnace.

The ladles that moved loaded from the blast furnace to the scales and from the scales either to the open hearth or to the foundry, that was the movement.

Most of the ladles were moved in direct line from the blast furnace to the scales, and from the scale to the open hearth.

The ladles which moved from the blast furnaces, particularly from blast furnaces A, B, and C, to open hearth No. 1 had an out-of-line movement, or a side detour to reach Scale 9, then back to the regular line and on to the open-hearth furnace."

Mr. STRANGE (reading):

"Q. You have been discussing the 101 ladles which were used?

A. That is right.

Q. What about the other 14 ladles?

A. They were not taken to a scale. They were moved from the furnaces into which they were originally placed, to another furnace where they were used for the next cast at the second furnace."

Mr. BROMLEY (reading):

780 "Mr. BROMLEY. Mr. Craig, when he said 'movement' from furnaces A, B, and C, was an out-of-line movement, what did that mean?"

Mr. STRANGE (reading):

"By Mr. CRAIG:

Q. What does that mean? Will you elaborate on that?

A. Yes. If the metal was moved directly from furnaces A, B, or C, to an open-hearth furnace, open-hearth furnace No. 1, it would have gone right around the north end of the Bethlehem Steel Company property via tracks which passed around the north end of open-hearth furnace No. 2.

Now, because the metal was taken to No. 9 Scale to be weighed, when the movement from the blast furnace to the open-hearth was made, when it reached the approximate center of that loop around on one end of the property, as I have described, the movement was reversed, and a reverse move made from that point down to No.

9 scale, the metal was weighed and then returned to the same point to where it was resumed its trip from the blast furnace to the open-hearth furnace.

Now, by 'out-of-line,' I mean that, by a trip out of line, 'over and above' the necessary haul from the blast furnaces A, B,
781 and C, to open-hearth furnace No. 1.

By Mr. CRAIG:

Q. Now, I will ask you whether or not in the case of these 14 ladles, when they, respectively, were moved from the respective blast furnaces, were they, or were they not empty?

A. In most cases they were empty, but in a few cases they had a small amount of metal in them.

I went to blast furnace A on September 8, 1943, and observed South Buffalo operations at that point from ten o'clock a. m. until 1:19 o'clock p. m.

I noticed that metal was discharged to five of the ladles for periods of around four minutes to five minutes apiece, and was discharged to the sixth ladle for about 90 seconds.

I followed that cut of six ladles over to 9 scale, and found that they only weighed five of the ladles, and did not weigh the sixth ladle, which happened to be the one that metal flowed into for only 90 seconds.

The South Buffalo crew cut that ladle off and shoved it out to the side nearby No. 9 Scale, and then I found that a couple of minutes later another engine got hold of that ladle and took it away to blast furnace No. 'c' for the next cast.

782 I went to the Yardmaster, Yardmaster O'Hara, and asked him why he did not weigh ladle No. 34, the ladle where the metal was nipped off. He said that it was empty, and I told him that it did not look to me like if metal flowed into it for 90 seconds, that it was empty, after he had told me that it was an empty ladle, and he said in reply 'If it is not full we consider it to be empty.'

So, I am not in a position to tell you definitely in either specific case the ladles were absolutely empty, or whether or not they had a small amount of metal in them.

I can tell you as to the ten cycles which I observed, and which I know exactly how many ladles metal flowed into, and how many ladles metal did not flow into in those ten cycles.

But, in the 115 that I have included in here, they are all the ladles that were handled in there during the ten cycles, plus some others which I have observed portions, but not all of the cycles."

The COURT. Does it appear how these ladles were carried in the cars, how they were carried from the furnaces, how they were carried physically?

Mr. STRANGE. The ladles were on these cars.

The COURT. That is what I mean. They hang there?

Mr. STRANGE. Yes; on wheels.

783 The COURT. I did not know.

Mr. STRANGE. Yes, sir.

The COURT. How many did they carry to a car?

Mr. STRANGE. You mean how many ladles? I am not in position to state that.

Mr. BROMLEY. Two. At least two; not more than two; more of them were one-ladle cars, and some were two-ladle.

"Q. Who is Mr. O'Hara?

A. Mr. O'Hara is the South Buffalo Yardmaster in charge, he is in charge of all the switching operations, as I was told by Mr. Royer, he is responsible for that.

Q. Who is Mr. Royer?

A. Mr. Royer is Vice President and General Manager of the South Buffalo Railroad in the first part of the investigation, and he has been succeeded by Mr. Dullenkopf.

Q. Mr. McLean, in connection with the empty metal ladles, the movement of which you have described between furnaces, I will ask you to state, if you are able to do so, what charge, if any, for this movement was made by the South Buffalo Railway Company to the Bethlehem Steel Company?

A. There was no charge made by the South Buffalo Rail-

784 way Company against the Bethlehem Steel Company for the movement of any one of these 14 ladles which I observed moving from one furnace to another furnace.

Q. Turning now to the open-hearth furnaces, Mr. McLean,

A. Yes.

Q. What, if anything, can you state with reference to the ownership of the track there?

A. The South Buffalo owns all the tracks which lead right up to the wall of the building housing the open-hearth No. 1.

The Bethlehem Steel Company owns only the track inside the building upon which the ladles stand while they are being unloaded.

The same thing is true with respect to South Buffalo and Bethlehem Steel Company ownership of tracks which the hot metal moves on to reach open-hearth No. 2. The actual point of ownership appears to be 10 feet or 15 feet outside that building.

The South Buffalo owns all of the tracks which lead up to the walls of open-hearth No. 3. And the Bethlehem Steel Company owns the portion of the tracks inside of the building upon which the ladles stand while they are being unloaded.

Q. Is there an overhead crane at open-hearth No. 1?

A. Yes. When they shove these loads——

Q. (Interposing.) Just a minute. Is there or is there not?

A. There is.

785 Q. With respect to that overhead crane, where are the ladles placed?

A. The South Buffalo portion of the—I mean the Bethlehem Steel Company portion of the track which is within the building will hold six ladles.

The crane reaches down and picks the ladle up, one of these ladles empties it, and replaces the ladle on the chassis, and then moved this string of six cars to the north one ladle length, so that ultimately it can reach all six ladles, and when they have completed their work, all six of them are outside of the north end of the building.

Q. Will you state whether or not you observed any switching operations at open hearth furnace No. 1 on September 3, 1943?

A. Yes; engine No. 11.

Q. The answer to that is 'yes'?

A. Yes.

Q. Now, what did you observe?

A. Engine No. 11 arrived at open hearth No. 1 with seven metal ladles.

As I have stated a little while ago, only six of those ladles could be placed inside of the building within range of the crane.

786 On this particular occasion the engine crew cut off, or the train crew cut off one ladle between the cross-overs on tracks 252 and 253.

Q. Where are they?

A. Just north of open hearth No. 1.

The crew waited from 7:26 p. m., when they arrived, until 7:48 p. m., a period of 27 minutes.

During that time they waited for the overhead crane to unload one ladle, lift it up, and dump it in the mixer, and return it to the chassis.

Then the South Buffalo crew removed the empty ladle and replaced the position occupied on the track by the ladle which had been made empty by the ladle which the South Buffalo crew had left outside of the building.

After this switching had been performed the engine again cut the whole string off and ran light around to 9 scale office.

I asked the conductor why he had used 22 minutes performing switch of one of these cars when all he had to do was to take the ladles over and leave them. And he told me that he had been instructed that he should never leave hot metal ladles outside of the reach of the crane, which meant that he could not leave it outside of the building.

787 On this occasion he had seven ladles to fit on this track, and the track would only hold six, so he had to wait until after the crane had made one of them empty. And he was just able to get six of them inside of the building, so he had to wait until he could cut one of them off.

Q. Do you know who that conductor was?

A. I do not know his name. But I can identify him. He was the South Buffalo conductor who had had a very unfortunate accident some years ago, and the entire side of his face was paralyzed so that he could hardly speak.

Also, he was the conductor on engine No. 11, and between 3 p. m. and 10:30 p. m., on September 3, 1943.

Q. I will ask you whether or not you observed any switching done by South Buffalo engines at open hearth No. 3 on September 3, 1943?

A. Yes; I did.

Q. What did you observe?

A. This same crew, but with a different engine—engine No. 56—took those six ladles over to open hearth No. 3 at 5:47, ran around the ladles, shoved them into open hearth No. 3.

The engine left light, and went back toward the blast furnace.

The engine returned at 6:20 with six more loads
788 of hot metal.

At that time they removed two of the six ladles which they had brought over at 5:47, which, by that time, were empty.

Instead of taking two empties and going back to the blast furnace area with them, then the conductor performed some extra switching brought about by the fact that he went in and got the four loads which he had brought over at 5:47 and cut them in ahead of the six loads which he brought over at 6:20. This with the result that after he had shifted ten loads inside of the house—I should say that the unloading track, the Bethlehem Steel Company portion of that track inside of open hearth No. 3 will hold ten loads—when he shifted the ten in he had the new metal on the south end of the track, and the four loads of old metal on the north end.

I asked the conductor why he had performed that extra switching when he could have saved himself that trouble by a very simple switching operation, and he made the statement to me that he had instructions to always put the new metal in on the south end, so that when the overhead crane unloaded the ladles they would shift the loads forward, or lift the loads up and dump the ladles,
789 and put them back on the chassis, and the crane would shift the empties, the empty ladles out of the door so that in the event it was necessary to hold any of the metal inside of the

ladles because the mixer was full, the newest metal would always be the metal that was held the longest.

790 By Mr. CRAIG:

Q. Was this same conductor which you described in connection with the operation of open-hearth No. 1?

A. Will you repeat that question?

Q. Was this the same train conductor which you described in connection with the operation of open-hearth No. 1 to which you referred to?

A. That is correct; of locomotive No. 11."

Mr. STRANGE. Now, continuing:

"By Mr. CRAIGS

Q. Mr. McLean, will you state whether or not you observed anything in connection with the weighing of metal ladles?

A. Yes.

Q. You did?

A. Yes, sir; I did.

Q. What did you observe?

A. The metal crews returned the empty ladles from the open hearths to scale 9 for light weighing.

Q. Is that scale 9?

A. Yes.

Q. Where is scale 9?

A. Scale 9 is about due east of blast furnace C, it is possibly 1,000 feet south of the extreme north end of the Bethlehem
791 Steel Company property, and 600 feet or 800 feet east of the ship canal.

Q. Thank you, proceed.

A. When the South Buffalo crew had reached scale 9 with the empty ladles a member of the South Buffalo crew pushed a push button which is mounted on the north side of 9 scale office and thus called for a Bethlehem Steel Company employee from the Bethlehem Steel Company ladle house, which was in the immediate vicinity.

The Bethlehem Steel Company employee came over to No. 9 scale and mounted a ladder which placed him in a position where he could look down into the interiors of all the ladles, and he observed the interiors of these ladles as they were light-weighed.

Q. Then what happened to the ladles?

A. Ordinarily, he did not do anything at all with the ladles; and in at least two cases that I know of, he came down and ordered the train crew to place certain ladles into the ladle house.

By Mr. CRAIG:

Q. Proceed.

A. At 4:05 p. m. on September 3rd, the Bethlehem Steel employee instructed the crew to place ladle No. 13 in the house, and at 4:23 p. m. ladle No. 13 was placed on track 104, which
792 is the ladle repair track in the steel company's ladle house which is used for ladle repairing.

Again, at 9:39 p. m., the same employee instructed the crew to place ladle No. 8 inside the ladle house, and that was done immediately.

Q. Have you finished?

A. I have finished discussing empty ladles which were lightweighed on scale 9.

Q. What, if anything, did you find in connection with the movement of ladle No. 7 into the ladle house in the test period?

A. The record of ladle No. 7 shows that it moved in and out of the ladle house sixteen times during the ten days of the test period.

Q. I will ask you to state whether or not you observed any inspection of empty ladles at Scale 10, and if so by whom.

A. The South Buffalo conductor performed the same inspection at scale 10 that the Bethlehem Steel employee performed at Scale No. 9. The conductor informed me that the ladles were all right and that they were suitable for placement in the furnace next due to cast, but he also informed me that if there was any question of a doubt he would take the ladle down to the Bethlehem Steel Company's ladle house and let the
793 Bethlehem Steel employee who had made the inspection at Scale 9 take a look at the ladle.

Q. Who was this conductor?

A. He was the same conductor referred to a while ago as the conductor of engines 56 and 11 between 3 p. m. and 10:30 on September 3rd, and who said I has suffered an unfortunate accident and he had an impairment of speech.

Q. In connection with the switching done relative to the movements of the empty ladles which you have described, I will ask you to state, if you know, what charge if any was made by South Buffalo Railway Company to Bethlehem Steel Company.

A. The records which we examined indicate that no charges were made for the movement of any ladles in and out of the ladle house during the test period.

Q. I will ask you to state, if you know, during your period of observation, whether or not all slag ladles needed for any one cast can be placed at one time in the furnaces.

A. The ladles required for a single cast at furnaces A and G can be placed at one time, but they cannot be placed in a position where all of the pots on the ladles can be loaded.

Q. What is done in order to accomplish that?

794 A. Well, after three of the pots on the two ladles—and I am referring now to double ladles each of which is equipped with two pots—after three of the pots have been filled, South Buffalo sends an engine down to couple to the two ladles and move them one-half ladle length, which places the fourth and still empty pot in a position under a chute so that it can be loaded.

Q. How about the other furnaces?

A. At furnace B there is always a second engine service, and that is true at furnace J.

Q. I will ask you to state if you know whether in all instances slag ladles are fully loaded in one operation.

A. Not; they are not. I observed an instance in which a ladle which was partly filled at furnace A was taken over to furnace B to be subsequently filled, and later on the same day another party filled ladle was moved from furnace B to furnace A to complete loading."

795 Mr. STRANGE. Now, then, skipping to page 121:

"Q. Will you state what if anything you observed in connection with the movements of slag to the dumping grounds?

A. Well, the engines, when they leave the blast furnace area, always pull the ladles because the ladles are not equipped with air, and the only braking control over the movement is by the straight air which the engineer has on the drivers of the engine. The engines pull the straight ladles down to a set of South Buffalo tracks immediately west of open hearth No. 3, and at that point the engine cuts off and runs around to the rear end of the slag ladles, and it pushes the string from the point immediately west of open hearth No. 3 to a run-around track which is almost but not quite at the top of the incline alongside of Lake Erie. At that point, if the ladles are going to be unloaded on the north end of the slag dumping track, the engine then again cuts off from the rear end and runs around to the head end of the cut. Then they pull up onto the track which is used to unload and shove north to the unloading position. If the ladles are going to be unloaded on that track at a point south of the junction switch, the engine does not run around the ladles at this run-around track, but just shoves them on up to the dumping track.

796 The reason for that is that they do not thereby incur the necessity of having the locomotive move over the rails on which the slag has been dumped.

Q. What if anything did you observe in connection with the promptness with which this dumping operation was accomplished?

A. Well, I found that in every instance the South Buffalo crew remained at the dumping ground No. 62 for twenty minutes, and usually thirty minutes, to a few cases of thirty-five and forty minutes, while the ladles were being dumped.

Q. Why, if you know, was that necessary, if that was necessary?

A. Well, I don't know why it was necessary, except that that is the way it was done. The South Buffalo crew stayed right with the ladles until they were dumped."

Mr. BROMLEY. "And then brought them back?"

Mr. STRANGE. "A. And then brought them back, yes. They could have been cut off and left them up there and go and do some other work, but they didn't do it. They operated the way I have described.

By Mr. CRAIG:

Q. Who dumped the ladles?

A. The Bethlehem Steel employees.

Q. And what means to dump the ladles was employed?

797 A. Well, as soon as the ladles were placed in position the Bethlehem Steel employees coupled up the steam line on the ladles with the steam line on the two engines, and then the steam from the South Buffalo locomotive was used to activate the turning of the ladle over to the side so that the slag would flow out."

Mr. STRANGE. Skipping now to page 231——

The COURT. If you had to have the steam from the engines to put over the ladles, how can you dump the slag? How can they be doing something else? How could they have been doing something else?

Mr. STRANGE. Well, presumably the engine could go ahead, do something else, and then return for that purpose.

The COURT. They would have steam on to turn the ladles; they would have to do that until they got through. I suppose they could spend the time doing something else.

Mr. STRANGE. Well, he says that the times the engine remained there 26 minutes and usually 30 minutes, a few cases of 35 and 40 minutes, presumably the locomotive may have been performing some service between that time and the time when the cars were actually dumped.

The COURT. Well, if they used the steam on the engines to dump the ladles, they would have to be there,

798 wouldn't they? I don't get the point, any point in the loss of time there, in view of that testimony.

Mr. STRANGE. Well, according to this witness, that locomotive could have been otherwise occupied. I myself, may it please the Court, cannot supply the answer to your question.

The COURT. Well, of course, it might have some bearing, the use of the steam on the engine might have some bearing on the question here. These two statements are inconsistent. How were they paid? How was the Railroad paid for this service?

Mr. STRANGE. Now, again we go to the tariff on that.

Mr. CRAIG. It was paid so much a car.

Mr. BROMLEY. The Railroad was paid so much a car and so much for the time used in furnishing the steam and for the steam.

Mr. CRAIG. Not under that charge.

Mr. BROMLEY. Oh, yes.

Mr. CRAIG. Our position is that they had the obligation to deliver the slag cars, and that was the end of it.

Mr. BROMLEY. Oh, no, no. They were paid for delivering the car at a rate per car, and they were paid for the time they
799 stood by the Bethlehem Steel, using their steam. They are not going to give steam away.

Mr. CRAIG. Well, that was our position, that that was the obligation, to deliver the cars. Now, whatever they have relative to this steam and the standing by, I don't know.

Mr. STRANGE. Again, may it please the Court, it is a question of tariff, and whatever the tariff provides on that will be brought to your Honor's attention.

The COURT. Where that comes in the tariff I don't know.

Mr. STRANGE. Yes; I think I can say that the Bethlehem Steel Company would have no right to pay for a service rendered by South Buffalo Railway Company and South Buffalo Railway Company would have no right to receive any payment from Bethlehem Steel Company, except as provided by a tariff filed either with the Public Service Commission of New York or with the Interstate Commerce Commission, or with both. And in that I think I can make that statement as a fact.

Mr. BROMLEY. I would like to say this, your Honor: That in the tariff which has already been referred to it is provided for movement of molten slag of the kind owned and loaded by
800 the Steel Company, at $6.60 a car. Then it says, "For use of locomotives not required in connection with performing service under items named above, such as stand-by time, with or without supplying steam or air for dumping, $16 an hour."

So not only did we get the $6.60 but we got paid for the steam and the time we stood by.

Furthermore, I want to point out to your Honor that in this man's testimony which has just been read he says that the South Buffalo crew and engine remained while the ladles were being dumped and as soon as the ladles were placed in position the steam lines were coupled up. So that it is perfectly plain that all he was talking about from his testimony was the time that it required to dump, for which we were paid.

Mr. STRANGE. Now, your Honor, that is where we had marked that part of the deposition as the end of that part which we intended to offer, but immediately following is the statement which the witness makes with regard to the charges for this service. Without at this time offering this part of the deposition,

I will call your attention to the question of "What if anything did you find in connection with charges made on these trips,
801 or any of them, by South Buffalo Railway Company to Bethlehem Steel Company?"

Does your Honor care for the answer to that question?

The COURT. Well, if you have any further testimony that you want to read, that elucidates the matter, I don't know. Of course, the last question referred to these services. I don't know whether that means the services in connection with the movements of the slag or whether it means in connection with the different types of service that he testified to. Read what parts you want to in connection with that.

Mr. BROMLEY. Of course, if you go into that matter, as to which you have given me no warning, I have to go into all his cross-examination on his summary of our records, to show that it was completely and utterly inaccurate.

Mr. STRANGE. Your Honor, we will offer, then, that part of the deposition beginning on page 123, and the answer thereto:

"Q. What if anything did you find in connection with charges made on these trips, or any of them, by South Buffalo Railway Company to Bethlehem Steel Company?

A. One of the conductors that is on a slag engine
802 reported the time he arrived and placed his empty ladles in position, and the time that the dumping was completed and he removed them. He reported 29 trips during the 10-day test period. One time he reported a delay of twenty minutes, one time a delay of twenty-five minutes, twenty-six times a delay of thirty minutes, and one time a delay of thirty-five minutes. The South Buffalo made a charge of $7 against the steel company for locomotive use on the occasion when this conductor was up there for thirty-five minutes. They made no charge on any one of the remaining 28 occasions."

Mr. BROMLEY. I move to strike that out as incompetent because conclusional. There is no support of it whatsoever.

The COURT. Of course, it is a conclusion whether he made a charge for it. The records and the books are the best evidence.

Mr. BROMLEY. Surely. That is why I move to strike it out.

The COURT. Well, I grant the motion. The record is the best evidence.

Mr. STRANGE. Very well, may it please your Honor.

The COURT. Whether he charged for it or whether he did not.

Mr. BROMLEY. Very well, your Honor.

Now, then moving to page 231:

803 "Q. What, if anything, did you find or observe with reference to engine service rendered by the South Buffalo Railway Company at the Structural Shipping Yard?

A. I followed the South Buffalo switching engine which performed switching service at the Structural Shipping Yard during a total of a little less than 17 hours, on portions of four different days

Q. What do you mean by followed the South Buffalo switching engine?

A. I mean that I was right with the conductor on the engine, or on the ground, and the engine remained in view all of the time that I observed the operations which, in the aggregate, added up to a little less than 17 hours.

These observations were made on July 28, July 29, July 30, 1943, and on September 7, 1943.

Q. Proceed.

A. All of the productive time of this engine crew was used in switching tracks in the Structural Switching Yard, or in weighing cars which had been or were intended to be used in that yard, or in assembling empties for use in that yard, or in disposing of cars which had been used in that yard.

During all of the nonproductive period the time in one
804 instance exceeded one and a half hours, and in another instance it exceeded one hour, the engine——"

The COURT. In what period of time does he mean, one hour? In how long a period of time? How much space of time was there, duration of time? He said at the outset how long he was there.

Mr. STRANGE. He said he was there on July 28, July 29, July 30, 1943, and September 7, 1943. And then he said, "All of the productive time of this engine crew was used in switching tracks in the Structural Switching Yard, or in weighing cars which had been or were intended to be used in that yard, or in assembling empties for use in that yard, or in disposing of cars which had been used in that yard.

"During all of the nonproductive period the time in one instance exceeded one and a half hours, and in another instance it exceeded one hour, the engine and crew remained at the south end of the Structural Shipping Yard, which was on the extreme northern end of the South Buffalo Railway Company operation or portion of the tracks 428, 429, 430, which is only a few feet away from the office of the Bethlehem Steel Company's loading foreman."

Now, that is the idle periods of the engine.

805 The COURT. He don't mean by that, by his answer, that they stayed there for an hour at one time? He is referring to the lost time within a period of or space of time.

Mr. STRANGE. That is right, sir, on this individual, within the terms he referred to above and below, he referred to the idle hours of the engine within those times.

The COURT. I don't know how long it was, within five hours or ten hours?

Mr. STRANGE. He said in one instance it exceeded one and a half hours. That is just one instance.

The COURT. Does he mean by that it stayed in one place for an hour and a half without moving?

Mr. STRANGE. Yes; idle.

Mr. BROMLEY. He does not say that.

Mr. STRANGE. Nonproductive.

The COURT. Nonproductive, whether that refers to an hour and a half in a period of eight hours or an hour and a half consecutively?

Mr. STRANGE. Well, let me proceed, may it please the Court, and see if that is cleared.

The COURT. All right.

(Mr. Strange continues reading as follows:)

806 "In many instances the conductor went into this office and in many other instances the Bethlehem Steel Company's loading foremen walked to where the conductor happened to be at the moment.

Q. Now I ask you what was the crew doing during these times of which you speak?

A. Well, the crew was doing nothing during the times I referred to as being on the South Buffalo Railway Company portion of the tracks 428, 429, 430.

One of those times I said exceeded one and a half hours and another one which I said exceeded an hour, the time which I have referred to as nonproductive time.

Q. You may continue with your testimony.

A. On July 29, 1943, the Bethlehem Steel Company loading foreman instructed the conductor to pull two cars off of track No. 428. The engine happened to be on track 428 at the time, and when it moved forward it began to comply with the loading foreman's instruction one minute later, at 1:42, the work in this instance was completed at 1:54.

Q. Who was the conductor? Do you know?

A. The conductor in charge of engine 21 on July 29, 1943, between 8 a. m. and 2:17 p. m., South Buffalo Railway Company, and they had only one engine by that number, and they had only one conductor in charge of that crew on that date and at that time.

807 I do not happen to know the conductor's name.

Q. You may continue.

A. On July 30, 1943, at 10:59 a. m., the Bethlehem Steel Company's loading foreman walked over to the South Buffalo Railway Company's conductor and instructed him to move a Pennsylvania car from one spot on track 429 to another spot on track 429. The engine started to perform the work at 11:02 a. m. It coupled to nine cars and removed the nine cars from track 29 at 11:08 a. m. The last car in the string on the track was Pennsylvania 347068. When it had reached a point on the South Buffalo portion of this track or tracks it shifted the Pennsylvania car onto track 428 far enough to clear the rest of the track.

Then it did a little switching, and at 11:19 a. m. shifted 10 cars back on track 429.

Pennsylvania 347068, which had been the ninth car from the south car on that track, when the work started, was the fifth car from the south end of that same track when the work was completed."

Mr. STRANGE. Moving next to page 239:

"Q. Do you know who was the conductor in charge of these movements?

A. He was the conductor in charge of South Buffalo Railway Company engine No. 12 on July 30, 1943, between
808 9:40 a. m. and 2:20 p. m. I do not know his name."

Mr. STRANGE. Skipping now to page 249:

"Q. Mr. McLean, yesterday I believe you testified relative to what you found or observed concerning engine service by South Buffalo Railway at the Structural Shipping Yard?

A. Yes.

Q. Will you continue your testimony, if any, in that connection? Continue, if you will.

A. I have forgotten the question now."

Mr. STRANGE. There was an objection interposed in there, may it please the Court.

"Q. Continue, if you will.

A. I have forgotten the question now.

Q. I asked you this, I believe: Yesterday you testified relative to what you found or observed, Mr. McLean, concerning engine service performed by the South Buffalo Railway at the Structural Shipping Yard. I want you to continue your testimony, if you have not concluded it, in that connection.

A. Oh, yes.

On July 30, 1943, at 11:06 a. m., the Bethlehem Steel Company loading foreman walked over to the conductor in charge of engine No. 12 of the South Buffalo Railway Company, and
809 told the conductor that NYC 635628 and CB&Q 76279 'were coming back.'

The South Buffalo Railway Company conductor replied that he 'would find a place for them.'

810 By Mr. CRAIG:

Q. State whether or not you heard the remarks about which you have testified?

A. I did.

Q. You may proceed.

A. I——"

Mr. STRANGE. Then counsel for the defendant interposed [reading]:

"Q. Proceed.

A. 11:28 a. m. this engine No. 12 went to track No. 412, stopped opposite the Yard Office, and at 11:32 a. m. moved north into South Buffalo track 410.

Q. What happened then?

A. It coupled to a string of cars, and then brought out ten cars from that track—410. Two of these cars it kicked onto track 409, and then shoved the other eight cars back into track 410, where they were originally located. The two cars which had been kicked into track 409 were CB&Q and NYC 635628.

Engine 12 picked these two cars up and returned to the Structural Shipping Yard, placing them on track 430 at a point where they would clear track 429.

The crew then tied up for lunch. At 12:07 p. m.

811 while the crew was eating their lunch the Bethlehem Steel Company loading foreman asked the conductor to make another move, and when he had completed his conversation, a Bethlehem Steel Company workman, who was standing opposite the loading foreman, asked him to place a 'Q' car.

* * * * *

Q. Proceed.

A. At 12:45 p. m. the engine conductor proceeded and the engine picked up CB&Q 76279 off of track 430, moved to track 429, and placed CB&Q 76279 under runway 15 on that track.

The overhead crane moved over to a position directly above CB&Q 76279 before the engine had gotten off of the lead and on its way out on that track.

On September 7, 1943, at 7:20 a. m.——

* * * * *

Q. Proceed.

A. On September 7, 1943, at 7:21 a. m., the Bethlehem Steel Company loading foreman asked the conductor to bring two circus cars down to 419——"

Mr. STRANGE. An objection was interposed there [reading]:

"By Mr. CRAIG:

Q. Proceed.

812 A. At 7:31 a. m. engine No. 2 went into the track 419 as far as run 10.

At 7:35 a. m. it came out of track 419 with ALS–73 and RAS–37. Those two cars were long circus type cars which had been in circus service at some time in the past.

The initials 'ALS' stood for Al Lewis Shows.

The initials 'RAS' stood for Royal American Shows.

The Bethlehem Steel Company had been putting some of these circus cars through their shops and painting off the former circus owner's name, substituting 'BS Company' on the sides of the cars, and also substituting their own number for the former circus numbers.

These two cars, however, still carried the original circus designation."

Mr. STRANGE. Skipping now to page 253 [reading]:

"By Mr. CRAIG:

Q. Proceed.

A. I want to say that the two cars that I have observed, and now refer to, and which I have identified as ALS–73 and RAS–37 were distinctly circus type cars, with which I am familiar, and which are peculiar and different from any other railroad cars which I have seen in my lifetime.

813 These two cars were definitely like the type of circus cars which moved over common carrier railroads, and distinctly different from any other cars that I have ever seen in railroad service, except other circus cars."

Mr. STRANGE. There is an objection there.

Mr. STRANGE (reading):

"Q. Proceed.

A. The two circus cars were put in a position on track 430, and the work was completed at 8:08 a. m.

At that time the engine returned to the work which it had been doing at 7:30 a. m., and went on with that work.

At 10:06 a. m. of the same day——

Q. What date is that?

A. What is that?

Q. What date is that?

A. September 7th, 1943.

Q. Proceed.

Q. At 10:06 a. m. of the same day, namely, September 7, 1943, engine No. 2 of the South Buffalo Railway Company was moving light northward into track 428. The conductor passed the signal 'Stop the engine,' and the engine reversed direction and started back up toward Smoke's Creek.

814 Just after he had passed his signals to reverse the direction of the engine he made the remark to me that he had to give 'him' some empties on 423.

* * * * * *

Q. Proceed.

A. At 2:10——"

Mr. STRANGE. Then counsel for the defendant interposed. Now, then, skipping to page——

The COURT. What do you claim for these circus cars, a delay in movement of them or that they are not adaptable or what?

Mr. STRANGE. I do not know as he has yet finished. Generally speaking they were in connection with movements which were made at the direct request of representatives of the Bethlehem Steel Company.

The COURT. Supposing that is true, supposing they wanted some cars that were on the railroad tracks, what is the difference?

Mr. STRANGE. They were transmitted directly to the yard conductor or the yard engineer without going through the ordinary normal channels.

Mr. BROMLEY. Do I understand from that that your contention is that it is improper for a Bethlehem Steel Company load-

815 ing foreman to speak to a South Buffalo Railway Conductor?

Mr. STRANGE. It is one of our contentions that at least at that time a locomotive was placed at the structural shipping yard to serve the will and the design of the Bethlehem Steel Company as the Foreman might extend the orders from time to time to the yard conductor or the yard engineer directly.

Mr. BROMLEY. He should not have done that, but should have gone to our yardmaster; is that your point?

Mr. STRANGE. He ought to have gone through the Yardmaster and if required a R-115 should have been issued so that the movement could have been billed promptly.

And, may it please the Court, I think it is in the record that after Mr. Dullenkopf became superintendent or occupied his present position that he ceased and terminated that service.

Moving then to page 256 (reading):

"Q. Proceed.

A. At 10:28 a. m. the engine completed the work of placing some empty cars on track 423.

At 10:38 a. m. on the same day, engine No. 2 of the South Buffalo Railway Company was shoving some cars northward on track No. 412 towards Scale No. 7 when the Yardmaster stepped over to speak to the conductor.

816 The conductor immediately passed signals to stop. The engine was cut off, after the engine stopped, and moved

southward right out of that track. It then moved northward, light, into track 411.

Q. Will you give us the detail of that, please?

A. I distinctly remember this particular conversation with the conductor, because just prior to the time that the engine was stopped, he had made the statement to me that his next job was to weigh cars which the engine shoved into track 412 at 10:28 a. m. After his discussion with the Yardmaster, he passed signals to cut off the engine, and the engine started to back out of track 412.

The conductor was in an embarrassing position with respect to me, because, obviously, he was doing something which was contrary to what he had just told me he was going to do.

At that time he said he had to put a Central car back. I emphasized 'Central' because he did not refer to any particular 'Central' car.

He referred—and if I may quote this, so that we will have the exact words, and exactly what my notes show, 'He referred to a Central car under 15, on 423.' Those were the exact words. He referred to a 'Central car on 15, under 423.' I have
817 got that backwards, it is 'to a Central car under 15, on 423.'"

Mr. STRANGE. Now, then, moving to page 258 (reading):

"Q. Proceed.

A. They coupled onto three cars on track 411, one of which was IC 82843. The designation 'IC' stands for Illinois Central.

This car, at 10:46 a. m., was placed under run 15 on track 423.

The other two cars which had been removed from track 411 were returned to track 411, after which the engine, at 10:52 a. m. backed out of track 411, light, and headed into 412, to couple with the seven cars which it had cut off and left on that track at 10:38 a. m., and then shoved the seven cars north onto the scale, which is the work the conductor had told me he was going to do, at 10:38 a. m."

Mr. BROMLEY (reading):

"Cross-examination by Mr. BROMLEY:

Q. Now, just so I can understand it—it was after the conductor talked to the South Buffalo Yardmaster that he did something other than he had told you he was going to do."

Mr. CRAIG. Now, is that cross-examination?"

818 Mr. BROMLEY. Then to page 664, the eighth line:

"Q. Now, at the bottom of page 258 and the top of Page 259, I would like to ask you with respect to the testimony you gave there——

A. (Interposing.) Just a minute.

Q. Concerning some observations you say you made of switching operations on the South Buffalo Railway?

A. Yes.

Q. I ask you whether or not it was after the conductor talked to the South Buffalo Railway Company Yardmaster that he did something other than he had told you he was going to do, and I asked you that question at that time. You did not answer the question. Now, the answer to that question is 'Yes', is it not?

A. Yes; the conductor was shoving these cars up to the scale. And while the engine was shoving these cars northward toward the scale the Yardmaster stepped out and had a conversation with the conductor, and the conductor immediately passed signals to stop the engine, and I believe he had about seven cars at the time—cut off the engine and moved over to pick up the Illinois Central car, and it was after the Yardmaster had spoken to him that he did that."

819 Mr. STRANGE (reading):

(Page 259.)

"DIRECT EXAMINATION—Resumed

Q. What, Mr. McLean, if anything, did you observe in connection with the removal of two cars from track 423 in the structural shipping yard and the placing of any empty car in or under run 15—under run 15?

A. As——

Q. Proceed.

A. I have not completed my discussion of the movement of this Illinois Central car.

Q. Proceed to complete your answer.

A. I would like to clear it up if I may.

Q. You may.

* * * * *

Q. You may continue your previous discussion, if you have not completed your answer.

A. Well, while these seven cars were being weighed, I told the conductor that I had noticed during my preceding observations there that he received his instructions directly from the Bethlehem Steel Company loading foreman, and he said. 'Well, when I am down there working around the Yard Office, he calls up the South Buffalo Yardmaster and relays certain instructions
820 to me to save him from walking from his office down to where the engine happens to be.'

That completes the testimony with respect to the Illinois Central car."

* * * * *

"Q. What, Mr. McLean, if anything, did you observe in connection with the removal of two cars from track 423 in the Struc-

tural Shipping Yard, and the placing of an empty car under run 15?"

* * * * * *

"A. At 10:40 a. m. on July 30, 1943, engine No. 12 moved light into track 423, which is one of the tracks in the Structural Shipping Yard.

The engine did not couple onto the two cars on that track, because some workmen were inside of Pennsylvania car 860636 bracing the car."

* * * * * *

"Q. Whose workmen, if you know?

A. Bethlehem Steel Company workmen.

Q. Proceed with your answer.

A. At 10:45 a. m., after the engine had stood idle then for five minutes, the workmen climbed out of PRR 860636, and the engine coupled to the two cars that were standing there.

The other car, which was PRR 284265, the workmen were
821 not in that latter car bracing the load. Therefore, the engine shoved further northward on the same track, and picked up the three cars and then moved southward out of the track, and shoved into a South Buffalo track known as 419, and coupled with Rock Island car, and then shifted the four cars northward to track No. 423.

Rock Island car No. 185775 was placed under the crane on runway 15.

This particular piece of track had been occupied by one of the Pennsylvania cars prior to 10:40 a. m.

The cars which had been on that part of the track were left on a portion of the track somewhat southward, of the position under runway 15, and after that switch was completed at 10:52 a. m. the Bethlehem Steel Company workmen resumed their work of bracing the load.

At 12:49 p. m., engine No. 12 of the South Buffalo Railway Company went into track 423, and coupled to PRR 284265 and PRR 860636, which were the cars standing on track 423 at 10:40 a. m., in a position under runway 15, and which were subsequently placed in a position somewhat southward of runway 15 at 10:52 a. m., where they stood until 12:49 p. m. when engine No.
822 12 returned to the track and the two cars were then removed from track No. 423.

Q. I will ask you whether or not you found any other instances, or observed any instances when a South Buffalo engine stood idle while cars were being loaded, or partially loaded, by Bethlehem Steel Company crews?

A. Yes.

Q. Will you tell us about that?

A. On July 30, at 1:50 p. m., engine No. 12 shoved a string of cars northward on track 436 in the Bethlehem Steel Company's Structural Shipping Yard, and made a cut in the cars and moved southward one car length. Still hanging onto some cars it stopped one of the cars and spotted one of the cars it was hanging onto, under runway 14, at 1:51 p. m., when the overhead crane started to drop a load of steel into BS 1843, which was the fourth car ahead of the engine.

While the load was hanging in a position about three or four feet above the floor of the car a discussion took place, none of which I heard, and then the engine moved southward about six feet.

After the engine completed that move, the crane dropped its load into BS 1843. I am referring now to BS 1843.

823 Subsequently, and at 2:05 p. m., there were more loads dropped into cars which were still coupled onto the engine, and this work went on between 2:05 p. m. and 2:10 p. m.

At 2:12 p. m. the engine was cut off and backed out of track 436, light."

* * * * *

"Q. Mr. McLean, I ask you whether or not, on September 7, 1943, you observed the movement of PMcK&Y 91519, and any other cars from track 428 to Scale 7?

A. Will you repeat that question, please?

Q. I asked you if on September 7, 1943, Mr. McLean, you observed the movement of car PMcK&Y 91519 and any other cars, from track 428 to Scale 7?"

* * * * *

"Q. If you wish to refresh your recollection, I suggest that you refer to your prepared statement before the Interstate Commerce Commission page, 81.

A. Yes, I am familiar with that movement.

Q. What did you observe?

A. This car that has just been referred to, being PMcK&Y 91519, and seven other cars were moved from Track No. 428 to Scale 7 where they were weighed at 8:20 a. m. on September 7.

824 At 8:55 a. m. they were moved to the Bethlehem Steel Company portion of track 435 in the Structural Shipping Yard where they were coupled to two cars already standing on that track, and one of which was being loaded by the overhead crane.

The engine stood still from 8:55 a. m. until 9:04 a. m., and during which time the crane continued to load the car.

At the latter time the conductor and some of the Bethlehem Steel Company employees engaged in conversation, following

which the engine cut off and left the cars on that track, and moved out, the engine, light."

* * * * *

"A. At 2:25 p. m., of the same day the engine returned and moved PMcK&Y 91519 from the position where it was at the time the engine cut it off, at 8:55 a. m., and moved it to the adjoining track, on 435, and at this latter time the car was placed under a crane."

Mr. BROMLEY. Reading last line on page 664:

"Q. On page 261 you talked about your observations of July 30, 1943, and the fact that some Bethlehem Steel Company workmen were inside of Pennsylvania car 860636 bracing the car.

You meant by that, did you not, bracing the load that was down in the car?

A. That is correct. Practically all loads that are
825 moved in line haul railway service are either solid loads and come flush against the side of the car, or they are braced so that the load will not shift around within the car while it is in transit.

Q. Now, is it not the custom of all railroads that when a string of cars is moved away from the loading platform for one of the brakemen or other employees of the railroad to go down the string of cars and see that the loading platforms are up, and that the employees of the shipper or loader of these cars are clear of the string of cars?

A. That is correct.

Q. And if he finds that the men are not out of the cars, it is not unusual for the switching engine to wait a short time such as five minutes for the men to get out of the car, is it?

A. Well, I did not have in any experience any time where I waited as long as five minutes. I did have many times in my experience, times when I walked along the side of the cars or a car and told the workmen that were in there to get out of the car, that we were going to move it, but I do not remember any time when the engine crew of which I was a member had to wait
five minutes in order to allow the people who were in the
826 car to get out. They had to get out, and they did get out when I told them to get out.

Q. Sometimes it certainly would take you, in your experience, as long as five minutes to walk along the length of a string of cars, in order to warn the people inside the cars to get out, and to be sure that they were clear?

A. Do not forget that when I got off the engine and started down the string of cars, when I got to the first car and I told the men to get out of it, I did not move from that car until they had got out, and I knew that all of the workmen were out of that car,

and I went on down to the end of the string of cars that way, seeing that each car was empty as I went along, before I left it, because when I got to the end I would start passing signals to move the cars, and I am not going to go to a car first and find some workmen in the car and tell them to get out, and not know whether they are out or not, and then start walking down ten car lengths, and start passing signals without a knowledge of the fact that those men are, within my personal knowledge, out of the car and the car is clear and safe to move.

827 That is exactly what the conductor did up there in the South Buffalo Railway operation, and that is what this particular crew did, the engine just stood there for five minutes, after they had coupled into that string of cars, they just shifted them forward and on that track to get the B&O car which was considerably northward, but they did not get it, they did not make a move until the workmen got out of the car."

Mr. STRANGE. Proceeding with the direct examination on page 275 (reading):

"Q. I will ask you, Mr. McLean, whether or not there is a Bethlehem Steel overhead crane runway along the north side of the merchant bar plant located between 5-Mill and the structural steel plant.

A. There is.

Q. And I will ask you whether or not there is a South Buffalo track which passes under that crane.

A. There is.

Q. Will you give the location of that track, please?

A. Well, that track leads out of the south end of the south yard and passes in a northwestward direction along the south and west side of 5-Mill and then turns northward and runs northward until it reaches a point between 10- and 6-Mills on the east, and

828 9-Mill on the West. It crosses—or it passes under the overhead crane runway that you referred to at a point north of its departure from south yard and prior to its passing between 6- and 9-Mills.

Q. I will ask you whether or not you have observed any Bethlehem Steel cars being unloaded at that crane.

A. Yes, I have observed the——

Q. The answer is yes?

A. Yes.

Q. Will you tell what you have observed?

A. On July 20th I observed BS 2103 and BS 227 on this South Buffalo track at 5:40 p. m., BS 2103 was in the process of being unloaded by the overhead crane which passes at right angles above the South Buffalo track. About two-thirds of the work had been completed at that particular time. I observed two slingloads

transported to the east and two other slingloads deposited on the ground to the west of that car.

On August 9th I noticed five cars coupled together on the South Buffalo track in the vicinity of the point where it passed under this crane. These cars, all of which were Bethlehem Steel cars, were numbered 1870, 919, 1860, 1832, and 816, in that order, from the south. The south car BS 1870, stood directly under the crane runway. The westerly of the two cranes that I ob-
829 served on that crane runway removed slingloads from that car at 1:55 p. m., 2:05 p. m., and 2:08 p. m., depositing this load on the ground to the west of that track.

On September 16, 1943, I observed four cars standing on this track. From the south the cars were BS 411, BS 644, BS 673 and BS 458. The three south cars were loaded with flat pieces of steel about six inches by eight inches by fifteen feet in length. As I approached the position of these four cars I noticed an overhead crane lift a load up from BS 673. At 12:39 p. m. I noticed the overhead crane lift a second load off this car which was standing directly under the crane at the time."

The COURT. What do you claim about these four cars, the question of time in the unloading?

Mr. STRANGE. Well, that the South Buffalo Railway Company was participating or aiding in the unloading of this cars and that engine was standing by while it was being done, and in addition to that that the overhead crane located as it is beside the South Bethlehem track indicates that that service is a normal and usual service extended by the South Buffalo to the Bethlehem Steel Company, and also the fact that Bethlehem Steel cars are being unloaded on South Buffalo Railway Company's tracks.

830 Mr. BROMLEY. Do you contend that that is improper?

Mr. STRANGE. We contend that these among other instances add up to a situation that is not normal between an independently owned railroad with an independently owned shipper.

Mr. BROMLEY. There was not any testimony here about the engine standing by at all, Mr. Strange.

Mr. STRANGE. I withdraw that part of my statement, then. The real inference here is the fact that the cars unloaded on the South Buffalo tracks and that this crane is situated beside the South Buffalo's tracks.

The COURT. You spoke about some being put in the yard or on the ground by the crane.

Mr. STRANGE. The witness said that "the westerly of the two cranes that I observed on that crane runway removed slingloads from that car at 1:55 p. m., 2:05 p. m. and 2:08 p. m., depositing

this load on the ground to the west of that track." That was one deposit. Now, earlier he said "About two-thirds of the work had been completed at that particular time. I observed two slingloads transported to the east and two other slingloads deposited to the ground to the west of that car." In other words, they were depositing on either side of the car.

831 Mr. STRANGE (reading):

"A. (Continuing.) On September 16, 1943, I observed four cars standing on this track. From the south the cars were BS 411, BS 644, BS 673, and BS 458. The three south cars were loaded with flat pieces of steel about six inches by eight inches by fifteen feet in length. As I approached the position of these four cars I noticed an overhead crane lift a load up from BS 673.

At 12:39 p. m. I noticed the overhead crane lift a second load off this car which was standing directly under the crane at the time."

Mr. STRANGE. I have read that previously. Now, continuing:

"On September 10, 1943, while I was riding a switch engine which was moving from the vicinity of 6- and 9-Mill southward on this track en route to south yard, the engine found VS 308, which was loaded with steel, standing on the running track under the crane runway at 7:32 p. m. I had, previous to this time, asked the conductor how he returned from the vicinity of 6- and 9-Mill to south yard, and he told me that he called the yardmaster and asked for instructions as to what route he would use to return to south yard when he had completed his work each evening.

832 When the engine came in sight of this BS 308 the conductor remarked to me that the yardmaster hadn't told him anything about that car standing there. After we got into the yard office I told the yardmaster about our having to couple onto BS 308 and shove it into clear on the north end of South Buffalo track 419. The yardmaster made a remark in which he said that he had not known the car was there and that he would have to send an engine to go and get it and put it back under the crane."

* * * * * *

"Q. I will ask you, Mr. McLean, whether or not you found a cable and pulley in the vicinity of the overhead crane runway—

A. Yes, there was a——

Q. Which has been involved in your testimony.

A. Yes, I did.

Q. Where did you find it, and when?

A. This pulley was mounted on one of the posts supporting the north side of the crane runway and which was located between the South Buffalo track which I have been discussing and Bethlehem Steel track 450½, which is located a short distance to the

west of that track. A cable passed through the pulley
833 and was stretched in a southward direction along the west side of the South Buffalo track.

Q. When did you find this?

A. I found it on August 30th, I noticed it the first time, and then I subsequently noticed it later.

Q. Will you state whether or not you observed anything in connection with the unloading of car No. X 39129 of the General American Tank Car Company?

A. Yes.

Q. When and where did you make the observation?

A. I found G. A. T. X. 39129, a tank car, standing on track 451, on August 30th——

Q. Well, now, just a minute.

A. 1943. This car——

Q. Just a minute. Whose track is that?

A. Well, at the spot that the car was standing on it belongs to the South Buffalo Railway.

Q. All right. Now, what did you observe?

A. This car was standing immediately west of an overhead stationary tank which was mounted on a platform the bottom of which was possibly eight or ten feet about the ground. The tank looked to me to be similar to the stationary tanks of possibly fifteen to twenty-five thousand gallon capacity, although I
834 do not know what the capacity of the tank was. There was a hose connected between the top of this tank and the dome of the tank car. There were two signs across the track on each end of the car which carried the words, 'Danger. Falling Material.' A blue flag was attached to the east rail of the track at a point two feet north of the switch in track 451, which leads to tracks 452 and 454. The entire car was north of and clear of the narrow-gauge track which runs into and becomes a part of track 452."

Mr. STRANGE. Strike out during June 1st to 10th [reading]:

"G. A. T. X. 38274 is a tank car of the same type as G. A. T. X. 39129, the car which I observed being unloaded or loaded on August 30th."

Mr. STRANGE. That part of the deposition ends on page 280. Going next to page 306 [reading]:

"Q. Mr. McLean, what, if anything, did you find concerning the length of time cars remained on South Buffalo Railway Company portion of track 509?

A. On August 5, 1943, I observed the handling of cars on track 509, but I did not learn anything as to how long they had been on that track.

Q. What, if anything, did you observe then and there?

A. I found several cars standing on the extreme northern
835 end of the South Buffalo Railway Company portion of track 509.

Just north of the string of cars standing on track 509 was a car which was under a covered roof, and there was a group of workmen engaged in the unloading of the car. It was loaded with some form of coke.

When this operation had been completed, the Bethlehem Steel Company workmen, one of them, carried a cable back and attached it to the cars which were standing on the South Buffalo Railway Company portion of the track, and pulled the string of cars one car length northward, which had the effect of kicking or knocking the empty car that stood on the south end of the Bethlehem Steel Company portion of the track 509 in a northward direction one car length and placing a loaded car of coke which had been the northernmost one of the string of cars previously standing on the South Buffalo Railway Company portion of the track, in a portion where it was subsequently unloaded a few minutes later.

The movement from the South Buffalo Railway Company portion of the track to the Bethlehem Steel Company portion of the track was accomplished by a cable powered by some stationary means."

836–838 The COURT. We will have to suspend at this time.

(Adjournment until Wednesday, January 30th, 1946, 10 o'clock a. m.)

839 Proceedings of Wednesday, January 30th, 1946, 10 o'clock a. m.

Appearances: Same as before noted.

Mr. CRAIG. May it please the Court, the plaintiff has concluded its offering of a part of the deposition of W. R. McLean.

The COURT. That is what you were reading yesterday?

Mr. CRAIG. We have completed it. Previously there has been received in evidence Plaintiff's Exhibit 147, which is the deposition of John E. Jacobs, and immediately after that exhibit was received in evidence No. 148, a plaintiff's exhibit, was reserved for further testimony of Mr. Jacobs, which was to be prepared and offered. That testimony has been prepared and marked Plaintiff's Exhibit No. 148, and at this time the plaintiff offers in evidence its exhibit 148. It is in addition to the deposition.

The COURT. When taken and how taken? It is part of the deposition?

Mr. CRAIG. No, sir.

The COURT. How does it come in this form?

Mr. CRAIG. As we explained to your Honor when we offered the deposition in evidence, Mr. Jacobs, it had been agreed
840 was not to appear, and in the deposition which was taken here in Buffalo in November 1945, the plaintiff covered all subjects save one, and that subject had been covered in the testimony of Mr. Jacobs before the Interstate Commerce Commission in its Ex Parte No. 128. This matter I might say is by agreement.

The COURT. It is stipulated?

Mr. BROMLEY. Yes.

The COURT. All right.

(Further testimony of Mr. Jacobs was thereupon received in evidence and marked as "Plaintiff's Exhibit No. 148.")

Mr. CRAIG. There is one more portion of the written stipulation entered into between counsel for the respective parties which I want to read at this time. It reads: "The South Buffalo Railway Company is now engaged and at all times since October 10th, 1922, and prior thereto, has been engaged in interstate commerce."

The COURT. That is admitted in the pleadings, is it not?

Mr. CRAIG. No, sir.

841 Edward S. Gram, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Gram, you are a Director of South Buffalo Railway Company, are you not?

A. Yes; I am.

Q. When did you become a Director of that Company?

A. December 1939.

Q. Do you recall the date?

A. No; I can't recall exactly. The early part of the month.

Q. Was it December 5, 1939?

A. It may be. I couldn't swear to it.

Q. What is your occupation?

A. Retired.

Q. Will you state whether or not, prior to your becoming a director of South Buffalo Railway Company, you had had any experience in connection with the management of a railroad company, either as a member of a Board of Directors or otherwise?

A. Not of a railroad company; no. A number of other Boards.

Q. How frequently are meetings of the Directors of the South Buffalo Railway Company held?

A. Usually four times a year and occasionally an extra
842 meeting, sometimes total five, as far as I can recall.

Q. Who presides at those meetings?

A. Usually Mr. Petty; in his absence, Mr. Trageser.

Q. Mr. Petty is President of the Company, is he not?

A. He is.

Q. Mr. Trageser is a Vice President of the Company?

A. That is right.

Q. And both of them are Directors of the Company also, are they not?

A. They are.

Q. At these meetings who brings up the matters for consideration of the Board?

A. Will you repeat that, please?

Q. (Question read as follows: At these meetings who brings up the matters for consideration of the Board?)

A. Usually one of the officers of the corporation.

Q. Isn't it true that, in connection with any questions relating to the operations of the Company, that either Mr. Petty or Mr. Trageser, as the case may be, brings up the question?

A. That is right.

Q. And when he brings it up does he explain the proposition involved?

A. Very thoroughly, yes, I would say.

Q. And does he make a recommendation of a course of
843 action to be followed in connection with the question?

A. I don't know as he makes a recommendation as to a course of action. He brings the matter before the Board and asks the pleasure of the Board.

Q. And asks what?

A. The pleasure of the Board.

Q. Do you ask questions of him?

A. Why, questions have been asked with reference to matters that have been brought up; not being railroad men, we naturally have to ask some questions.

Q. And during the course of that questioning does Mr. Petty or Mr. Trageser indicate his views on the proposition before the Board?

A. Yes.

Q. Isn't it a fact, Mr. Gram, that in these questions concerning the operations of South Buffalo Railway Company that you, as a Director, lean heavily on the recommendations and the views of Petty in connection with matters concerning the operation?

Mr. BROMLEY. I object to that as incompetent, as calling for a conclusion.

The COURT. Well, "lean heavily," that calls for a conclusion, does it not?

Mr. CRAIG. Very well.

Q. What is the extent of your reliance, if any, on the

844 views expressed at the meetings by Mr. Trageser or Mr. Petty in connection with matters concerning the operation of South Buffalo Railway Company?

A. Well, my views are just exactly the same as if I were attending any other Board meeting—and I have been on a number.

Q. Just a minute, please.

A. Yes.

Mr. CRAIG. I move that that be stricken.

The COURT. Well, state with reference to this particular company. That is the question.

The WITNESS. All right.

The COURT. Read the question.

The WITNESS. Will you repeat the question, then?

Q. (Question read by reporter as follows: "Q. What is the extent of your reliance, if any, on the views expressed at the meetings by Mr. Trageser or Mr. Petty in connection with matters concerning the operation of South Buffalo Railway Company?")

A. I am largely guided by their experience and the statements they give to the Board as to the necessity of purchasing this or that or making repairs in buildings, and what not.

Q. Does the same thing apply to the sale of track?

A. Yes.

845 Q. Sale of tracks to Bethlehem Steel Company?

A. Sale of tracks to anybody; usually Bethlehem Steel.

Q. Do you have occasion to pass on the matter of purchase of track from Bethlehem Steel Company?

A. Yes.

Q. You place reliance in those instances on the recommendations of Mr. Petty or Mr. Trageser?

A. I do.

Q. And is it not true that you follow the same process in connection with any other matters in connection with the operation of South Buffalo Railway Company?

A. Usually so; yes.

Q. Mr. Gram, who spoke to you about the possibility of your becoming a director of South Buffalo Railway Company?

A. Mr. Robison, I think his name was.

Q. And when was that?

A. Well, it was in the latter part of November 1939.

Q. Did Mr. Robeson or Robison identify himself?

A. As an attorney for the South Buffalo Railroad.

Q. What did he say to you?

A. Why, he said the stockholders, as I recall it, of the South Buffalo Railroad desired to make some changes in the Board of Directors, and he said my name had been brought to his attention

and had been recommended as a possible candidate for director of that corporation.

846 Q. Do you remember his first name or his initials?

A. I haven't the remotest idea.

Q. Did he tell you who owned the stock of South Buffalo Railway Company?

A. Subsequently, because——

Q. No. At this time?

A. At this time, yes, but at this meeting.

Q. Oh, yes. All right.

A. When he brought the question of directors to my attention, I had in the back of my head a possible stock sale of some sort, and I said, "Does that involve purchase of stock in the South Buffalo Railroad?" He said, "No, I don't think so." And after that he did tell me that the stock was owned by Bethlehem Steel Corporation. That is how it was brought out.

Q. Did he state to you at that time whether or not he or any member of his law firm was Counsel for Bethlehem Steel Corporation?

A. No.

Q. What, if anything, did he say about the desire of either—well, of anyone, for that matter, to have a complete separation between South Buffalo Railway Company on one side and the Bethlehem Steel Corporation or Bethlehem Steel Company, or both, on the other side?

A. Didn't say anything about it.

847 Q. Did he say anything to you at that meeting concerning any investigation of South Buffalo Railway Company by the Interstate Commerce Commission, which was then pending?

A. No, sir.

848 Q. Now, relative to the time that you became director do I understand that you say you became a director in December of 1939, or was that in January 1940?

A. I was notified some time in December, and the first meeting was in January 1940.

Q. And it was at that meeting, was it, when you took your oath and became a director of the Railway?

A. That is right.

Q. Now, did you know and do you know that at a meeting of the Board of Directors of South Buffalo Railway Company held on December 5th, 1939, that David M. Petty was elected President of the South Buffalo Railway Company?

A. No.

Q. That is elected for the first time.

A. I didn't know he was elected at that time.

Q. Did you know that at that meeting on December 5th, 1939, of the Board of Directors that all nine directors were employees of the South Buffalo Railway Company?

A. I hadn't any knowledge of any of the directors or anything about the company.

Q. Did you know or did Mr. Robison tell you that for more than a year prior to December 5th, 1939, that all the directors of the South Buffalo Company were officer or employees of the Company?

849 A. He did not.

Q. And you didn't know that?

A. Absolutely not.

Q. Well, did you know or do you know that from 1909 to 1939 that Mr. Petty had been an employee of the Bethlehem Steel Company?

A. No.

Q. Do you know that any experience that Mr. Petty, prior to his becoming President of the South Buffalo Railway Company, any experience that he had had in the operation of a railroad was in connection with his work with the Bethlehem Steel Company?

A. I knew nothing about it at all.

Q. Did you know or do you know that prior to Mr. Petty's becoming President of the Railway Company that his interest in railroad problems was secondary to Steel Company problems, except as they affected the Steel Company?

Mr. BROMLEY. I object to that as immaterial.

The COURT. Sustained. Secondary—that is a relative term.

Mr. CRAIG. It is Mr. Petty's testimony previously given.

The COURT. Reframe the question.

Q. Do you know that Mr. Petty is not only President of the South Buffalo Railway Company, but that he is President
850 of six other railroad companies, all the stock of which is owned by the Bethlehem Steel Corporation?

A. I knew that he was president of six other railroads. I found that out after I became a director. I didn't know it before.

Q. Did you know that the stock of each of those companies is owned by the Bethlehem Steel Corporation?

A. I do not.

Q. Do you know or have you known that Mr. Eugene Grace, President of both the Steel Corporations and the Steel Company, that is Bethlehem, of course, was the person who asked Mr. Petty if he would be willing to have Mr. Grace put his name before the directors of the seven subsidiary railroads of the Bethlehem Steel Corporation, including the South Buffalo Railway Company, or the position of President of the respective railroads?

Mr. BROMLEY. I object to that as immaterial.

The COURT. How does he know?

Q. Did you know or do you know that Mr. Grace told Mr. Petty that Mr. Petty's salary or compensation would be a figure satisfactory to Mr. Petty in round figures?

A. I have no information of what Mr. Grace told Mr. Petty. I know nothing about it. I heard something about it.

Q. You don't know of any conversation that Mr. Petty had with Mr. Grace?

851 A. No.

Q. Do you know or have you known that prior to Mr. Petty's election as President of the South Buffalo Railway Company that he had had no business dealings with at least six of the directors at the time of his election, but he knew them only as people connected with South Buffalo?

A. I had no means of knowing anything about it.

Q. But you don't know that?

A. I do not.

Q. Do you know that Mr. Edward F. Entwisle is manager of the Bethlehem plant at Lackawanna?

A. No, I don't know it.

Q. Then you don't know that he has been Manager since about 1936?

A. No, I don't know that.

Q. You know nothing and have known nothing, I take it, then, concerning any business connection between Mr. Entwisle and Mr. Petty when both of them were employees of the Bethlehem Steel Company?

A. No.

Q. Mr. Gram, you know, do you not, that Mr. Paul Trageser served as President of South Buffalo Railway Company from November of 1933 to January 1940?

852 A. I know it now. I didn't know it prior to the time I was elected to the Board.

Q. When did you find that out?

A. At some meeting of the Board it was informally announced or stated, but I didn't pay any attention to it, because I didn't know Mr. Trageser or Mr. Petty or any one else. It was only a name to me.

Q. Do you recall about when you learned that?

A. I can't say, no.

Q. Do you think it was in the first year that you were director of the company?

A. It might have been. I can't state definitely.

Q. Well, do you know that while Mr. Trageser was President of the Railway Company that excluding any contributions from the Bethlehem Steel Corporation that South Buffalo made money?

A. I don't know anything about the affairs of the corporation prior to the time I got on the Board. I had no interest in it at all.

Q. Well, do you know that prior to the time that Mr. Trageser became President of the South Buffalo Railway Company that he had been an employee of the Steel Company?

A. No, I didn't know it.

Q. And I take it from your answers that you know nothing about the circumstances surrounding Mr. Trageser's
853 ceasing to be President of the Railway Company?

A. I know nothing at all about it.

Q. Do you know, Mr. Gram, whether or not the Board since you have been a member of it has ever considered electing a president other than Mr. Petty?

A. No meeting of the Board ever discussed that. It was never discussed at any meeting of the Board. I never heard of it.

Q. And is the same true in connection with Mr. Trageser as Vice President?

A. That is right.

Q. Did anything ever come up at the Board to the best of your knowledge concerning the prior employment of any officer or chief operating official of your Railway Company?

A. No.

Q. Do you know who the Superintendent of the Railway Company is?

A. I know him, but I can't think of his name at the moment. I met him.

Q. Do you know who the Secretary-Treasurer of the Company is?

A. Mr. Sellers; George Sellers, I believe.

Q. Do you know that prior to the time he became Secretary-Treasurer of the company that he was an employee of the
854 Bethlehem Steel Company?

A. I didn't know it.

Q. And who is your Auditor?

A. Did you ask me a question?

Q. Yes; who is your Auditor?

A. I don't know.

Q. Do you know who your Purchasing Agent?

A. I think his name is Michaels, or something like that.

Q. Do you know who your General Agent is?

A. No.

Q. Now, isn't it a fact, Mr. Gram, that when a vote is taken of your directors that vote is unanimous?

A. As far as I can recall they have been unanimous, yes.

Mr. CRAIG. You may examine.

Cross-examination by Mr. BROMLEY:

Q. The Superintendent of the South Buffalo Railway is a member of your Board of Directors, isn't he?

A. Yes, sir.

Q. And you know him, don't you?

A. Yes; he has a peculiar name. I never can think of it.

Q. If I told you it was Dullenkopf would that refresh your recollection?

A. That is right.

Q. You know him and have known him since 1940, haven't you?

855 A. That is right.

Q. You have seen him quite frequently?

A. Yes, sir.

Q. You likewise know General Agent Handwerk, don't you?

A. I don't know as I do. I couldn't place him.

Q. You know that he is located in Bethlehem and not in Buffalo?

A. I didn't know that, either.

856 Q. If I suggested the name "Fatzinger" to you as the Auditor, would that recall anything to your mind?

A. It would not.

Q. How many men are on the Board of the South Buffalo Railway at the present time?

A. I have to count on my fingers. I think there are nine.

Q. And of those nine four are officers of or connected with the Railway and five are outsiders; isn't that so?

A. That is right.

Q. That has been the situation since 1939, has it not?

A. Since the first part of January 1940; yes.

Q. Yes. I mean since January 1940.

A. Yes.

Q. Will you tell us, just briefly, what your business experience was prior to January 1940, or prior to the time you retired?

A. I retired in 1939 as Vice President and General Manager of the Crosby Company, sheet metal and stamping manufacturer; and I was and still am on the Board of the Utica Mutual Insurance Company of Utica, New York, and also Allied Fire Insurance Companies. I have been on that Board for eighteen years. And, incidentally, my name has been handed to the Superintendent of Insurance as a candidate for election next month for another 857 three years. I have also been director in the Acme Steel Malleable Iron Company; that was taken over by the Buffalo Brake Beam Company. I resigned my directorship in the Crosby Company last year because I sold out my entire interest there, so I am not affiliated with them now.

Q. Looking at your services on those Boards, Mr. Gram, can you tell us whether or not, generally speaking, you placed reliance on the officers of those companies?

A. Positively do.

Q. Is there anything any different in the way you look upon the recommendations of South Buffalo officers from the way you looked upon recommendations of the officers of your other companies?

A. No.

Q. So far as Mr. Petty, your President, is concerned, are you satisfied with the way he performs his duties?

A. Up to this time I have been.

Q. Do you recall that in January 1940 your Board fixed his compensation as President of the Railroad?

A. Yes; I have knowledge of it.

Q. And is it the fact that the Secretary of the Company keeps minutes of your meetings?

A. Very much—very accurately, I would say.

Q. You mean the minutes are full minutes?

A. Full minutes; yes.

858 Q. And are the minutes of each preceding meeting read aloud to you directors at each meeting?

A. They are.

Q. Don't you recall that in the first meeting in January 1940 the minutes of the old Board of Directors for the meeting in December 1939 were read to you?

A. I cannot swear that I remember that. They may have been but I do not recall that they were.

Q. Don't you remember that you were told in some fashion that that old Board, predecessor Board, had elected Mr. Petty as President of the Railroad?

A. My recollection don't go back definitely on that point, but I presume that was it. I had some knowledge of it but I can't swear to it.

Mr. CRAIG. I object to the "presume"; move that it be stricken.

The COURT. The words "I presume" may be stricken out. He says his recollection does not go back definitely on that point.

Q. At any rate, Mr. Gram, you know that your Board has either approved or changed or fixed the compensation of most all, if not all, of the officers of the Company since you have been a director?

A. Yes; I know that.

Q. You told Counsel, I believe, that you knew that Mr.

859 Petty acted as officer of some other railroads?

A. Yes.

Q. And that Mr. Trageser did?

A. That is right.

Q. And the compensation which you directors fixed for them gave due regard, in your opinion, to that fact, did it not?

A. That is right.

Q. And are you satisfied with the amount of time they devote to the affairs of your Railroad, as distinguished from what they do for other railroads?

A. They seem to spend a good deal of time here, outside of the regular directors' meetings. I do not see them at those times but I know they are in Buffalo and Lackawanna in the interests of the Railroad, between directors' meetings.

Q. Did you say you did or did not know Mr. Entwisle, the Bethlehem Steel Manager of the Lackawanna plant?

A. I only know him by name. I have never met him or seen him.

Q. Has he ever talked to you or you ever talked to him about the affairs of the South Buffalo Railway Company?

A. No.

Q. So far as you know, Mr. Gram, do you know anybody connected with Bethlehem Steel Corporation, of which Mr. E. G. Grace is the head?

860 A. I don't know anybody out there, nor Mr. Grace, except by name and reputation.

Q. So far as you know, do you know anybody connected with Bethlehem Steel Company, the Company which operates, among other things, the plants at Lackawanna?

A. I do not.

Q. And, therefore, I take it that you have never had any discussion with anybody from Bethlehem Steel Corporation or Company with regard to what you should or should not do as a director?

A. Never have seen anybody or talked with anybody.

Q. And have you at all times felt perfectly free to exercise your own judgment, uncontrolled by anybody else, in the performance of your duties?

A. I have.

Mr. CRAIG. I object to that question, your Honor, if he felt free to do, uncontrolled by anybody.

The COURT. Well, perhaps the form of the question is not quite proper. It can be shown in another way, I think.

Mr. BROMLEY. Well, I will withdraw it.

Q. Have you acted independently in the performance of your duties?

A. I have.

Mr. CRAIG. I move it to be stricken, your Honor; the
861 question calls for a conclusion.

The COURT. It is cross-examination, of course.

Mr. CRAIG. True. All right.

Q. Since you have been on the Board has the amount of dividends, if any, been fixed by your Board?

A. On two occasions. Once there was a dividend of $300,000—I can't recall the date; and at another time a dividend of $75,000 was voted by the Board. And at our last meeting Mr. Petty brought up the question of dividend but the members of the Board, I will say that were not employed by the Railroad, they said "No" unanimously, without any question, because the balance sheet, the cash position, did not warrant paying dividends; so the matter was dropped right there.

Q. That was an instance, then, in which the Board did not follow the recommendations of the President; is that right?

A. It was practically that, yes; because he did not bring it up any further and it was dropped.

Q. You thought, did you, that the financial position of the Railway Company did not warrant the declaration of a dividend?

A. That is right.

Q. And the other Buffalo directors, at least, agreed with you?

862 A. That is right.

Q. Do you recall that there was a time when the Board of which you were a member, declared a $75,000 dividend?

A. Yes.

Q. Isn't it a fact that at that time Mr. Petty recommended a dividend in a larger amount?

A. I think there was some question about $150,000 dividend. There was quite an amount of discussion and it was finally definitely settled on the $75,000 dividend.

Q. And when you voted for that you voted for it because you thought it was the proper thing to do, did you not?

A. Well, we had the statement and the cash balances and the tax bonds, and after all liabilities there were ample funds, including paying the dividend of $75,000, for the working capital of the corporation, according to our judgment, and as explained by Mr. Petty, would be required, so forth.

Q. But you thought that amount was not sufficient to declare a higher dividend?

A. That is right.

Q. And you did not declare a higher dividend?

A. No. Seventy-five was the final.

Q. Have you any relationship or connection with the Bethlehem Steel Corporation or Bethlehem Steel Company?

A. No.

863 Q. As to which I have not asked you, in any form of any kind?

A. No.

Q. Are you familiar with the property of the South Buffalo Railway Company, Mr. Gram?

A. In a general way, yes; been through it several times.

Q. Has it been the practice for your Board to inspect the Railway, since you have been on the Board?

A. Annually.

Q. Annually?

A. Yes. I think I would say annually; we have inspected it three different times, to my knowledge, that I have been on the tour.

Q. Are you accompanied by officers or employees of the Railway who are equipped to answer your questions or point out things in which you may be interested?

A. We are.

Q. And did you ask questions and did you receive information?

A. Yes; there are always questions asked.

Q. Can you give us any idea as to the approximate length of a meeting of your Board of Directors since you have been on it?

A. The meetings usually last from an hour and a half to two hours.

Q. And what can you say about the attendance at those meetings? Are people habitually absent or has it a good

864 attendance record?

A. Very seldom any absentees. I have been absent several times, but I have been out of the city when the meeting was called.

Q. What can you say as to whether or not the matters which are brought up before your Board are discussed?

A. They are thoroughly discussed; and we have been able to get what I considered sound answers. We have had blueprints submitted to us for observation as to any change in trackage or location of new buildings, or anything of that sort. And we have acted on it—I will say I have acted on it as intelligently as I knew how, not being a railroad man.

Q. Now, do you follow Mr. Petty's recommendations just because he is President of the Company or because you think he has some connection with the Steel Company or did have some connection with the Steel Company?

A. Well, the recommendations by the President is what I consider fair recommendations. I have no knowledge of his being interested in the Steel Company.

Q. And you follow his recommendations, when you do follow them, because you think they are proper and sound; isn't that right?

A. That is right.

Q. Have you directors, as a Board, ever considered the
865 matter of getting more business for your Railroad?

A. Yes. As a matter of fact, Mr. Petty has suggested that if any of our—any of the outside directors, local directors, knew of any plants that might be brought out to that section, that it would help them. And I only knew of one new plant that was put up; I think it stopped operation—chemical plant.

Q. What was that?

A. I think there was a chemical plant located out there at one time at the end of the spur of the road, but they are out of business.

Q. So far as you know, has your Railroad ever received any complaints from shippers, other than Bethlehem Steel Company, over its lines?

A. I know of none. I happen to know the Manager of the Buffalo Tank Corporation out there and I asked him about a year ago if the South Buffalo Railway Company served him. He said "Yes."

Mr. CRAIG. Pardon me, what was the answer? He said, what?

The WITNESS. I said that I had met the General Manager of the Buffalo Tank Corporation and I asked him whether the South Buffalo Road touched their plant.

The COURT. Touched their plant?

The WITNESS. The Buffalo Tank Corporation.

866 The COURT. Touched their plant?

The WITNESS. Pardon?

The COURT. You said "touched"; is that the word you used?

The WITNESS. Whether the South Buffalo Railway touched their plant, served them. And he said, "Yes." I said, "Have they taken care of them?"

Mr. CRAIG. What is that now? I did not hear.

The WITNESS. I asked him if the South Buffalo Railway Company would take care of them.

Mr. CRAIG. I object to further conversation.

The COURT. All right; strike it out.

867 Q. Has it been the practice of the Board to require the officers to submit to the Board in advance the matter of substantial commitments or proposed expenditures of Railway funds?

A. Will you state that question again? I didn't get it clearly.
(Question read.)
A. No.
Q. Do you consider the matter of commitments, or such things as the erection of new buildings, or the building of new tracks?
A. Yes, surely.
Q. Well, that is what I am talking about. I want to know whether in those instances in which the railroad plans to make an expenditure whether that is submitted to you before the commitment or not until afterwards?
A. Oh, it is submitted before the commitment.
Q. And would you say generally that the Board has passed upon and approved in advance all commitments or expenditures or proposed expenditures of any substantial amounts?
A. I will.
Q. Does the Railway Company maintain its own bank accounts and keep its funds therein?
A. They do.
Q. Does it retain and keep any securities which it may
868 have purchased for investment or otherwise?
A. Do they what?
Q. Do they keep them in their own possession?
A. I think there is a deposit in the safe deposit box.
Q. What I am getting at is this, Mr. Gram: There is no practice here of the Railway turning off to its stockholder, the Steel Corporation, any of its cash funds, is there?
A. I have never heard of such a thing.
Q. The South Buffalo Railway Company does not keep any deposits with the Bethlehem Steel Corporation, does it?
A. No, they do not.
Q. And it does not turn over to the Bethlehem Steel Corporation any of its securities or any of its property at all so far as you know, does it?
A. It does not.
Q. And do you Board of Directors decide where the corporation securities and money shall be kept?
A. Yes, sir.
Q. Has that matter come before your Board from time to time?
A. It has.
Q. Now, can you give me an illustration of a matter of prior approval of expenditures on which you passed? I am
869 thinking particularly whether you have ever passed on new buildings or extensions to the Railway?
A. We built a new tool house. That was quite an expense, and it was absolutely necessary. On one of our inspections of the

road we found it to be a terrible mess, and they put up a very desirable building from the manufacturer's point of view. It saves us money.

Q. You mean from the Railway point of view?

A. Yes. I happen to be a manufacturer and I have some knowledge of how stock should be kept. We went over the plot and had the blueprints with us and the building was subsequently erected and then again inspected, and it certainly was for the interest of the Railway Company's activities.

Q. When you say it was again inspected you mean by the Board of Directors?

A. That is right. Then the question of buying Diesel engines came up from time to time also to replace steam engines.

Q. And has your Board passed on that matter?

A. They have.

Q. And what did you finally do, authorize the purchase of new Diesels or not?

A. We authorized the purchase of new Diesels, and the proposal from the manufacturer was laid before us, so that we knew
870 what the cost would be. We also bought snowplows and certain equipment which we authorized them to buy.

Q. Are such matters as the tariffs, freight tariffs, and other tariffs of the railroad, laid before you prior to the time that they are filed by the Company officers?

A. Well, they are submitted to us, but I am frank to say that I am not familiar with tariffs. I haven't any idea of tariffs. I think they did get an advance once as I remember, in their freight tariff; but generally I couldn't discuss that.

Q. Nevertheless, is it the practice of the officers to lay the tariffs before you and inform you of what they propose to do; as to whether it is an increase or a decrease?

A. They do that, absolutely; yes.

Q. And you are given the opportunity to ask questions about it and pass on it and either approve or disapprove; aren't you?

A. We are.

Q. What about the sale of land belonging to the railroad company; has that ever been discussed or approved or disapproved?

A. Yes, there was a sale of two pieces of property while I have been on the Board. One was down on the Turnpike and the
871 canal, and another one was further over on the railroad property. They were discussed thoroughly.

Q. And were those sales approved by the Board before they were made?

A. They were.

Q. There has been some suggestion here that, so far as the sale of the property to the South is concerned, your Board was furnished with an independent appraisal; do you recall?

A. I don't recall that we were furnished with an appraisal, but I believe there was an appraisal. You are talking about the piece down on the canal?

Q. No, sir; I am talking about the piece to the south that you mentioned. That has been referred to here as part of the 450-foot strip.

A. Yes, I know now. I know that.

Q. Do you know who made that appraisal?

A. I can't say who made the appraisal.

Q. What it Allingham?

A. I wouldn't know.

Q. At least you know there was an appraisal?

A. There was an appraisal.

Q. Which you were furnished with before you approved the sale?

A. That is right.

Q. It has been brought out here that when you came to
872 approve the sale of the dock property to the north you got no appraisal?

A. That is right.

Q. Well, can you tell us the reason for the difference in the way that those transactions were handled?

A. Well, the dock property was used partly by the South Buffalo Railway, and they held it for a number of years hoping to get some business to compensate them for holding that property, and the Board was finally advised that there was an annual loss, and they recommended selling that property to the Bethlehem Steel Corporation, I think it was, and we voted to sell it on that recommendation.

Q. Do you recall that you got a little over $391,000 for it?

A. I thought it was exactly $391,000.

Q. Well, I think it was $859 more, as I remember it.

A. All right.

Q. Do you consider that an advantageous sale for the railroad?

A. I would say so; yes; because it a continual loss to the railroad in holding it. The cost of it was $391,000, the cost of it to the railroad, as I recall it, and it was sold for that price.

Q. Do you recall what you were told about its assessed valuation as of the time that it was sold?

875 A. Well, I heard it somewhere around $145,000 for the land and some $5,500 for the buildings, or improvements that were on it. It totaled about $150,000.

Q. In voting in favor of that sale did you have any desire to render to Bethlehem Steel Company or Bethlehem Steel Corporation any advantage at the expense of your own company?

A. The Bethlehem Steel Company was not in the picture at all. It was a matter of business policy to get rid of a dead horse or a white elephant.

Q. Do you recall that the matter of selling land to the Spring Perch Company was up before your Directors?

A. Yes, it was for a parking lot.

Q. Did you authorize the sale of that land to that company?

A. We did.

Q. Was it sold?

A. As far as I know it was sold. I think it was.

By the COURT:

Q. Where was that land?

A. Right next across the road from the present South Buffalo office building.

Q. That is across the Turnpike, you mean?

A. No, there is a little blind alley runs past the office of the South Buffalo Railway Company and across from that
874 alley is a vacant piece of property that the Spring Perch Company wanted. The Spring Perch Company wanted that for a parking lot.

Mr. BROMLEY. There is the Spring Perch Company's property, sir [indicating on Plaintiff's Exhibit 1], and here is the Railway office [indicating].

The COURT. That is right. It is on the east side of the Turnpike.

Mr. BROMLEY. Yes, sir.

The COURT. That is what I thought.

Mr. BROMLEY. That is right, sir.

By Mr. BROMLEY:

Q. Can you tell whether or not there has come before your Board such things as proposed contracts with the Steel Company whereby the Railway Company was to do repair work on Steel Company tracks?

A. Yes.

Q. Was that matter explained fully to your Board before the arrangement was entered into?

A. Yes, it was.

Q. And approved and authorized by your Board?

A. Yes, sir.

Q. Do such matters as proposed expenditures for betterment of right of way and repair of bridges come before your Board?

A. They do.

875 Q. Are they discussed and approved?

A. They are thoroughly discussed and usually approved.

Q. Can you recall whether the matter of a proposed drilling of a new gas well was brought before the Board?

A. Yes; it has been up quite a few times.

Q. Was the Board informed of the investigation and subsequent litigation brought by the Interstate Commerce Commission against the company?

A. Yes, I think they were.

Q. Do you recall that a member of the Cravath firm named Adkins from New York came up and reported to you Directors fully about it at one time?

A. Yes, sir.

Q. And was the institution and pendency of the present suit reported to the Directors?

A. Yes, sir.

Q. And have you been kept informed about it?

A. Yes, sir.

Q. Do such matters as may relate to the Railway's relations with its employees such as vacation plans come before the Board?

A. They do.

Q. Can you think of any other matters which have been passed upon by the Board or considered by the Board which I haven't mentioned, Mr. Gram?

876 A. No.

Q. Was there a director named Flershem?

A. Rudolph Flershem, yes.

Q. He was a Buffalo resident, was he?

A. Yes. He was Vice President of the Marine Trust Company.

Q. And he resigned?

A. He resigned.

Q. And his successor was elected?

A. That is right.

Q. Who was that successor?

A. Francis Smith, who was a Vice President of the Marine Trust Company.

Q. Can you tell me what compensation, if any, you Directors receive as Directors?

A. We receive $50 at each meeting.

Q. And is that something which the Board considered and passed upon?

A. It was.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. Mr. Gram, in connection with the sale of the dock property am I correct in my recollection that you stated that the cost of that property to the South Buffalo Railway Company had been $391,000?

877 A. I had been informed that it cost that.

Q. Isn't it a fact that that was the book value of the property?

A. My understanding was that it was the cost to the corporation.

Q. And you understand that if that was the cost that that was the price, the value at which it has been carried on the books of the South Buffalo Railway Company?

A. Yes; that is right.

Q. So that regardless of whether or not it was the cost that was the book value of the property on South Buffalo's books?

A. That is as I understand it; yes.

Mr. CRAIG. That is all.

Mr. BROMLEY. No questions.

BURTON L. GALE, Jr., a witness called by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Gale, you are a Director of the South Buffalo Railway Company, are you not?

A. Yes.

Q. How long have you been a Director of that company?

878 A. Since 1939.

Q. When in 1939?

A. December, I believe.

Q. Did you take office then, or did you take office in January of 1940?

A. I don't recall.

Q. What is your occupation?

A. I am a Vice President of the Manufacturers & Traders Trust Company.

Q. Prior to your becoming a Director of the South Buffalo Railway Company what, if any, experience had you had in connection with the management of a railroad company, as a member of the Board of Directors, or otherwise?

A. I had none.

Q. Do I understand that you generally have four or five Directors' meetings a year?

A. That is correct.

Q. And that Mr. Petty, if he is present, presides at those meetings?

A. Yes, sir.

Q. And if he is not present Mr. Trageser presides?

A. That is correct.

Q. Does anybody else preside?

A. I have no recollection of anybody else presiding.

Q. Who spoke to you in connection with the possibility of
879 your becoming a Director of the South Buffalo Railway Company?

A. Mr. Harriman, the President of my bank.

Q. And what was that conversation?

A. He told me that the South Buffalo Railway had come to the bank saying they would like to have local representation on the Board and asked if the bank cared to name a man to go on the Board. Mr. Harriman asked me if I would be willing to serve, and I said I would.

Q. Did he say who, representing South Buffalo, had come to him?

A. Not to my recollection.

Q. Were you informed before you became a Director that the Bethlehem Steel Corporation owned all the stock of the South Buffalo Railway Company?

A. No.

Q. Do you know that the Bethlehem Steel Corporation does own all of the stock of the South Buffalo Railway Company?

A. I understand it owns a great majority. I don't know whether there are qualifying shares outstanding in the hands of others than the Bethlehem Steel Company.

Q. Were you informed at the time or prior to the time of your becoming a Director that it was desired by anybody that there be a complete separation of Bethlehem Steel Corporation or
880 Bethlehem Steel Company or either of them on one side and South Buffalo Railway Company on the other?

A. No.

Q. Were you informed prior to or at the time of your becoming a Director that there was pending an investigation of the South Buffalo Railway Company by the Interstate Commerce Commission?

A. No.

Q. Mr. Petty is President of your company, isn't he?

A. That is correct.

Q. Do you know when he was first elected President?

A. I do not.

Q. Do you know that prior to his becoming President of the South Buffalo Railway Company that he had been an employee of the Bethlehem Steel Company?

A. No.

Q. Did you not know it until this time?

A. Well, I think I have seen it in the newspapers. I didn't know it at that time.

Q. No one connected with the South Buffalo Railway Company ever told you anything about that?

A. No.

Q. Do you know that Mr. Petty is President of six other railroad companies, all the stock of which is owned by the Bethlehem Steel Corporation?

881 A. I know he is President of the railroad companies. I don't know what the stock ownership is or where it is located.

Q. You don't know, I take it, of any conversations which took place between Mr. Eugene Grace, President of both the Bethlehem Steel Corporation and the Bethlehem Steel Company, and Mr. Petty prior to his becoming President of your railroad company, do you?

A. I have no knowledge of it.

Q. I take it also you don't know what, if any, business connections Mr. Petty had with the Directors of the railroad at the time when he was first elected President of the Road?

A. I know nothing of it.

Q. And I take it also that you are not aware of any prior business connection Mr. Petty and Mr. Edward F. Entwisle, Manager of the Lackawanna plant of Bethlehem Steel Company, have had in the past?

A. No.

Q. Do you know anything concerning the success or lack of success of the Company prior to the time when Mr. Petty was President and while Mr. Trageser was President?

A. No.

882 Q. Do you know that Mr. Trageser formerly was President of the Company?

A. I didn't know it until recently.

Q. When did you learn that?

A. I couldn't say—oh, perhaps in the last six months or so.

Q. I take it, then, you know nothing of Mr. Trageser's business connections, including employment by the Bethlehem Steel Company, prior to his connection with the South Buffalo Company?

A. I knew nothing of it.

Q. You know nothing of it now?

A. Yes—well, I know he is employed by the South Buffalo Railroad; that is all I know.

Q. You know nothing about his prior business connections?

A. No; I do not.

Q. I take it you know nothing concerning the circumstances surrounding Mr. Trageser's ceasing to be President of the South Buffalo Railway Company?

A. I know nothing of it.

Q. To your knowledge has the Board ever considered electing anybody President except Mr. Petty? That is, of course, while you have been a member of the Board.

A. I know of no other nomination for President.

Q. Well, do you know whether or not it has been considered?

A. I don't know that it has ever been considered.

883 Q. To the best of your knowledge it has not been considered?

A. To the best of my knowledge it has not been considered.

Q. Would your answers be similar in connection with Mr. Trageser's being a Vice President of the South Buffalo Railway Company?

A. Yes; my answer would be the same.

Q. Do you know who the General Superintendent of South Buffalo Railway Company is?

A. Yes.

Q. Who is he?

A. Dullenkopf.

Q. Do you know when he became Superintendent, about when?

A. Oh, perhaps two years ago.

Q. Do you know anything about his prior business connections before becoming Superintendent?

A. No; except it was reported he came from one of the other roads.

Q. One of what other roads?

A. One of the other six roads of which Mr. Petty is President.

Q. Do you know who your Secretary-Treasurer is?

A. Yes.

Q. Who is he?

A. Mr. Sellers.

Q. You don't know anything about his prior business connections before he came to South Buffalo Railway Company?

884 A. Nothing at all, no.

Q. Do you know who your Auditor is?

A. Craig?

Q. Well, at any rate, whoever he is, you know nothing of his prior business connections?

A. I know nothing. Trying to dig up a name.
Q. Do you know who your Purchasing Agent is?
A. Not by name, I don't believe.
Q. Do you know who your General Agent is?
A. I think not.
Q. At your directors' meetings, which, as I understand it, were presided over by Mr. Petty or Mr. Trageser, as the case may be, isn't it a fact that the presiding officer presents the matters to be considered by the Board?
A. I think most usually he does.
Q. And does he state there his recommendation therewith as to what the Board should do?
A. Very frequently; yes.
Q. And isn't that done, as a rule?
A. Beg pardon?
Q. Isn't that done as a rule?
A. Well, I wouldn't—it is done frequently. I don't know whether it is done as a rule or not. And it is presented as a matter for the Board's consideration.

Q. There came up before the Board, did there not, ques-
885 tions concerning the sale of track by South Buffalo Railway Company to Bethlehem Steel Company?

A. I don't recall sale of track. They sold property in one or two instances, I recall.
Q. You don't recall the sale of any track?
A. I don't recall the sale of track.
Q. Do you recall any proposals coming up for the purchase of track from the Bethlehem Steel Company by South Buffalo Railway Company?
A. I don't recall any; no.
Q. Do you recall any questions coming up about the purchase of new equipment by South Buffalo?
A. Yes.
Q. In that instance did the presiding officer make a recommendation as to what should be done?
A. Yes.
Q. Wasn't that generally true in connection with problems involving the operation of the road?
A. I would think, in general, that the management presented their recommendations and the reasons for them.
Q. There might be some difference in connection with financial problems, for instance, of the road?
A. I don't know what you mean by "difference."
Q. In the matter of recommendations by Mr. Petty or Mr. Trageser?
886 A. I still don't understand your question.

Q. As I understand, as a rule, and generally, the presiding officer, Mr. Petty or Mr. Trageser, as the case may be, would present his recommendation in connection with anything before the Board for action?

A. That is generally true.

Q. Did that include both operating matters and financial matters?

A. I would think so.

Q. That is your recollection?

A. That is my recollection.

Q. I take it that the Board would discuss the various matters presented by the presiding officer for action?

A. That is corrrect.

Q. What, if any, reliance in connection with the propositions placed before the Board by Mr. Trageser or Mr. Petty did you place on the recommendations made by him?

A. Well, if they were reasonable and made sense we placed absolute confidence in their recommendations.

Mr. CRAIG. That is all.

Cross-examination by Mr. BROMLEY:

Q. So far during your term of service as a Director have you been satisfied with the services of Mr. Petty as President?

887 A. I have.

Q. Can you tell me, sir, whether or not you feel entirely free to urge his removal and election of somebody else should you ever become dissatisfied with him?

A. I would feel entirely free to do so.

Q. Have you any commitment or understanding with anyone that you will keep him in office?

A. No.

Q. Have you any understanding with anyone that you will supplant him with somebody who has theretofore worked for Bethlehem Steel Company or the Railroad?

A. No.

Q. And it is the fact, is it not, that you feel entirely free and independent to substitute anybody for him whenever the occasion, in your opinion, demands it?

A. That is correct.

Q. Do you serve or have you served on any other Boards of Directors?

A. Yes.

Q. Would you name them, please?

A. Buffalo General Laundries, Ward Pecos Petroleum Corporation; a number of charitable organizations.

Q. Is it the practice on those Boards for the presiding
888 officer or officers to submit matters with recommendations to your Boards?

A. It is.

Q. What can you say about whether or not you rely upon their recommendations?

A. Of course we rely on them. We must consider, if they are sensible, as I said before, accept them.

Q. Do you act any differently in your capacity as a South Buffalo Director from what you do in your capacity as other directors?

A. Not a bit.

Q. Now I ask you the same question with respect to Mr. Trageser and the other officers of the South Buffalo: Are you satisfied with their services to date?

A. I am.

Q. You feel perfectly free to fire them or supplant them by anybody else at any time that you think the occasion demands it?

A. I do.

Q. Do you know Mr. E. G. Grace or Mr. McMath, or anybody connected with Bethlehem Steel Corporation?

A. I don't know them. I know, very casually, Mr. Entwisle.

Q. Mr. Entwisle, the Manager of the Steel Company?

A. That it right.

Q. Have you any acquaintanceship with any other officer
889 of Bethlehem Steel Corporation or Bethlehem Steel Company, or Director thereof, so far as you know?

A. Not so far as I know.

Q. Have you and Mr. Entwisle ever discussed the affairs of South Buffalo Railway Company?

A. No.

Q. So far as you know, does he know you are a Director of the Railway Company?

A. I would guess he didn't.

Q. You have had no conversation with him about the subject matter whatsoever at any time; is that right?

A. That is right.

Q. And is that likewise true so far as concerns any officer, director, or representative of Bethlehem Steel Company or Bethlehem Steel Corporation?

A. That is right.

Q. And is your judgment exercised entirely independently in your capacity as a South Buffalo Director?

A. It is.

Q. Have you, sir, made inspections of railway property since you have been a director?

A. I have.

Q. How many?

A. Well, I would guess perhaps five, four or five.

Q. And have you been accompanied by some of the officers?

890 A. Yes.

Q. And can you tell us something about that inspection, as to how detailed it is?

A. Well, in general, we have been taken over all of the main track of the Road, both on the Lake side and away from the Lake side on the Hamburg Turnpike. I think we covered the main track of the Road; saw the Companies they serve, their bridges, their track and switches; and discussed any problems they had in connection therewith.

Q. Have you attended all or the majority of the meetings of the Board?

A. I have attended the majority of the meetings.

Q. Is it the custom and practice for someone to read to the directors the minutes of the last previous meeting or meetings?

A. It is.

Q. What can you state about the action which your Board has taken with respect to fixing dividends?

A. The Board has—when the question has been considered the Board has discussed it in regard to the earnings of the prior period, has acted in accordance with the then financial status of the Company and the earnings record of the immediate past.

Q. Has your action in that respect ever been influenced

891 by anyone from the Steel Corporation, or stockholder?

A. It has not.

Q. What can you tell me as to whether or not you have or have not followed the recommendations of the President's with respect to either the amount of the dividend, or its declaration?

A. I don't recall whether an amount was suggested by the President or not. The amount that we arrived at seemed to be entirely reasonable in relation to the then financial condition of the Company and the condition of its earnings.

Q. What about the last occasion that you considered it: Did you declare a dividend?

A. We did not.

Q. Do you know what, if anything, the President, Petty, may have recommended in respect to whether you do or not?

A. He made no recommendation.

Q. Did you discuss the matter?

A. We did.

Q. Can you tell me what his position was in respect to whether you should or not?

A. I don't recall. We didn't pass a dividend.

Q. You mean you didn't declare a dividend?

A. We didn't declare a dividend.

892 Q. Can you give me some idea of the character of matter which becomes before your Board, Mr. Gale?

A. The questions of the operations of the Road; the physical facilities; condition of the right-of-way, bridges, tracks, so forth; matters of repair, renewal; matters of purchase of new equipment; questions of labor relations; question of wages; different times specific problems, snow removal, and what is involved there; discussion of the current operations insofar as earnings are concerned; forecast of what may be expected; I think, in general, all the things that are pertinent to the operating efficiency of the Road.

Q. And is it the practice of the officers to submit in advance to you the matter of contemplated expenditures or contemplated contracts involving substantial expenditures?

A. Yes.

Q. Are those matters submitted to you before the commitment is made, before the expenditure is made, or afterwards?

A. Before.

Q. What can you say as to whether or not there is available at your meetings full information with respect to the matters which are considered by you?

A. I have always found that there has been full and
893 adequate information for any purpose the Board wanted.

Q. Are you Directors kept informed currently with respect to any of the Railway's affairs?

A. Yes.

Q. Will your tell us about that, please?

A. We receive monthly a balance sheet and an income statement, which shows the current month's operations and the operations of the year, to date; we also have usually some comment which is pertinent to the immediate operations, from the President.

Q. You mean that comment is in the form of a letter accompanying the monthly statement?

A. Yes; that is correct.

Q. And do you exercise or give attention to the matter of the compensations of your officers?

A. We do.

Q. There has been testimony here, Mr. Gale, that in 1942 the Bethlehem Steel Company bought track of the Northern Operating Company. Do you know anything about Northern Operating Company?

A. Very little. I don't think I know anything about it.

Q. Well, do you know——

A. Yes, I do; I change that. I will change that. I recall it was a holding company, I believe, of the Nickel Plate Railroad.

894 Q. And do you recall that your Railway has a trackage agreement over that line——

A. That is correct.

Q. (Continuing.) Of railway owned by the Northern Operating Company?

A. Yes.

Q. The testimony shows that that property was bought from the Northern Operating Company by the Bethlehem Steel Company and was not bought by the Railway Company. Were you told of any communications from the Steel Company to the Railway which resulted in your Railway not buying the property?

A. No, sir; I don't recall any.

Q. Did you know that Mr. Trageser had negotiated for the property.

A. No; I did not.

Q. What do you know about the sale of the dock property which has been mentioned here in the evidence?

A. My recollection is that the property had been of no practical operating value to the South Buffalo Road; that, as I recall it, it was carried—it was operating—it was held at a loss, when you considered the charges, interest charges, and the rest.

Mr. CRAIG. What was the last?

The WITNESS. It was not self-supporting; in other words,
895 the charge to interest and taxes and so forth did not make the property self-supporting; and the Company had an opportunity to sell it at a price that was substantially its book cost.

Q. Were you give all the information that you desired in connection with that matter?

A. I was.

Q. Did you think it was a good deal for the Railroad Company?

A. I did.

Q. And did you vote in favor of it?

A. I did.

Q. Do you recall the sale of a part of what has been referred to as the 450-ft. strip at the south end of the Railway?

A. Yes.

Q. And what do you know about that transaction?

A. The property was of no particular value to the Railroad or its operations could be sold at a reasonable price, and it seemed desirable to sell it on that basis.

Q. Do you recall that, in connection with the latter sale, you were furnished with or given access to an appraisal by Mr. Ellingham?

A. Yes; I believe so.

Q. Do you recall that, in connection with the sale of the dock property, you had no appraisal?

896 A. Yes; I think I do recall that.

Q. Are you able to tell us why you had no appraisal of the first property but did of the second?

A. Well, I think, in the first instance, we are getting—we contemplated getting our original book value. I think in the second instance the possibility of getting some profit over book.

Q. Well, were you influenced to any extent in your approval of the sale of the dock property by the fact that the sale was to the Steel Company?

A. I was not.

Q. Did you believe it to be for the best interest of the Railway Company?

A. I did.

Q. Have you ever been called upon by officers of the Railway to interest yourself in connection with the development of new shipper business on the Railway?

A. It has been discussed at different times.

Q. And, as far as you know, have the officers attempted to interest new shippers in the possibility of——

A. I think so. I think I made one suggestion myself. I don't believe it resulted in any business.

Q. You are a banker, Mr. Gale?

A. That is right.

Q. Does the South Buffalo Railway Company exercise

897 complete control over all of its financial matters, money, securities, and so forth?

A. Insofar as I know, it does.

Mr. CRAIG. I object to that, your Honor, about complete control over financial matters. After all, it is within the limits of his knowledge he can testify.

The WITNESS. I said, insofar as I know.

Q. Well, I will put it this way: Is there any practice, so far as you know, whereby any of the funds of the Railroad Company are either deposited with Bethlehem Steel Corporation or turned over to them in any way other than as dividends?

A. Not that I know of.

Q. Are the accounts or the funds or the securities of the Railway Company mixed or commingled with those of the Steel Corporation or the Steel Company?

A. Not insofar as I know.

Q. So far as you know, does your Treasurer report to anyone other than the Directors and officers of the South Buffalo Railway Company?

A. Not so far as I know.

Q. Do you recall that your Board passed upon the employment of a new chief engineer?

A. You mean Mr. Dullenkopf?

Q. No. I am referring to Mr. Dalziel.

898 A. No; I don't recall the details now.

Q. When did Mr. Dullenkopf come with the Company, do you say?

A. I thought about two years ago.

Q. By the way; who was his predecessor?

A. Mr. Reuther, I believe his name was.

Q. Did you know Reuther?

A. Knew him at the time; yes.

Q. Who was his precedessor?

A. St. Clair.

Q. Did you know Mr. St. Clair?

A. Yes.

Q. Was there a Mr. Benning there?

A. Yes.

Q. Did you know him?

A. Yes; just by being a Director of the Road; that is the only acquaintance I had with him.

Q. Was he on the Board with you for some time?

A. Which one?

Q. Benning.

A. I think it was a very short time.

Q. A very short time?

A. Yes.

Q. And then he retired?

A. That is right.

Q. Now, wasn't he Superintendent to the Railroad prior

899 to Reuther?

A. I can't recall.

Q. Do you recall how Mr. Smith was elected to succeed Mr. Flersheim, whether by you directors or by the stockholders?

A. I don't recall.

Q. Do you recall that he was elected to the Board and has since served?

A. Yes; I do.

Q. And he succeeded Mr. Flersheim?

A. Mr. Flersheim; yes.

Q. Do you recall that some land was sold by the Railway Company to the Spring Perch Company?

A. Yes.

Q. Was that matter approved by the Board?

A. It was.

Q. Was there a period of time during which this Railway was seized by the Federal Government, Mr. Gale?

A. Yes.

Q. When was that, if you recall?

A. Gee, [a pause] I think it was in the winter of 1943.

Q. My records show December 1943 and January 1944. Does that accord with your recollection?

A. Yes.

Q. Did that matter come before the Board of Directors?

900 A. It did.

Q. And were there such things as releases to the Government that tended to the return of the Railroad to your management, which were passed upon by the Board of Directors?

A. That is right.

Q. That seizure was in connection with the threatened general strike, was it not?

A. Yes.

Q. That lasted some two or three weeks?

A. That is right.

Q. Does the South Buffalo Railway Company own any securities?

A. I think they own some tax anticipation notes or some short term Federal certificates of indebtedness.

Q. Where are they kept, do you know?

A. I don't know.

Q. So far as you know, they are kept in some depository of the Railway Company and not in the possession of any depository of the Steel Company?

A. So far as I know.

Q. Is it the fact that there are presented to you and your fellow-directors the matter of tariff and demurrage changes which may be proposed by the Railway officers?

A. That is correct.

Q. And are those matters approved by the Board likewise?

A. Yes.

901 Q. Has your Board been kept informed of the progress of the I. C. C. investigation and this suit?

A. Yes; I think it has been.

Q. There is testimony here that at some time, I think during your tenure of office, the Railroad Company moved into a new

office building to the eastward of Hamburg Turnpike. Did that happen while you were a Director?

A. It did.

Q. Did the matter of the erection of that building come before the Board?

A. It did.

Q. And did the matter of the location of the site come before the Board?

A. It did.

Q. And did the Board pass upon both those matters?

A. It did.

902 Q. And was the availability of land other than that finally decided upon discussed and considered by the Board?

A. It was.

Q. And was the land acquired and the building erected pursuant to authority from the Board?

A. Yes, sir.

Q. During the time that you have been Director has the Railway erected any other buildings as you recall it?

A. Yes, sir.

Q. What was it?

A. We made a rather substantial investment in a new shop. They built some better facilities for their crews. They have done some building in connection with the storage of fuel and things of that sort.

Q. Did these matters come before the Board for prior authorization?

A. They did.

Q. What kind of a shop was it that was built?

A. A general repair shop I think they call it.

Q. And did you in company with other Directors inspect that building after it was erected?

A. We did.

Q. Are there any other matters which come to your mind as having been passed upon by the Board which I have neglected to ask you about?

903 A. I don't think of anything of importance.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. Mr. Gale, as compensation for serving as a director of the South Buffalo Railway Company, you receive $50 per meeting, don't you?

A. We do now; yes.

Q. For how long have you been receiving that compensation?

A. I think the fee was changed from $20 to $50; it was changed last year. I can't tell you which one of the meetings it was changed at.

Q. Prior to that time you received $20 per meeting?

A. That is correct.

Mr. CRAIG. That is all.

Re-cross-examination by Mr. BROMLEY:

Q. Was that change made by your Board of Directors, Mr. Gale?

A. It was.

Mr. BROMLEY. That is all.

904 BENJAMIN KLOPP, a witness called by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Klopp, you are a Director of the South Buffalo Railway Company, are you not?

A. Yes, sir.

Q. How long have you been such director?

A. I believe around 1939 I first went on the Board.

Q. When in 1939?

A. In the Fall, I would say.

Q. What month?

A. That I don't know.

Q. Do you recall that you took your position as Director in January of 1940?

A. That may be. It was around that time.

Q. What is your occupation?

A. Why, I make baskets, manufacture baskets.

Q. Had you had any experience in connection with the management of a railroad company prior to your becoming a member of the Board of Directors of the South Buffalo Railway Company?

A. Some years ago I was connected with the Niagara Junction Railroad.

905 Q. In what capacity?

A. Down at Niagara Falls. I was Assistant Secretary.

Q. As I understand it you Directors have four or five meetings annually in connection with the affairs of the South Buffalo Railway Company?

A. Approximately.

Q. And isn't it true that at those meetings either Mr. Petty, the President, or Mr. Trageser, a Vice President, preside?

A. Yes; that is correct.

Q. Does the presiding officer bring to the attention of the Board the matters which are to be considered by the Board?

A. Yes, sir.

Q. Do they explain the matters which are before the Board?

A. In detail.

Q. What, if anything, do they do in recommending a course of action to be adopted by the Board?

A. Well, I don't know that they recommend any definite course of action. They bring up whatever matter is to be talked over, and eventually, of course, it is brought to a vote.

Q. Do you think that neither of them makes recommendations?

A. Well, they make recommendations. They bring it up before the Board as a whole and talk about the proposition, but they don't try to influence——

906 Q. I am asking you if they make recommendations.

A. Why, yes; they make recommendations in conjunction with the operation of the business.

Q. That is recommendations concerning proposals involving the operations of the business?

A. That is right.

Q. Which comes before the Board?

A. That is right.

Q. In casting your vote as a Director what reliance, if any, do you place on the recommendations of the presiding officer?

A. I place a great deal of confidence in their judgment.

Q. Who came to you, if any one, in connection with the possibility of your becoming a Director of the South Buffalo Railway Company?

A. As I recall it a Mr. Adkins.

Q. Who is Mr. Adkins?

A. He was an attorney. At the time I believe he was connected with the Cravath law firm in New York City.

Q. The Cravath law firm in New York City?

A. Yes, sir.

Q. Don't you recall, Mr. Klopp, that it was Mr. Robison who came to you and not Mr. Adkins?

A. I guess it was Robison or Adkins. I have forgotten. It is quite some time ago.

907 Q. Who is Mr. Robison?

A. Mr. Robison is an elderly man. He seemed to be a very pleasant individual. I have seen him once since that time. I would say he is a man about 65 or 70 years old.

Q. Can you identify his professional standing?

A. He is an attorney.

Q. For whom was he an attorney at that time, did he say?

A. I believe it was with this Cravath law firm.

Q. Well, did he say that he was attorney for the Bethlehem Steel Company?

A. I didn't know whether he was an attorney for the Bethlehem Steel Company or not.

Q. He didn't say whom he represented?

A. No, he didn't at the time.

Q. Well, what did he say to you?

A. He called on me down at the warehouse that I was associated with at the time and asked if I would become a Director of the South Buffalo Railway Company, and, of course, I questioned him, asking him how come myself, and so forth and so on; and he explained that he was getting three or four other people in Buffalo, and he listed their names, gave me their names. He asked me if I would be willing to serve, and I told him I would think it over, and I subsequently did accept.

908 Q. Did he tell you anything else at that time?

A. Not that I can recall; no.

Q. Do you know when Mr. Petty first became President of the South Buffalo Railway Company?

A. No, I think it was at or about the time that I started serving on the Board.

Q. As a matter of fact, it was before you began serving on the Board, wasn't it?

A. Before that? I don't know.

Q. Wasn't he President when you became a member of the Board?

A. I couldn't answer that correctly. I don't recall.

Q. Well do you recall who was President when you took your place on the Board?

A. I would say it probably was Mr. Petty. It was either Mr. Petty or Mr. Trageser.

Q. At the first meeting which you attended as a Director the Board did not elect a President, did it?

A. I don't believe so.

Q. Nor did it elect a Vice President did it?

A. I don't believe so.

Q. Had you known Mr. Petty prior to your becoming a Director of the South Buffalo Railway Company?

A. I had never known him, no.

Q. So that I take it you know nothing of his business
909 contact and experience prior to the time when you became a member of the Board of Directors of the South Buffalo Railway Company?

A. I did not.

Q. And you do not now know, do you, of his previous experience prior to the time you went on the Board?

A. I don't know a great deal about it, no. No, I really don't

Q. Well, do you know anything about it?

A. Well, I know the last four years that I have been on the Board.

Q. I mean prior to the time that you went on the Board.

A. No.

Q. You know nothing concerning the circumstances of his becoming President of the Railway, do you?

A. I do not.

Q. Did you know at the time you took your place on the Board anything of the prior business experience or connections of Mr. Trageser?

A. I did not.

Q. So that you know nothing of the circumstances of his becoming Vice President of the Railway, do you?

A. That is correct.

Q. And do you know that Mr. Trageser formerly was President of the South Buffalo Railway Company?

910 A. I didn't know it at the time. I have heard that subsequently.

Q. When did you learn that—about when?

A. Two or three years ago.

Q. Do you know anything about the success or lack of success of the South Buffalo Railway Company while he was President?

A. I know nothing about that, no.

Q. Do you know if the Board has ever considered electing a President other than Mr. Petty—of course, while you have been a member of the Board?

A. Not to my knowledge.

Q. Is the same situation true relative to Mr. Trageser in his position as Vice President?

A. Right.

Q. Do you know who the General Superintendent of the Railroad Company is?

A. Charlie Dullenkopf.

Q. Do you know anything about his business connections prior to his becoming General Superintendent of the Railway Company?

A. Not except that when we made a change from Mr. Royer to Mr. Dullenkopf, Mr. Petty outlined the qualifications of Mr. Dullenkopf, and they seemed to check out pretty well, and

911 since then I would say he has lived up to all expectations.

Q. At that time did Mr. Petty say anything about Mr. Dullenkopf in the past having been an employee of the Bethlehem Steel Company?

A. He may have. I don't recall it. I think he presented the qualifications of the man. If he did work for the Bethlehem Steel Company, he was probably on there. I don't know. He presented the qualifications of Mr. Dullenkopf and if it included employment

with the Bethlehem Steel Company at some time past it was probably listed there.

Q. But you don't recall that he did mention that?

A. No, I don't.

Q. Who is the Secertary-Treasurer of your company?

A. Sellers.

Q. Do you know anything about his business connection prior to the time that you came on the Board of Directors?

A. No, sir; I do not.

Q. And who is the Auditor of the Company?

A. I don't know.

Q. And who is the Purchasing Agent of the Company?

A. I don't know.

Q. Who is the General Agent of the Company?

A. I don't know him, either, I don't believe.

912 Mr. CRAIG. You may examine.

Cross-examination by Mr. BROMLEY:

Q. You know Mr. Craig, don't you, Mr. Klopp—not this Mr. Craig, but the Railway's Mr. Craig?

A. Yes, sir.

Q. Don't you know that he is Division Auditor of your railroad?

A. I didn't know what his title was.

Q. You know him, though?

A. Yes.

Q. You have seen him and talked to him?

A. Yes, sir.

Q. You know Mr. Handwerk who sits back here at the end, don't you [indicating]?

A. Yes, I do. I know his face, but I didn't know his name.

Q. Didn't you know that his title was General Agent?

A. I am glad to know it.

Q. You know him as an employee of the railroad?

A. I do.

Q. And you have seen him and talked to him?

A. I have.

Q. What was the name of this other terminal railroad which you were connected with one time?

913 A. Niagara Junction Railroad.

Q. Where was that railroad?

A. A subsidiary of the Niagara Falls Power Company, serving industries in Niagara Falls.

Q. For how long a time did you have a connection with that railroad?

A. About four years.

Q. Now, will you tell me what your other businesses have been?

A. I have been in the investment business, but practically I am in the basket business. That is my business.

Q. A manufacturer of baskets?

A. Manufacturing and selling of baskets.

Q. Have you ever been on any Boards of Directors other than the South Buffalo Railway Company?

A. Yes.

Q. What are they, please?

A. I have been on the Board of Schoellkopf & Company, the Niagara Share Corporation. I guess that is about all. I am no longer connected with either one of those outfits now. Schoellkopf Company has dissolved, and I resigned from Niagara Share effective the end of last year.

Q. In connection with the performance of your duties as director of those companies, was it your practice to
914 rely upon the recommendations made by the officers of those companies?

A. In every case.

Q. Do you act any differently in the performance of your Railway duties so far as your Directorship is concerned than you did in connection with other companies, Mr. Klopp?

A. I do not.

Q. Do you feel perfectly free to recommend to your fellow directors the discharge of Mr. Petty or Mr. Trageser should you ever become dissatisfied with them?

A. For cause, yes.

Q. Have you any understanding or arrangement with anybody that you will not advocate their discharge and replacement by somebody else if you ever come to the point where you desire it?

A. No.

Q. In your judgment have those two gentlemen performed their duties satisfactorily and efficiently and for the benefit of the railroad?

A. To the best of my knowledge.

Q. And has your Board of Directors exercised supervision and passed upon the compensation paid to those two men?

A. That is correct.

Q. Does that likewise go for all of the rest of the officers
915 of the corporation; have you passed upon their compensation and changed it from time to time or fixed it?

A. Yes, sir.

Q. You know that Mr. Petty and Mr. Trageser are officers of other railroad companies, do you not?

A. I do.

Q. Have you any complaint against them as to the amount of time they spend on the affairs of your railroad company?

A. No.

Q. Do you think they are managing its affairs efficiently?

A. Yes.

Q. Do you think they devote a sufficient amount of time to it?

A. Yes, sir.

Q. Since 1940, is it the fact that your Board of Directors has each year elected the officers of the Railway Company?

A. That is correct.

Q. Now, how often have you attended Directors' meetings of this Railway?

A. I believe I have been fairly regular.

Q. And about how many meetings take place a year?

A. I would say four.

Q. What can you tell us about whether or not you have made any inspection trips of the railroad?

916 A. We make at least one every year and sometimes there have been two.

Q. And have you made them?

A. I have.

Q. What is your recollection as to how long these Directors' meetings last, if you can average it for us?

A. About two hours, I would say, except when we inspect the road and then it is pretty much of an all-day proposition.

Q. What can you say generally as to whether or not matters are discussed fully by the Directors?

A. The matters are not only discussed fully, but sometimes the detail is wearying. It is almost too much for me.

Q. Do you exercise your own independent judgment so far as the matter of the declaration of dividends is concerned?

A. Definitely.

Q. What can you tell us about your discussions in connection with the subject of dividends?

A. Well, we haven't paid a dividend in some time now, and it does not look as though we are going to, either, for a while. The last two or three times it has been brought up the road just has not been in a position to do anything dividendwise.

Q. Will you tell us some of the matters other than divi-

917 dends which have come before your Board, Mr. Klopp?

A. Well, of course, from time to time we have made certain betterments to the property, such as a new building for employees, rest rooms and wash rooms, and so forth and so on. We have put in a new roundhouse and a new master mechanic's shop there, and one thing and another. We fortunately drilled and hit a gas well which has been a big aid to the property. Every now and then the matter is brought up about selling some of the real property which the railroad owns, and the matter of trying

to locate new businesses is always brought up at every meeting.

Q. What do you mean about the matter of trying to locate new businesses?

A. Well, naturally we have got a lot of property there and paying taxes on it, and so forth and so on. If any of us as directors can steer a new industry on the lines any place, it will increase the revenue of the company; also if we can sell some of the land we can get out of some of the carrying charges.

Q. I interrupted you. Are there any other matters that occur to you? What about new power, for instance?

A. Well, I am glad you brought that up. That is something which is just one of the things that goes on at most of the
918 meetings. I think it is fair to say that it has been the management's idea to eventually standardize on Diesel operation, and to that end since I have been on the Board, we have purchased, I just forget how many engines, but quite a few. It is at the point now where it is 50–50, about half Diesels and half steamers, and the Diesels have worked out much better for the operation of the Railroad.

Q. What did you have to do, if anything, with the selection of a site for the erection of a new office building?

A. Yes; we built an office building on the Turnpike, very well located there from the standpoint of operation, and the office building itself was very much needed. Prior to that time the offices were housed in an old frame building, and it was pretty noisy and pretty dirty and much too small for the sufficient operation of the tremendous amount of detail that had to go through the office. They not only built a new building, but they have mechanized a lot of the operations, and they are currently improving on that right along.

Q. In connection with employees, what do you know about any change, if any, you made in your chief engineer?

A. Well, we elected a chief engineer I would say about two years ago. I have just forgotten the man's name. I know his face. He is a young man, and I thought it was a step in the right direction.

919 Q. Do you recall that both the sale of the dock property and the portion of the 450-foot strip to the south came before your Board?

A. Yes; I do.

Q. And did you vote to authorize both of those transactions?

A. Yes, sir.

Q. You thought they were in the interest of the Railway Company?

A. Very much so.

Q. Have any matters come before your Board in connection with proposed arrangements between the Railway Company and the Steel Company looking to the repair of tracks owned by the Steel Company?

A. Will you phrase that question again, please?

Q. I will withdraw it. Have any matters come before your Board in connection with the repair by the South Buffalo Railway employees of tracks owned by the Steel Company?

A. Well, yes, I do recall something like that.

Q. And was that matter discussed by the Board and finally authorized by the Board?

A. I believe so.

Q. Has the management submitted to you such things as freight and demurrage tariffs?

A. Yes.

Q. Your answer is "Yes"?

920 A. Yes, sir.

Q. And have you Directors discussed and informed yourselves about the changes and approved the filing of such tariffs?

A. Yes, sir.

Q. And has the matter of the sale of track either by the Railroad Company to the Steel Company or the reverse ever been considered by your Board?

A. It has.

Q. And are such matters as that, Mr. Klopp, authorized in advance, rather than approved after they are done?

A. No; they are brought up and actually each piece of track is actually voted upon. As a matter of fact, that is one of the things that takes up a lot of time at the meetings.

Q. In addition to that I was interested in finding out whether that action by the Board is taken in advance of the transaction.

A. Well, yes. In other words, they bring up whatever they are going to do in relation to tracks, and they get our authorization sometimes before it is done; yes. As a matter of fact, most times before it is done, I would say. I guess I was referring to some retirement of tracks in my other testimony.

Q. What about the subject of track retirement; what do

921 you refer to there?

A. Well, every time a piece of track is taken up or renewed that is brought before the Board.

Q. And either approved or disapproved by the Board?

A. That is correct.

Q. Have you any acquaintanceship with anyone connected with Bethlehem Steel Corporation or the Steel Company?

A. Well, I know some of them, but not personally; no. I mean I am not friendly with any of them, if that is what you mean, particularly.

Q. Do you know Mr. Entwisle, for instance?

A. I know Mr. Entwisle. I haven't seen him in years. I haven't played golf in four years. When I used to play golf I used to see some of those fellows. I don't see them any more. I don't see any of those fellows.

Q. Have you ever discussed with Mr. Entwisle anything having to do with the Railway Company?

A. Never.

Q. Or have you ever had any discussions with anybody connected with the Bethlehem Steel Corporation or Company?

A. I have not.

Q. And have you at all times acted in your capacity as a Director of this Company entirely independently, Mr. Klopp?

A. I have.

922 Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. Mr. Klopp, you know, of course, that the Bethlehem Steel Corporation owns all of the stock of the South Buffalo Railway Company, don't you?

A. I understood it owned everything except perhaps a few qualifying shares.

Q. Do you know who owns the stock of the other railroad companies of which Mr. Petty is President?

A. I do not.

Mr. CRAIG. That is all.

Mr. BROMLEY. That is all.

Mr. CRAIG. I am informed, your Honor, that the remaining directors will be here at 2 o'clock, and in the meantime, the plaintiff has no further evidence to offer.

The COURT. We will recess now until 2 o'clock p. m.

(Whereupon a recess was taken until 2 o'clock p. m.)

923 After Recess, 2 P. M.

Appearances: Same as before noted.

FRANCIS A. SMITH, a witness called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Smith, you are a Director of South Buffalo Railway Company, are you not?

A. I am.

Q. And when did you become a Director of that Company?

A. I believe in December 1942.

Q. You succeeded Mr. Flersheim. didn't you, who had resigned as a Director of the Company?

A. I did.

Q. Directors have four or five meetings a year, do they not?

A. Yes, sir; they do.

Q. Is it not true that at those meetings either Mr. Petty, the President of the Company, or Mr. Trageser, a Vice President of the Company, presides?

A. That is correct.

Q. And is it not true that the presiding officer lays before the Board the matters to be considered at the meetings?

924 A. That is correct.

Q. Will you state whether or not the presiding officer, when he lays a matter before the Board for its consideration, explains that matter?

A. He does; yes.

Q. Will you state whether or not the presiding officer recommends a course of action to be followed by the Board in connection with the matter laid before it?

A. He generally does.

Q. Are there any exceptions?

A. No; I think I had in mind small matters that he brings up, need no course of action.

Q. Will you state, in casting your vote as a Director, what, if any, reliance you place on the recommendation of the presiding officer concerning the matter to be voted upon?

A. Well, I have placed my reliance on them in view of the fact that, in my opinion, they have provided good management for the Road.

Q. Prior to the time you became a Director of the Company had you known Mr. Petty, the President?

A. I had not.

Q. Had you known anything of his previous business contact and connections?

A. No; I had not.

925 A. And he was President when you became a member of the Board, was he not?

A. He was.

Q. Do you know how long he had been President?

A. No, I don't. Several years, I knew that, but the actual date——

Q. Do you know that he is President of six other railroad companies?

A. So I understand; yes.

Q. Do you know who owns the stock of those companies?

A. Only by hearsay. I believe the Bethlehem Steel Corporation.

Q. And you know, of course, that the Bethlehem Steel Corporation owns the stock of South Buffalo Railway Company, do you not?

A. Yes, sir; I do.

Q. Prior to you becoming a Director of the South Buffalo Railway Company had you known Mr. Paul Trageser?

A. I had not; no.

Q. And I take it, then, that you don't know anything of his business connections prior to the time that you became a Director, is that right?

A. No; I didn't.

Q. Do you know that Mr. Trageser in the past has been President of the Company?

A. I know that; yes.

926 Q. You know when he was President?

A. I believe prior to Mr. Petty's election to the presidency.

Q. Do you know anything concerning the success or lack of success the Railroad had while Mr. Trageser was President?

A. No; I do not.

Q. To your knowledge has the Board ever considered electing a President other than Mr. Petty since you have been on?

A. Not since I have been a member of the Board; no.

Q. Do you know whether the Board, since you have been a member, has ever considered electing a Vice President in place of Mr. Trageser?

A. No; I do not.

927 Q. Do you know who is the purchasing agent for the South Buffalo Railway Company?

A. I believe I have never met him, and I can't recall his name at the moment. I know there is such a man.

Q. The purchasing agent is elected by your Board, isn't he?

A. I believe no action has been taken on it since I have been a Director. I believe no such action has been necessary since I have been a Director, so that I can't answer that as to whether they do elect him or not.

Q. Do you know who is the Auditor of the Company?

A. I have never met him; no, sir. I don't know him.

Q. Do you know who he is?

A. I can't remember his name at the moment. I know there is one and he is in Bethlehem, I believe.

The COURT. Where?

The WITNESS. Bethlehem, Pennsylvania, I believe.

Q. Since you have been on the Board you have elected an Auditor, haven't you?

A. If we have I don't recall it.

Q. Do you know who the General Agent of the Company is?

A. No; I do not.

Q. Do you know who the Secretary-Treasurer of the Company is?

A. Mr. Sellers.

Q. Had you known him before you became a Director of
928 the Company?

A. I had not; no.

Q. You know nothing about his previous business contact or connection?

A. No.

Mr. CRAIG. You may examine.

Cross-examination by Mr. BROMLEY:

Q. Did you miss any meetings in 1945, Mr. Smith?

A. I believe I missed one meeting.

Q. Do you recall that you were in attendance at a meeting in 1945 in March where the compensation of Mr. Sellers, your Secretary-Treasurer was increased?

A. I do recall the meeting; yes.

Q. And don't you recall that at the same time you considered and increased the compensation of your Auditor, whose name was Fatzinger?

A. Yes: I do recall it now.

Q. Does that refresh your recollection as to your Auditor's name?

A. That is right.

Q. Have you ever met your Division Auditor located here whose name is Craig?

A. I can't recall meeting him.

Q. Likewise do you recall that in June 1943, the matter
929 of the compensation of a man named McGuire came before your Board?

A. I don't recall that, Mr. Bromley.

Q. If I said that Mr. McGuire was the Purchasing Agent would that refresh your recollection?

A. I think it would. I had forgotten his name.

Q. Do you recall it now?

A. Yes; I do.

Q. Do you recall that some time in 1943 the matter of increasing his compensation came before your Board and was acted upon by your Board?

A. I believe I did, but my memory is not at all clear on it.

Q. Do you know the Superintendent of the Railway?
A. Yes; I do.
Q. Who is he?
A. Mr. Dullenkopf.
Q. And do you recall that his compensation was fixed by your Board when he came to work here for the Railway?
A. It was; yes.
Q. Now, it is a fact, isn't it, that you Directors are elected by the stockholders each year?
A. That is so; yes.
Q. You hold office only for a year?
A. That is correct.
Q. By the way, who spoke to you, if anybody, about be-
930 coming a Director of the South Buffalo Railway Company?
A. Mr. George F. Rand, then President of the Marine Trust Company, first spoke to me about it.
Q. Who else?
A. Mr. Petty came and called on me and asked me if I would consider becoming a Director of the Railroad.
Q. And at the time Mr. Petty came to call on you you had not yet been elected; is that correct?
A. That is right.
Q. And thereafter you were elected?
A. Yes, sir.
Q. If you believed it to be to the disadvantage of the Railway Company would you hesitate to disapprove or vote against any recommendation of the management, Mr. Smith?
A. No; I would not.
Q. Do you act entirely independently in the performance of your duties as a Director of this Company?
A. Yes; I attempt to do so.
Q. Have you any acquaintanceship with any officer, director, or employee of the Bethlehem Steel Corporation or the Bethlehem Steel Company?
A. Yes; although it is not a personal acquaintanceship. I know Mr. Bender, the Treasurer of Bethlehem Steel Company, with whom I have had business dealings in con-
931 nection with their relationship with the Marine Trust Company.
Q. And what is that relationship?
A. It is an account relationship.
Q. That is the Company is a depositor?
A. That is correct.
Q. Is the South Buffalo Railway Company also a depositor?
A. Yes; they are.
Q. How well do you know Mr. Bender?

A. I don't know Mr. Bender intimately. I know him only in a business way through one of two meetings with him in his office.

Q. Have you and he ever discussed the affairs of the South Buffalo Railway Company?

A. We never have; no.

Q. And, therefore, he has never made any suggestion to you as to how you should act or not act as a Director of the Railway?

A. I don't know that he knows that I am a Director.

Q. Anyone else connected with the Bethlehem Steel Corporation or Company do you know or have you any connection with?

A. Well, I know Mr. Entwisle, the Superintendent here in Buffalo, personally.

Q. How lonk have you known him?

932 A. Oh, for eight or ten years.

Q. Have you and he ever discussed at any time the affairs of the Railway Company?

A. No; we have not.

Q. Have you ever discussed with him anything having to do with your duties as a Director of the Railway Company?

A. No; I never have.

Q. Do you know that he knows that you are a Director?

A. I doubt if he does know it. If he does he has showed no indication of knowing it to me.

Q. You are a banker, are you, Mr. Smith?

A. Yes, sir.

Q. And have you had any other business experience outside of banking?

A. Not directly; no.

933 Q. Are you at the present time, or have you ever been, a member of the Board of Directors of any other corporation?

A. I am a director of another bank, that is all.

Q. What bank is that?

A. First Trust Company of Tonawanda, New York.

Q. Do you attend the meetings of that bank?

A. I do.

Q. Is it your practice there to accept the recommendations of the officers of that bank if you think they are sound?

A. It is.

Q. And you act, in the performance of those duties, any differently from the way you you act as a railway director?

A. Not a bit; no, sir.

Q. Are you satisfied with the manner in which Mr. Petty and Mr. Trageser and the other officers of the Railway perform and have performed their duties?

A. I am; yes.

Q. And should you become dissatisfied would you hesitate to recommend or vote for their being supplanted by somebody else?

A. I would not.

Q. And do you feel free at any time to use your influence and your vote to replace them with other officers, if occasion should arise that you should become dissatisfied with their services?

934 A. I do.

Q. Your Board elects the officers each year, does it not?

A. That is correct.

Q. Has anyone at any time ever attempted to influence your action as a director of the Railway Company?

A. Never.

Q. Have you attended all or substantially all of the directors' meetings?

A. I have. I believe I have missed perhaps two since I have been elected to the Board.

Q. Have you ever made any inspection of the Railroad properties since you have been a director?

A. Yes, on a number of occasions.

Q. Along with the other directors?

A. Yes, sir.

Q. And can you tell us, briefly, about the nature of those inspections, how long they last and what they comprehend?

A. They have generally lasted throughout an afternoon; we have inspected the track; on another occasion we inspected the roundhouse, first, with an idea to discussing the improvements proposed for the roundhouse, and, later on, upon completion of those improvements, we again inspected it. We, on another occasion, inspected the new crossing over the Hamburg Turnpike.

It had been recommended that a double bridge, double-
935 track bridge, be installed. That was inspected by the directors, both before and after the installation.

Q. What means has been used to take you over the line of the Railway?

A. We have generally ridden in—on a flat car, equipped with benches, drawn by a Diesel locomotive.

Q. And have you gone from one end of the main line to the other?

A. We have; yes.

Q. And have you gone up the branches?

A. That is right.

Q. While you were a member of the Board did the matter of the construction of a new office building come before the Board?

A. No. That was prior to my election.

Q. Can you tell us from your recollection some of the things which have come before the Board since you have been on it, Mr. Smith?

A. Well, they have been very numerous.

Q. About how long have the meetings lasted, on an average?

A. Well, it would be a guess, but I would think from an hour to an hour and a half.

Q. And what can you tell us about the nature and extent of the discussion which takes place on the part of the directors
936 with respect to the business transacted or discussed there?

A. Well, the directors are very free with their questions in questioning the Management on proposed actions and past actions.

Q. Would you say the discussion was full or not?

A. I would say they are full discussions; yes.

Q. It is not the fact, is it, that the officers' recommendations are accepted as a matter of routine?

A. Well, I would say they are generally accepted, but not as a matter of routine. I think they are accepted, because, in my experience, they have—and in my opinion they are sound recommendations.

Q. Do you feel that you have been furnished with information sufficient to enable you to reach an informed decision as to whether they are sound or not?

A. I do.

Q. Is it your recollection that on the occasion of each meeting the minutes of the preceding meeting are read to you for approval?

A. They are read; yes.

Q. What can you tell us about the matter of the declaration of dividends or failure to do so by your Board?

A. Well, the Board, I believe, like any other Board, declares dividends when they feel that the earnings warrant it. If not, they do not vote a dividend.

937 Q. And do you give attention to what the amount shall be in relation to what is available?

A. Yes, we do.

Q. And can you tell me whether there have been occasions since you were on the Board that you have disagreed with the suggestions of Mr. Petty as to what the amount should be?

A. Well, I can't recall that. I do know that, at a recent meeting, the subject of a dividend was put forth; I cannot say there was a recommendation. It was discussed very freely and no action taken on a dividend at the last meeting.

Q. And in your view was that a proper, prudent thing to do?

A. Yes, it was. The Railroad had lost money.

Q. Since you have been on the Board has it been the practice of the officers to submit to you in advance contemplated capital expenditures and commitments of a substantial nature?

A. Yes.

Q. And is it the practice of the Board to approve such things in advance of their being incurred?

A. No. I think that the Board approval comes only after a discussion at a directors' meeting.

Q. And so far as the time of that approval is concerned do you approve those things before the money is spent
938 or not until afterwards?

A. Not until—we approve them before the contract is made.

Q. That is what I mean.

A. Yes.

Q. Before the obligation is incurred or entered into or the money spent?

A. That is right.

Q. And, of course, the Railway Company keeps full charge of its cash, does it not, and its securities, if it owns any?

A. That is right.

Q. Do you recall whether or not you were on the Board at the time the question of selling part of the strip of land to the south of the Railway was up for consideration?

A. I don't recall it, Mr. Bromley?

Q. The testimony is that that sale was made in December, early in December 1942; and I wondered whether you were on the Board at that time.

A. No, I was not.

Q. Do you recall the matter of the sale of Railway land to the Spring Perch Company in 1943?

A. I do, yes.

Q. Did that come before the Board?

A. Yes, it did.

Q. And was it approved by the Board?

A. It was.

939 Q. And since you have been on the Board have there been submitted to your Board for action any proposals to sell or retire tracks belonging to the Railway Company?

A. Yes, there have.

Q. And have those matters been discussed and approved or disapproved?

A. They have.

Q. Any proposals put before you with relation to the purchase of new motive power by the Railroad?

A. Yes.

Q. Have you authorized the purchase of any new locomotives?

A. Yes, I believe we have authorized the purchase of some Diesel locomotives, when, as, and if the market is—conditions are right.

Q. Is it the practice of Company officers to keep you informed of such things as lawsuits, like personal injury actions brought against the Company?

A. It is.

Q. And the amounts of the settlements thereof, if any?

A. Yes, sir.

Q. And have you been informed about the institution and progress of this present case?

A. Yes, we have.

Q. Likewise, is the same thing true of proceedings brought by the Interstate Commerce Commission against the Company?

940 A. Yes.

Q. Are labor matters taken up with the Board?

A. General policies are; yes.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. Mr. Smith, who do you say the Auditor of the South Buffalo Railway Company is?

A. I don't believe I said, did I?

Q. Do you know?

A. Mr. Craig.

Q. Do you know whether or not he is Auditor of the Company?

A. I do not, no.

Q. Do you recall who the Purchasing Agent is?

A. He just told me his name.

Q. Do you remember?

A. No. I have never met the gentleman. I don't know him.

Q. Whoever he is, you don't know what his business connection was before he became Purchasing Agent of the South Buffalo Railway Company, do you?

A. No, sir; I don't know.

Q. And whoever the Auditor is, you don't know what his business connection was before he became Auditor of South Buffalo Railway Company, do you?

A. No, I don't.

941 Mr. CRAIG. That is all.

Re-cross-examination by Mr. BROMLEY:

Q. I forgot one thing: Do you receive monthly reports in the form of a balance sheet and income statements and explanatory letter from the President each month?

A. We do.

Q. Are those reports sent out to all directors, do you know?
A. They are.
Mr. BROMLEY. That is all.

942 RAYMOND T. FISKE, a witness called by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Fiske, you are a Director of the South Buffalo Railway Company, are you not?
A. That is right.
Q. And when did you become such Director?
A. I think it was in December of 1939.
Q. Did you take your place as Director then, or were you elected in December of 1939?
A. I don't know.
Q. Well, who was President when you became a Director?
A. At the first meeting?
Q. Yes.
A. Well, there was five men from Buffalo——
Q. Who was President of the company?
A. I thought you said "present."
Q. Mr. Petty?
A. Mr. Petty, sure.
Q. Prior to your becoming a Director of the South Buffalo Railway Company, what had been your experience in connection with the management of a Railway Company as a member of a Board of Directors or otherwise?

943 A. None.
Q. The Directors generally hold four or five meetings a year, don't they?
A. That is right.
Q. And if Mr. Petty is present he presides, doesn't he?
A. That is right.
Q. And if he is not present Mr. Trageser presides, doesn't he?
A. That is right.
Q. Isn't it true that the presiding officer presents to the Directors at their meetings the matters which are to be submitted for the consideration of the Directors?
A. Yes, he outlines the proposal and suggestion.
Q. By "outlines," does he explain the proposal or what is to be considered?
A. Yes, sir.
Q. And does he recommend the course of action to be followed by the Directors?

A. Why, he explains what and why, and what it will accomplish, and then the Board acts.

Q. Doesn't he give you his recommendation as to what the Board should do?

A. Not always. I think once in a while he says "The management recommends," but not always.

Q. But he expresses his views on the proposal, doesn't he?

944 A. His reasons for and against, yes; his reasons for proposing it, yes.

Q. Does he submit his reasons why it should not be adopted by the Board?

A. No; I don't think that has ever happened.

Q. He submits his reasons why the proposal should be adopted; is that correct?

A. Yes, sir.

Q. To what extent do you as a Director in casting your vote rely on the recommendations of the presiding officer or his reasons favoring the adoption of a proposal?

A. Well, everything that has been proposed has been very logically laid out, with the reasons why it should be done, the savings to be accomplished by the change, or whatever it may be, and the cost of it.

Q. I understand that, but to what extent do you rely on those reasons which are given by the presiding officer in casting your vote as a director on the particular proposal?

A. I think they are sound reasons, and I think probably they have always been sound reasons, and they have been acted on favorably.

Q. The question is to what extent do you rely on the rea-

945 sons given and the recommendations, if any, by the presiding officer in casting your vote?

A. I think on all the things that have come up so far I would say pretty much.

Q. In the matter of the operations of the railroad have you ever failed to vote in line with the reasons given or the recommendations made by the presiding officer?

A. I think not.

Q. Who spoke to you about the possibility of your becoming a Director of the South Buffalo Railroad Company?

A. I think his name was Robison, or Robinson.

Q. And did he tell you who he was?

A. Oh, yes; but I have forgotten what the explanation was.

Q. What is that?

A. He explained at the time, but I don't remember just exactly what it was.

Q. You don't recall that he said what his connection was?

A. I think he said that he was an attorney.

Q. For whom?

A. Well, I don't remember. It would be my impression he probably said South Buffalo, but I don't know.

Q. To refresh your recollection I want to call your attention to certain testimony which, as I understand it, you gave before the Interstate Commerce Commission on May 21, 1943, in the matter of the investigation of the South Buffalo Railway Com-

946 pany, Ex Parte 128, before the Interstate Commerce Commission. You recall, don't you, that you did testify before the Commission at that time?

A. At the Hotel Buffalo. I remember that.

Q. And this question was put to you: "Q. Who asked you to become a Director when you first became a Director?"

And you gave the answer "Mr. Robison, who stated he was an attorney for the Bethlehem Steel Company and they wanted to divorce the control of the Board of Directors entirely free from the Steel Company and were looking for some local directors."

A. I think that is possibly correct.

Q. You recall that testimony?

A. Yes, sir.

Q. Now, does that refresh your recollection?

A. Yes, sir.

Q. And that is what he said? Is that correct?

A. I think probably; yes.

Q. So far as you recall that is what he said?

A. Yes, sir.

Q. Did he tell you that this Interstate Commerce Commission investigation was pending at that time, do you recall?

A. I don't remember that there was any conversation on that; no.

947 Q. Prior to your becoming a Director of the South Buffalo Railway Company, had you known the President, Mr. David M. Petty?

A. No.

Q. You had known nothing of his previous business connections?

A. No.

Q. Do you know how long he had been President when you became a Director?

A. No.

Q. Before you became a Director had you known Mr. Paul Trageser?

A. No.

Q. You knew when you became a Director that he was a Vice President of the Company; is that right?

A. That is right.

Q. Did you know that formerly he had been President of the Company?

A. No.

Q. You then, of course, knew nothing of his previous business connections, did you?

A. No.

Q. Well, do you know now that Mr. Trageser is a former employee of the Bethlehem Steel Company?

A. No. I saw something in the newspaper, but I wouldn't
948 say that I even remember that. No; I don't.

Q. Do you know presently as of this time that Mr. Petty is a former employee of the Bethlehem Steel Company?

A. I think I read that in the paper.

Q. That is your only source of information?

A. Yes, sir.

Q. And how recently did you read that?

A. Since this case was up.

Q. Do you know that Mr. Petty is the President of six other railroad companies?

A. Yes, sir.

Q. Do you know who owns the stock of those companies?

A. I imagine, but I don't know; no.

Q. You do not know that the Bethlehem Steel Corporation owns the stock of the South Buffalo Railway Company, don't you?

A. Yes, sir.

Q. Do you know if the Board, since you have been a member, has ever considered electing a President of the Company other than Mr. Petty?

A. They have not.

Q. Since you have been a member of the Board do you know if the Board has considered electing anyone in Mr. Trageser's place?

A. No.

949 Q. Do you know Mr. Dullenkopf?

A. Yes, sir.

Q. Who is he?

A. He is the Superintendent of the South Buffalo.

Q. And Vice President?

A. Yes.

Q. Had you known him before he came to the Railroad Company in his present capacity?

A. No.

Q. You know nothing about his previous business connection?

A. No. I think it was explained that he had a similar position with one of the other railroads. That is my recollection.

Q. Was anything else said about his previous business experience?

A. No; not that I remember.

Q. You weren't told that formerly he was employed by the Bethlehem Steel Company?

A. No; I don't think any mention was made of that.

Q. Do you know now that to be the fact?

A. No.

Q. Do you know who the Purchasing Agent of the Railroad Company is?

A. I do by name; yes.

Q. Do you know him personally?

950 A. No.

Q. You know nothing about his business connection before he became Purchasing Agent, do you?

A. Not a thing. I haven't met him.

Q. Do you know the Auditor of the Company?

A. No; except by name.

Q. Do you know what his name is?

A. I think it is Craig, isn't it? I am not dead sure.

Q. Whatever his name is you know nothing about his previous business connection, do you?

A. No.

Q. Do you know who the General Agent of the Railroad is?

A. No.

Mr. Craig. You may examine.

Cross-examination by Mr. Bromley:

Q. Have you been satisfied with the manner in which Mr. Petty has performed his duties, Mr. Fiske?

A. Yes; very.

Q. What about Mr. Trageser?

A. Very.

Q. What about the other officers of the Company insofar as you have observed them?

A. Why, very satisfactory.

Q. You wouldn't have any hesitation about voting to

951 change them and putting somebody else in if you didn't like the way they were doing their work would you?

A. No; not at all.

Q. Are you subject to anybody's control in the performance of your duties as a Director of this Company?

A. No, sir.

Q. Do you know anybody connected with the Bethlehem Steel Corporation?

A. Why, I have met Mr. Entwisle socially two or three times

Q. Anybody else?
A. Oh, I have met once the present Assistant General Manager.
Q. Here in Buffalo?
A. Yes.
Q. Do you know Mr. Schunkweiler?
A. That is right.
Q. Do you know either of them at all intimately?
A. No.
Q. Have you ever discussed anything about the South Buffalo Railway Company or its business with either one of them?
A. No.
Q. Have they ever attempted to give you any suggestions as to how you should act as a Director?
A. As far as I know they don't know that I am a Director.
Q. Has anyone ever made any suggestion to you how you
952 should act as a Director?
A. No.
Q. Do you feel that you should act entirely independently as a Director of this Company?
A. Yes, sir.
Q. What is your business?
A. I am Secretary-Treasurer of the Retail Merchants Association.
Q. Here in Buffalo?
A. Yes, sir.
Q. What other business, if any, have you had?
A. I have none at the present time.
Q. That you had prior to your association as Secretary?
A. I have been there 29 years.
Q. Have you ever been a member of any other Board of Directors of any other corporation?
A. Yes; I was up to December 31st, when I resigned from the National Consumer Credit Reporting Corporation.
Q. Do you feel that it is essential that you should have had railroad experience in order for you to act as a Director of this railroad company?
A. Not at all.
Q. Do you accept propositions put forward by Mr. Petty and Mr. Trageser merely because they are recommended by them?
953 A. No.
Q. What do you do, if anything, about exercising your own judgment on the matter?
A. Well, we raise a great many questions, but usually the case is laid out very logically as to what is to be done, what it is to

cost and what is to be saved or what is to be accomplished by the change.

954 Q. Would you hesitate to vote against any proposal that any of the officers made, if you thought it unsound?

A. Not a minute; no.

Q. What about your attendance at directors' meetings over the years? Have they been regular or irregular?

A. I think I missed one about a year ago. I was out of town.

Q. What have you done about inspecting the Railroad, if anything?

A. We have made several tours of inspection.

Q. Does each of those tours take about a half a day?

A. Yes.

Q. Do you go over the Railroad on a flat car?

A. That is right.

Q. And do you go over the main line and the branches as well?

A. That is right.

Q. And do you inspect its buildings and shops, roundhouse, and so forth?

A. That is right.

Q. You receive, I take it, from the President, monthly, financial statements and explanatory letter, do you not?

A. Correct; that is right.

Q. Does the Railroad control all of its own finances, the deposit of its own money and the holding of its own securities?

A. So far as I know; yes.

955 Q. What can you say about what action you yourself have taken or considered in connection with the declaration of dividends?

A. Well, the only one I remember positively was the last one; when the question was brought up it was vociferously voted to declare no dividend.

Q. Were you present at a meeting where a $75,000 dividend was declared?

A. That is right.

Q. Do you recall what the amount was that was suggested to the corporate officers in that connection?

A. My recollection, it was more, but I wouldn't say for sure. That is quite some time ago.

Q. At any rate, did you think seventy-five was a prudent amount to declare?

A. At that time.

Q. That is what you voted for?

A. Yes.

Q. And that is what was passed?

A. Yes.

Q. Is it your recollection that the minutes of each preceding meeting are read at each meeting of the directors?

A. Correct.

Q. What is your recollection as to how long the average length of time of a meeting is?

956 : A. Oh, couple of hours; sometimes—except on inspection trips, then it is much longer.

Q. And it is a fact, is it not, that you directors have fixed and changed the compensation of your officers?

A. That is right.

Q. Right from Mr. Petty down?

A. That is right.

Q. And do you feel that the amount of time that Mr. Petty and Mr. Trageser give to the affairs of this Railroad is sufficient?

A. Yes.

Q. You were present, I assume, when the sale of the so-called dock property by the Railway to the Steel Company was authorized?

A. Correct.

Q. What can you tell us about that transaction?

A. Well the matter was brought to our attention with the statement that this property had been bought and was carried on the books at a sum of money—it is my recollection something under $400,000—$400,000, roughly, the figure that I have in mind; and that a portion of it had been leased and had an income of, I think, $4,500 a year; that that was not sufficient to carry the charges; and there was no immediate possibility of using it

957 at all in connection with the Railway; and we were offered that sum of money, the book value, and we agreed to sell it.

Q. Did you vote for it?

A. Yes, sir.

Q. Did you think that was a wise and prudent thing for the Railway Company to do?

A. Yes, sir.

Q. Do you recall that there was placed before you for consideration the sale of any other property of the Railroad—land, I mean?

A. I think there have been two or three smaller cases; yes.

Q. Do you remember the Spring Perch Company?

A. Yes.

Q. Did you act on the sale of land to that Company?

A. Yes, sir; that is right, a little piece of property.

Q. Do you remember the 450-ft. strip or part thereof to the south of the Railway?

A. Does that overrun the strip mill?

Q. No.

A. I remember there was such a thing, but price, or when, I have forgotten.

Q. Do you remember you had an appraisal by a man named Ellingham?

A. Yes; Parke-Hall & Company, I remember now.

Q. And did you think that was a wise and prudent thing
958 for the Railway to do, to sell that property?

A. Yes.

Q. Can you tell us any other type of matter which came before the Board while you were in attendance at meetings?

A. Oh, there was the rebuilding of the machine shop, improvements to roundhouse, purchase of Diesel engines, drilling of gas wells, great many changes of track, rebuilding and strengthening of bridges. That is about all I think of at the minute.

Q. Is it the practice of the officers to submit to you tariffs, when they change their tariffs and file new ones?

A. I think I remember that coming up once.

Q. Was the matter of labor relation a frequent subject of discussion and action?

A. Very frequent; yes.

Q. And was the matter of the deposit and safekeeping of Company securities passed on by the Board?

A. Two or three times, I remember that.

Q. And the opening of new bank accounts?

A. I don't know as I remember that.

Q. Do you remember anything about a so-called fuel oil ration bank account?

A. That is right.

Q. What was that?

A. That had to do with the rationing of fuel oil.

959 Q. You had to make a special deposit in the bank to cover that, did you?

A. Yes.

Q. That fuel oil was for the use of your locomotives?

A. Diesel engines; that is right.

Q. Were you one of the directors who inspected the new shops after they were built?

A. Yes.

Q. Do you recall that you acted on the selection of a site and the erection of a new office building?

A. You mean the present office building?

Q. Yes.

A. I think that was very early; yes.

Q. Very early in your service?

A. Yes; I think I remember it now. First I thought that was settled before we were on, but I guess it was not.

Q. You remember that was discussed and authorized by the Board?

A. Yes.

Q. Were you kept advised by the officers of suits against the Company, Mr. Fiske?

A. Yes; damage actions and others.

Q. Was the matter of settlement of such actions submitted to you for approval?

A. Yes.

960 Q. Is it the fact that all contracts and proposed commitments of a substantial nature are submitted to you for your consideration in advance?

A. I think always; yes.

Q. Are there any other matters which occur to your mind as having been passed upon by the directors while you were present at a meeting or meetings?

A. Well, we did approve the building of some welfare buildings, I think they are called, but we have not proceeded on that as yet.

Q. For the use of the employees?

A. That is right.

Q. And, finally, do you feel that you act in your own uncontrolled discretion in the performance of your duties as a director?

A. I do.

Mr. Bromley. That is all.

Mr. Craig. No questions.

The plaintiff rests, your Honor.

The Court. Plaintiff rests.

(Plaintiff rests.)

Defendants' motion to dismiss

Mr. Bromley. May it please your Honor, the defendants move to dismiss the complaint for failure of proof generally; and specifically on the following grounds:

961 First, that the commodities clause does not apply to the situation disclosed by the evidence here, since the defendant South Buffalo Railway Company is a terminal switching railroad; and,

Second, on the ground that there is no proof that the defendant railroad transports any goods which it owns or produces or has any interest, direct or indirect, in any such goods; nor is there any proof that there are any such goods which are purchased under the same authority; and,

Thirdly, on the ground that there is no proof that the Railroad is a department or mere instrumentality of its stockholder, the

Bethlehem Steel Corporation, or of the Bethlehem Steel Company; and that there is no proof of domination or control of the Railroad by the Bethlehem Steel Corporation or the Bethlehem Steel Company.

And on the ground that there is no proof that the Railway is used by the defendant Steel Corporation or Company as a means of doing by indirection what the commodities clause forbids.

The COURT. Read the first three counts.

Mr. BROMLEY. Yes, your Honor.

First, that the commodities clause does not apply to the
962 situation disclosed by the evidence here, because the Railroad is a terminal switching railroad; and,

Second, that there is no proof that the defendant railroad transports any goods which it owns or produces or in which it has any interest, direct or indirect, or which are purchased under the same authority—I am using the words of the Act.

And, thirdly, there is no proof that the Railroad is a department or mere instrumentality of the Bethlehem Steel Corporation or the Bethlehem Steel Company; and no proof of domination or control of the Railroad by either such company; and no proof that the Railroad is used by either such Company as a means of doing by indirection what the commodities clause forbids.

I suppose perhaps the most immediate part of that motion is that there is not even a prima facie case which would justify the finder of the facts in piercing the corporation veil. If one is to follow the decision of the Supreme Court in the E. J. & E. case, certainly the trier of the fact must find that the separate corporate identity of the Railway has been completely destroyed by a
963 stockholder, disregarded and overridden, so that it, in effect, has no separate identity but is a mere department or instrumentality of the corporation which owns its stock.

In the E. J. & E. case the majority of the Court, after considering the facts, which are very illuminatingly summed up in Chief Justice Stone's dissent, held that there was no ground to pierce the corporate veil, held that it did not make any difference. In that situation the U. S. Steel Corporation owned all the stock of the E. J. & E. Railway and siphoned off its money as fast as it got it and ran it as a unit in a larger organization, having presidential meetings in which all presidents of its subsidiaries came in together and issuing instructions to the Railway people just what they should do, forbidding them to spend any sum in excess of $5,000 without prior authority from the U. S. Steel Corporation. Running them, in other words, as a subsidiary corporation, but with a very considerable amount of supervision which far trans-

cends anything apparent here, but which, nevertheless, the Supreme Court said was proper for a hundred per cent stockholder to do and did not result in the destruction of the corporate entity.

964 Now, the dissent broke with the majority on that point. They looked at the facts and they said, "We think that is enough evidence." But the majority clearly said, "It is not enough evidence."

And I say again what I said at the outset, that when one looks at analagous cases in which a contract or tort creditor tries to hold the parent liable for debts of the subsidiary one is reminded of the leading case in the State of New York, Berkey vs. The Third Avenue Railroad, in which our Court of Appeals had the question before it and came to the conclusion, just as the majority did in the E. J. & E. case, that you have to have complete destruction of the two separate identities and they have to be run, not as separate corporations, all of the stock of which is owned by one, but they have to be run with their affairs and finances and direction so intermingled that the formalities which the law throws around a corporation to create that artificial person are destroyed by the stockholder. And that, I submit, takes an amount of proof so far in excess of that which is presented here that no prima facie case has been made out.

965 I can think of practically no activity presented by the evidence here which is not clearly within the proper limits of the Bethlehem Steel Corporation as a hundred per cent stockholder. I think they could have gone much farther than they did. I do not believe that there is anything in the criticism that in the past all of the directors of this Company were Railway employees. That certainly does not show the stockholder control. It would not show that the stockholder controlled it if the directors had been at the same time directors of the stockholder, as was the case in the E. J. & E. case, because mere identity of officers, where they perform separate functions, is not even enough. There can be an overlapping, can have common directors as between the stockholder and the subsidiary, without violating the law.

So that I say here, having regard only to the central question, whether, as a matter of fact, there is enough evidence to require the defendants to go forward in defense, it seems to me that there clearly is no evidence.

We have some letters written here, which are here in evidence, written by officers of the Steel Company, Superintendents, Traffic Manager, Superintendent of the Railway to the Super-

966 intendent of the Steel Plant, in which matters are discussed between them, and they are incorrectly addressed to Mr. Entwisle as the Manager of the Railway Company, when he was

not. He never wrote a letter signing himself as Manager of the Railway Company. Once in a while the Manager of the Railway Company, in addressing him, would address him under that title. The matters which they discussed, however, were rare exceptions with matters of business between—and properly so—the Railway and the shipper. Those letters, taken with all inferences resolved against the defendants, fall far short of establishing that the two corporations are not properly run as independent entities, in the face of the fact that the one owned all the stock of the other.

And, therefore, I respectfully submit that there is a complete failure of proof and the complaint should be dismissed.

The COURT. Have you anything to say, Mr. Craig?

Mr. CRAIG. Well, of course, the motion would require, I think, a rather extensive analysis of the evidence here.

The COURT. That is true, of the whole issue so far presented.

Mr. CRAIG. That is true. Of course, I would much prefer
967 not to undertake that analysis at this moment.

The COURT. I purposely refrained familiarizing myself with the E. J. & E. case, waiting until the evidence was presented here, so that I would have that evidence before me. But I suppose, so far as this motion is concerned, it is a question of whether there is enough evidence to sustain the case. In other words, if the evidence is substantially the same as in the E. J. & E. case, I would have to follow the Supreme Court, would I not?

Mr. CRAIG. Certainly.

The COURT. Unless the defendant prefers to present his case in this matter with a pro forma, you might say, denial at this time, I would have to take this up and of course consider it somewhat. I do not know what your attitude about that is, Mr. Bromley.

Mr. BROMLEY. Well, I should think, of course, I ought to go ahead; having appealed to your Honor's convenience, put in my defense, rather than have you take two bites of the matter because you denied the motion.

The COURT. I am not indicating any view whatsoever, whether you should follow that course or I should take it up as a separate matter now.

Mr. BROMLEY. What I am inclined to think, sir, that it
968 would be more economical for all concerned if I put in my defense rather than to have your Honor consider this where the test may be slightly different at this stage than it would where the motion was for judgment.

The COURT. I know you take that view. That is the practical way to handle it.

Mr. BROMLEY. I think it is, sir.

The COURT. But I will deny your motion.

Mr. BROMLEY. May I have an exception?

The COURT. Yes.

Mr. BROMLEY. Now, the sudden resting of the case has left me unprepared to go ahead and finish out the day, and I shall have to ask your Honor to indulge me until tomorrow morning.

The COURT. All right. You will be ready to go on in the morning?

Mr. BROMLEY. Yes, your Honor.

The COURT. Adjourned until tomorrow morning at 10 o'clock.

(Whereupon a recess was taken until Thursday, January 31, 1946, at 10 o'clock a. m.)

970 Proceedings of Thursday, January 31, 1946, 10 o'clock a. m.

Appearances: Same as before noted.

Offers in evidence

Mr. BROMLEY. May it please the Court, I offer in evidence Defendants' Exhibit No. 1 for identification, which is the freight tariff of the defendant Railway Company.

(Defendants' Exhibit D–1, previously marked for identification, was received in evidence.)

Mr. BROMLEY. Likewise Defendants' Exhibit 2 for identification.

(Defendants' Exhibit D–2, previously marked for identification, was received in evidence.)

Mr. BROMLEY. And 3 for identification.

(Defendants' Exhibit D–3, previously marked for identification, was received in evidence.)

Mr. BROMLEY. And 4 for identification.

(Defendants' Exhibit D–4, previously marked for identification, was received in evidence.)

Mr. BROMLEY. And 5 for identification.

(Defendants' Exhibit D–5, previously marked for identification, was received in evidence.)

Mr. BROMLEY. And 6 for identification.

(Defendants' Exhibit D–6, previously marked for identification, was received in evidence.)

971 Mr. BROMLEY. And 7 for identification.

(Defendants' Exhibit D–7, previously marked for identification, was received in evidence.

Mr. BROMLEY. And 8 for identification.

(Defendants' Exhibit D–8, previously marked for identification, was received in evidence.)

HAROLD T. DOW, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Dow?

A. I live in Elma, a suburb of Buffalo.

Q. What is your business, please?

A. I am President of the Spring Perch Company.

Q. And for how long a time have you been President of that Company?

A. About four years now.

Q. Four years?

A. Yes.

Q. And how long have you been connected with the Company?

A. Approximately 30.

Q. Will you tell us what its business is, please?

A. We manufacture leaf springs for the automotive trade.

972 Q. And they are made out of steel, of course, aren't they?

A. That is correct.

Q. Do you manufacture anything else?

A. We do manufacture a rather small side line of heat-treated spring-steel products.

Q. How long has the company been in business, about?

A. 100 years.

Q. And where is it located with reference to the Hamburg Turnpike and the South Buffalo Railway?

A. Well, of course, it is right on the South Buffalo Railway and on Hamburg Turnpike.

Q. Is it on the east side of the Turnpike?

A. On the east side.

Q. And it is down here where the Turnpike going south turns to the west, isn't it?

A. Yes; that is a fairly good description of the location.

Q. And you are a shipper on and a customer of the South Buffalo Railway; is that right?

A. That is correct.

973 Q. How many switches are scheduled for your plant each day, if there are any?

A. At least one.

Q. And what time of day does that occur?

A. I think it varies a little; it may be sometimes around 10 o'clock in the morning and sometimes around 3 in the afternoon, I believe.

Q. Do you sometimes, in addition to that morning service, have a night service?

A. Yes, we do occasionally, particularly if we request it.

Q. And about when does the night service occur?

A. I really can't tell you exactly. Some time during the night.

Q. Do you have occasion, Mr. Dow, to request special service other than these regular night and day switches?

A. At times, when we have to have cars spotted, inasmuch as we only have the one spur and the incoming and outgoing freight has all to go out on the same line and we may have—well, I have known sometimes 25 or 30 cars of incoming freight on the siding and probably may be loading one or two to go out; and it means quite a reshuffling of cars, which calls for quite a bit of maneuvering to spot new cars to unload and take out the loaded cars.

Q. And have you found that, when requested, the Rail-
974 way has rendered this special service to you?

A. Yes.

Mr. CRAIG. I object to that question, your Honor.

I think we are now getting into the subject of service rendered by South Buffalo Railway Company to other shippers, and we claim that that testimony is not relevant to the issues in this case, is immaterial to the decision of this cause. Our view of the case on this feature of it is, as I stated at the opening of the case, that when the unity of the Railroad carrier corporation and the shipper corporation is established a case is made out under the commodities clause. It is not incumbent upon the plaintiff to show any discrimination against other shippers. The statute is general in its terms and applies not only to particular instances in which the carrier uses its power to the prejudice of the shipper but to all shippers which, however innocent in themselves, come within the scope of probability of the thing to be prevented.

I might add to that that any showing of the service rendered by the Railway Company to other shippers has no bearing on the case. Whether the service which is rendered by the Railway Company to shippers other than the Bethlehem Steel Com-
975 pany is proper or improper, is lawful or unlawful, I think is a matter to be determined by the Interstate Commerce Commission. It has no place in this case.

Mr. BROMLEY. I had in mind, may it please your Honor, three points at least, which it seemed to me that this kind of testimony answered. It seems to me that some of the testimony of the Government, particularly those parts of the McLean deposition which were read in evidence, must have been read by Government Counsel for the purpose of creating the inference, at least, that the Railway rendered special, favorable, and discriminatory service to the Steel Company. Why else did he read the testimony that

Steel Company employees asked our conductors to do things, that we interrupted some of our journeys to turn to do other things? It seemed to me, although, of course, I am quite willing to admit that he has proved no standard against which we could judge, whether that kind of service testified to by McLean was or was not unduly favorable to the Steel Company. Nevertheless, it seemed to me that he must have put it in on the theory that it created that inference. And, therefore, I wanted to show by other shippers on the line that we rendered, in general, the same kind of
976 service and would do the same kind of things for anybody who asked us to.

And, secondly, I wanted to show that we served all of our shippers to their satisfaction.

Thirdly, I wanted to show that we expanded our facilities to keep abreast of the growth in our business and the growth in the establishments of our outside shippers; factors which seemed to me to be important to rebut what I understand to be the Government's contention, that we are but a department of the Steel Corporation, created and existing merely for the purpose of serving the Steel Company and rendering it special service. So I submit that this testimony from these shippers is material in answer to a part of the Government's case.

The COURT. Overruled. You may answer.

Mr. BROMLEY. Will you read the last question?

(Last question and answer read by the reporter as follows:)

"Q. And have you found that, when requested, the Railway has rendered this special service to you?

"A. Yes."

977 By Mr. BROMLEY:

Q. I would like to know specifically whether in response to orders, directions, or requests by your company the South Buffalo Railway Company spots cars in places that you want them placed?

Mr. CRAIG. Your Honor, in order to save my record, but in order further not to complicate the questioning, may it be agreed, Mr. Bromley, that the defendant interposes an objection to each of the questions on this subject?

Mr. BROMLEY. If his Honor——

The COURT. Yes, directed to the matter in inquiring now?

Mr. CRAIG. Yes, the matter of service rendered by the South Buffalo Railway Company to the shipper.

The COURT. Yes, one objection is sufficient.

Mr. BROMLEY. I agree.

(Question read.)

The WITNESS. Yes.

Q. Does your company have an overhead crane which it uses to unload the contents of cars?

A. Yes, sir.

Q. And do you request the railroad to spot cars underneath that crane?

A. Yes, sir.

Q. And does it do so?

978 A. Yes, sir.

Q. Generally speaking, are most of your hopper and gondola cars, or at least open cars, unloaded by cranes, Mr. Dow?

A. All of them.

Q. And how are your boxcars unloaded?

A. We don't have any boxcars to unload. We load into boxcars and they are loaded with a lift truck, an electric truck, and the load is driven directly into the cars on skids.

Q. From a loading platform?

A. From a loading platform.

Q. These trucks are these little trucks that run around in the buildings?

A. Yes, sir.

Q. That carry some material in front of them and lift it up and put in the boxcar?

A. Yes, we use a one-time skid and just drop the load right on the floor of the boxcar. The electric truck drives right into the car.

Q. And that is accomplished by means of a gangway between the car and the loading platform?

A. Yes, sir.

Q. Is it necessary and does the railroad spot those cars that you take in there for loading?

979 A. Yes, sir.

Q. In exact positions designated by you?

A. That is right. We have a door opening and, of course, the door opening in the car must coincide with the door opening in the building.

Q. And the railroad places the cars in those spots, so that there will be that coinciding between the building door and the car door?

A. That is right.

Q. Does that mean that sometimes cars have to be uncoupled in order to be thus placed?

A. Yes, sir.

Q. Would you say generally that each car in a drag of boxcars that go in there has to be uncoupled from the others to be placed?

A. Sometimes, but more often the incoming car must be placed.

Q. And placed in a place separate and apart from the next car?

A. That is right.

Q. Is there a fence around your plant?

A. Yes, sir.

Q. And does that fence go across it at least by means of a gate to the tracks of the South Buffalo Railway Company?

A. It does.

980 Q. On the surface or underground?

A. It is right across the track.

Q. You are opposite the tracks; the tracks are on the west side and you are on the east side of the Hamburg Turnpike?

A. Well, the spur comes right in on our land.

The COURT. You are speaking about the west side. I see what you mean now.

The WITNESS. The spur comes right in our land and we open a gate to allow the cars to come in.

By Mr. BROMLEY:

Q. That is what I wanted to find out. This spur comes down from the north?

A. Yes, sir.

Q. It comes right into your property?

A. Yes, sir.

Q. And the railroad owns part of the tracks there and you own the rest?

A. Yes, right up to our line.

Q. And the track that the railroad owns joins right onto the tracks that you own?

A. Yes.

Q. This fence of yours has a gate in it and the gate closes across the track?

A. That is right.

981 Q. And it closes across the track at a point where the tracks belong to the South Buffalo Railway Company?

A. Yes, sir.

Q. Do you keep that gate locked?

A. Normally we do.

Q. Do you keep it closed normally?

A. We keep it closed.

Q. What does the railroad do in order to get in there when it comes in with a string of cars?

A. It notifies our shipping clerk who makes arrangements to have the gate open or—well, that is an answer.

Q. Does one of your men open the gate in response to the clerk's direction?

A. Yes, sir.

Q. Do you receive any steel products inbound from any manufacturers whose plants are located on the South Buffalo Railway Company, Mr. Dow?

A. Occasionally.

Q. And from whom do you receive these steel products?

A. The Republic, I believe. I believe the Republic is on the South Buffalo.

Q. And do you receive any steel products from Bethlehem?

A. Yes, we do.

Q. And do those steel products move from Republic or from Bethlehem to your plant via the South Buffalo Railway?

982 A. Yes; I believe so.

Q. Have there been situations in which there have been in the possession of the South Buffalo loaded cars consigned to you in a number greater than you had track capacity to hold them?

A. Yes, sir.

Q. That is quite usual, is it?

A. Oh, yes.

Q. What is done with those cars in excess of the number that you can handle to unload?

A. They are held back on the South Buffalo Railway somewhere until we can handle them, that is all.

Q. And for how long a time? Can you give us any idea?

A. I would say at least a week sometimes.

Q. Those cars are loaded cars consigned to you?

A. That is right.

Q. And then when you get ready and get in a position where your tracks are open so that you can handle them, what do you do?

A. We notify the railroad and they bring in such cars as we specify and spot them for us.

Q. Such cars as you specify? How do you specify what cars out of those being held by the South Buffalo that you want?

983 A. By car number. We have shipping memorandums. I know this to be a fact that we had about 30 cars at a time on our siding, 30 carloads of steel incoming, and there are certain sizes and gauges that we want ahead of others, and we have certain specified car numbers to spot certain cars, because we are in greater need of them.

Q. Those 30 cars that you have just referred to are cars held by the South Buffalo awaiting your order?

A. Yes; and maybe some on our siding.

Q. That results in your ordering the South Buffalo Railway Company to deliver to you cars which may have arrived on the South Buffalo Railway at a time later than some of the other cars which the South Buffalo is holding for you?

A. That is right.

Q. The Railway always does that for you when you ask them?

A. Yes, sir.

Q. Of course, the Railway charges you demurrage on those cars?

A. That is right.

Q. And you pay it?

A. Yes, sir.

Q. You get 48 hours free time, however, before the demurrage starts, do you not?

A. That is right.

Q. With regard to the spotting of cars in positions at
984 your plant to which you have referred is it the fact that some one of your employees gives such instructions directly to the South Buffalo conductor?

A. I believe that is true, although I don't know really who he does call up. I know he calls up and instructs somebody, and it is done.

Q. Have you ever seen one of your men at your tracks talking to one of our conductors?

A. Oh, yes. Our shipping clerk is in very close touch with him all the time.

Q. And it is quite usual for your shipping clerk to tell one of our conductors if he wants some change in the direction of the cars or some different shipping movement, isn't it?

A. Yes; that is very common.

Q. You know, do you not, Mr. Dow, that switching inside of your plant is referred to as intraplant switching?

A. Well, vaguely.

Q. Does the South Buffalo Railway Company make any movements for you inside of your plant on your tracks?

A. Well, it is just a single spur and they merely pull cars out and put them in, and then the reshuffling is all done outside somewhere. That is all they can do on one track.

Q. Can't they move a car ahead from one location on a
985 part of your track to another?

A. I would call that spotting it, that is all.

Q. Supposing you wanted a car that had been spotted moved to another place—would the Railway do that for you?

A. Well, they would, but—it has been done. We might have a loaded car moved to one side while they spotted another. That is done.

Q. Is it necessary for our crews to exercise caution before they move cars on your tracks in connection with the loading that is done by these power trucks?

A. Yes, sir.

Q. And are there also automobile trucks which are loaded in the same place onto railway cars?

A. That is correct.

Q. And is it sometimes necessary for our crews to wait for those automobiles to get out of the way before they can move a string of cars?

A. Yes; that is true.

Q. Over the last ten years has the business of your company, the Spring Perch Company, expanded or contracted?

A. We have expanded.

Q. About how much?

A. Well, during the war about 100 percent.

986 Q. And take a period of the last ten years, would you be able to tell, the past ten years?

A. About three times.

Q. Has the service which the Railway has given you expanded along with your growth?

A. We have not had any complaint whatever.

Q. You had no complaint against the service the Railway has given you?

A. No; we have had no complaint against the service whatever.

Q. Is it the fact that, at the time your plant was built, if you can recall, Mr. Dow, that the Railway extended its line of track in order to serve your plant?

A. Oh, yes; they did. That spur was not there at all.

Q. And the Railway built more track in order to get in to you?

A. That is right.

Q. And can you recall that your Company dealt with Superintendent Benning of the South Buffalo in that respect?

A. That is right.

Q. And it had no dealings with any employee of the Bethlehem Steel Company, did it, in regard to that?

A. Oh, no, no. I was Chief Engineer of the Company at that time and I dealt directly with Mr. Benning, distinctly.

Q. And Mr. Benning was the Superintendent of the South Buffalo Railway, was he not?

987 A. That is right.

Q. And, as a result of your negotiations and arrangements, the Railway built a new spur so that it could come down and reach your plant, is that right?

A. That is correct.

Q. Do you know how long that was, about?

A. I don't know exactly, but it is quite long; it might be one

or two thousand feet. That is a rather wild guess, but it is a long spur before it gets to our property.

Q. Are any of your loading or unloading tracks inside of buildings, Mr. Dow?

A. Yes. Where we unload our steel the track runs through the end of the building, so that the cars are directly under the crane, under the crane runway; and, of course, the crane runway is covered. It is a warehouse.

Q. And does the South Buffalo Railway move loaded and unloaded cars on those tracks which are thus located inside the buildings?

A. Oh, yes.

Q. At some time not so long ago your Company bought some land from the South Buffalo, did it not?

A. That is right.

Q. And who did you deal with with respect to that purchase of that land by your Company?

A. Why, the South Buffalo Railroad. It was the South
988 Buffalo Railroad's parking lot and I naturally dealt with them, that is all.

Q. Who in the Company did you deal with?

A. Well, I think Mr. Trageser.

Q. Mr. Trageser?

A. Yes; mostly.

Q. And can you recall when that was?

A. Oh, about two years ago. That is a guess. I would guess it was aproximately that.

Mr. BROMLEY. That is all.

Mr. CRAIG. Now, your Honor, the plaintiff moves, for the reasons heretofore stated, that all the testimony of the Witness Dow, in connection with service rendered to Spring Perch Company by the South Buffalo Railway Company, be stricken from the record.

The COURT. Motion denied. You may have an exception.

Mr. CRAIG. Thank you.

Cross-examination by Mr. CRAIG:

Q. Mr. Dow, will you come to this map, please? This map is Plaintiff's Exhibit No. 1. I will ask you to point out on that map the location of property of the Spring Perch Company. Perhaps you had better come over to the right a little bit, so the Court can see.

A. This map I am not familiar with.

989 Q. At the north is to the left and east is at the top; here is the Hamburg Turnpike [indicating on map].

A. Where is Smoke's Creek?

Q. [Counsel indicates on map.]

A. Right here [indicating on map].

Q. That is, bearing the mark "19," is it not?

A. Yes; 19. This [indicating] is the piece of land that we bought from the South Buffalo Railway Company.

Q. That is, the land you bought is to the north?

A. Yes; to the north; yes.

Q. On this map the tracks of South Buffalo Railway Company are shown in white and the tracks of other industries, including your company, are shown in green.

A. Yes.

Q. This map has been prepared by South Buffalo Railway Company. Will you state whether or not the line approximately parallel to the Hamburg Turnpike and east thereof and immediately above the word "Spring," designating the Spring Perch property, represents the east property line of Spring Perch Company?

A. East property line? Well, right here [indicating], if that is the——

Q. Yes; the line immediately above the word "Spring."

A. That is right. I presume that is it. Made out to scale. That is our fence around our property [indicating].

990 The COURT. It would not be the east line of the Spring Perch Company?

The WITNESS. That would be east.

The COURT. It would be the west line.

The WITNESS. That [indicating] is east.

Mr. CRAIG. Your Honor, I think toward the top is east.

The COURT. Yes; I know it is. You are describing land down toward the Hamburg Turnpike.

Mr. CRAIG. No, sir. I said it was approximately parallel to the Turnpike but immediately above the word "Spring."

The COURT. Oh, above the word "Spring." I misunderstood you.

Mr. CRAIG. Yes, sir.

The COURT. Then that is the east line of the Company's property?

Mr. CRAIG. Yes, sir.

The COURT. All right.

By Mr. CRAIG:

Q. You will notice, Mr. Dow, that to the west of that east property line the track which is shown is all green; is that not correct?

A. Yes.

Q. And the white line which, according to this map, represents South Buffalo Railway track, which is to the east of your east property line, is all white, is it not?

A. Yes.

991 Q. Now, what do you say as to the fact as to whether or not there is any South Buffalo track west of the east line of Spring Perch Company's property?

A. West of the east line?

Q. Yes, sir.

A. This is the east line [indicating]?

Q. Yes. Is there any South Buffalo track west of that line?

The COURT. Towards the bottom of the map, he means.

MR. CRAIG. Sir?

The COURT. You mean toward the bottom of the map?

MR. CRAIG. Yes.

A. No, I would not say so.

Q. Isn't it a fact that there is no South Buffalo track within the Spring Perch Company property?

A. That is right.

Q. That is, the South Buffalo track comes up to your property line?

A. Up to there [indicating]; yes.

Q. But does not extend into your property?

A. That is right.

Q. In connection with the operation of your business, is it necessary that any of your products, either completed or partly finished, be moved there promptly or regularly?

A. Yes.

Q. Such as?

992 A. Such as all of them.

Q. Do you have any hot metal, for instance?

A. Oh, no; no. You mean within the plant? No; we do not have any hot metal.

Q. Well, you have any other products which it is necessary to have moved as distinguished from a matter of convenience?

A. No.

Q. When the South Buffalo locomotive finishes work for you at your plant it departs, does it not?

A. Yes.

Q. That is, that locomotive does not stand by for any further orders from your Company, does it?

A. Oh, no.

Q. So when you want another job done you make arrangements for the locomotive to do that work, do you not?

A. Yes.

Q. Isn't it a fact that South Buffalo Railway Company is the only connection between Spring Perch Company and the line haul carriers?

A. Yes, that is right.

Q. And there is no other service available, is there, for railroad purposes, for the doing of any of your other work, is there?

A. I don't know what you mean.

993 Q. Well, South Buffalo Railway Company is the only railway company which serves you for any purpose; isn't that true?

A. That is correct.

Q. Well, now, as I understand it, inasmuch as South Buffalo has no tracks within your plant it is true, is it not, that you do not either load or unload any cars on South Buffalo tracks?

A. No; we don't. We unload or load right on our own track.

Mr. CRAIG. That is all.

The COURT. Tell me something of the volume of your business.

The WITNESS. Well, we have about 2,000 tons a month coming in and 2,000 tons a month going out. That is, during the War.

The COURT. You spoke about large numbers of cars. Your steel comes from the Republic, and you said also the Bethlehem Steel Company?

The WITNESS. Also comes from Carnegie and United States Steel Company. We buy from three or four of them, as a matter of fact, or better—as a matter of fact, about five.

The COURT. All right.

Mr. BROMLEY. That is all.

994 BRUCE K. CONOVER, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Conover?

A. I live at East Aurora, New York.

Q. And what is your business, please?

A. Feed manufacturing business.

Q. Connected with what company?

A. Maritime Milling Company.

Q. What position do you occupy with that company?

A. Vice President in charge of production and distribution.

Q. For how long a time have you been connected with the Company in any capacity?

A. Eleven years.

Q. Will you tell us something about its business and its plant, please, so that we may know what it does?

A. Well, its plant is located on Hopkins Street, South Buffalo; and it is engaged solely in the manufacture of prepared feeds for animals and fowls; complete feed-manufacturing operation, starting with the raw materials, the necessary grinding, blending,

mixing, sacking, loading into freight cars or trucks for distribution throughout the Northeastern part of the United States.

995 Q. So that you ship a finished product which, generally speaking, is put in bags?

A. Correct.

Q. And shipped, in part at least, in boxcars?

A. To a large extent in box cars.

Q. The raw materials from which you make the feed, sir, are what?

A. The various cereal grains; corn, wheat, barley, oats, so forth; and the—rather, what we call the byproducts of other operations, such as soya bean meal, gluten meal, gluten feed, brewer's grains, distiller's grains, to mention a few. There are all together probably 97 to 102 different items. Also use cod liver oil, and that comes in different containers. That comes in tanks—I mean in drums. Also molasses, which comes in tank cars; all of which are used in various proportions in the manufacture of these prepared feeds which are manufactured according to a very definite formula which is made up by nutritionists, and so on. And the mill operates on this formula with various weighing devices, and so on.

Q. Do all or substantially all of these about 100 raw products come into your plant by railroad?

A. Practically all. There is a few exceptions, but I would not say it would be over five per cent normally.

996 Q. And where is the Maritime Milling Company located with respect to the South Buffalo Railway?

A. Well, the Maritime Milling Company is located on one of the—I don't know what you would call them—one of the branches, or whatever it is.

Q. Branch.

A. (Continuing.) Of the South Buffalo Railroad. They come in within probably—well, they run right along the western side of our property and switch off into our plant on our switches; come out of Station C and run up paralleling Hopkins Avenue—Hopkins Street, I should say—practically to Tifft Street, and just before getting to Tifft Street, why, the South Buffalo goes off their right-of-way to the right or to the east and come into the Maritime's plant, which is located between the South Buffalo Railway and Hopkins Street.

Mr. BROMLEY. That is Hopkins Street, your Honor [indicating on map].

Q. And I assume that I am pointing between Hopkins and Germania Street, that is about the location on this map, is it?

A. I must admit I have been out in South Buffalo quite a while but I don't know where Germania Street is.

Q. Maybe it isn't open. Are you served by any other
997 railway than the South Buffalo?

A. No, sir.

Q. Can you tell me something about the South Buffalo service in this respect: How many switches or shifts are there scheduled for you each day by the Railway?

A. Three.

Q. And can you give me the approximate time that those three shifts are made during the 24-hour period?

A. Starting at, let us say, 12:01 a. m.: The first shift comes into our plant around between 3 and 3:30 a. m.; the second shift at approximately 1 p. m.; and the third shift at approximately 7 p. m. I say approximately because, outside of the first shift, our people at the plant, the people engaged in this, keep in close touch with the Railroad and, on occasions, upon request, they will come in a little earlier, or, if it is necessary or we would rather have them come a little later, they come a little later. But normally that is it. The early morning switches, our main one, that is, when we set up our tracks for the day's operations—I am talking about the loading tracks—spot the 24 or 28 cars which are on the railroad equipment, which we need for our operations; the other switches which come in are to bring in raw materials and, well,
if necessary, pull out some of the loaded cars, if that will
998 be to our advantage; but normally it is to bring in raw materials where we do not have the track storage for empties, hence when our empty storage is complete we have to get those empties out of the way before we can unload any more at our unloading pits.

Q. How long would you say the early morning or 3 a. m. switch takes the railroad to perform?

Mr. CRAIG. Now, your Honor, I object to this question on the grounds previously stated in connection with the witness Dow, that the matter of service to Maritime Milling Company by South Buffalo Railway Company is irrelevant to this case and immaterial to the determination of the issues involved herein.

The COURT. Overruled. Exception to the Government.

Mr. CRAIG. May we have the same stipulation relative to objection to each question relative to the operation?

The COURT. Yes.

Mr. CRAIG. Is that agreeable, Mr. Bromley?

Mr. BROMLEY. I agree.

Will you read the last question?

(Last question read as follows: "How long would you say the early morning or 3 a. m. switch takes the railroad to perform?")

A. I would say, roughly, from three to four hours, if that is close enough. Say three and a half, if you want to

999 strike an average, three and a half, three hours and forty-five minutes. Quite a little depends on—I mean, that might vary some from day to day, depending on how much work there is in bringing in the raw materials and how many cars have to be handled, that varies, not to any great degree but to some.

Q. During that period which you estimate at approximately three and a half hours does the South Buffalo locomotive stay there all the time?

A. Yes, sir.

1000 Q. And during that time it places in position, as I understand you, the loaded cars which it delivers to you?

A. It places them in the rotation which we request. By that I mean the string of cars are placed on our north side, or unloading track where we can reach them with our car puller, but particularly in the last three or four years when we have been operating under abnormal conditions so far as supplies are concerned, we desire to have those cars lined up with—well, for instance, corn and then soy bean meal, and then pulverized oats, and so on down the line to fit in with our production schedule. The South Buffalo Railway always lines the cars up in that manner. When I say "abnormal," that feature of the South Buffalo Railway service is not abnormal. They have always done that, but if we have lots of corn in the plant or lots of everything for our operations, we might like to scoop six cars of corn one right after the other, and they would put the cars of corn there, and then whatever we request, so that when the South Buffalo Railway once gets through—I am trying to say that when the South Buffalo once gets through we can't change the order that we have to unload. We have to unload the cars practically in the order that they are set, and that is why they are put in that way. They are not actually

1001 spotted at any particular spot. They are just spotted here close enough so that our car puller which operates by motor, which our men operate, that they can be reached.

Q. Do you accomplish that order of cars with regard to their contents by directing the railroad to classify and arrange the cut of cars by order, by designating car numbers?

A. Yes, sir.

Q. That is how the railroad knows?

A. Yes.

Q. To put the cars of corn together and cars of meal together; is that right?

A. That is correct.

Q. This car puller that you mentioned, is that anything more than a power drum with a cable going through a pulley on a post and a hook on the end of the cable?

A. Yes; that is all.

Q. That is quite common for industries to have, isn't it?

A. Yes, sir. You say "industries." It is common to the feed industry. It is common to feed plants in Buffalo with which I am familiar. I am not posing as knowing anything about all these other industries.

Q. That enables the plant which has it to make a movement of cars even though the switching engine from the Railway is not there, doesn't it?

1002 A. That is correct. It takes us from 15 to 20 minutes to unload a car of grain. If you didn't have some method of moving those cars off your unloading pit, of which you only have one or possibly two, I mean it would require dumping those cars along every 15 minutes, which would be unnecessary and a delay to us, because you would have to move them all. This way we can move one at a time and the rest can set.

Q. Have you had any track extension since your track was built, Mr. Conover?

A. Yes, sir.

Q. Who has performed that work for you?

A. The same part of the South Buffalo Railway.

Q. It has been an extension of the South Buffalo tracks, has it, or of your tracks?

A. I mean we paid for it, but I would have to look up to see exactly who did it. It was my impression that one extension there that we put on was done by South Buffalo road gang. I mean I would have to check up. Stimms—I can't think of the whole name of the company right offhand; that is all I know them by; Stimms also has done some track extension; I mean additional track. It really is not an extension. I mean we have put in another siding or two on our property. I mean we are in
1003 the process of doing that right at the minute and Stimms is doing that.

Q. When the South Buffalo Railway Company performed the work for you, did you deal with the officers of that company and not the Steel Company?

A. Entirely. We have never had anything to do with the Steel Company. I do not know who they are except what you read in the papers.

Q. During the time that you have been with the Company would you say that you have used more railway service as the years have gone by?

A. Yes, sir.

Q. It has increased, has it?

A. Yes, sir.

Q. Can you give me any estimate over the last five or ten years how much it has increased?

A. Well, our volume has increased about 300 percent, and I would say that the South Buffalo—I mean the railroad service would be increased, say, 150 percent, because the increase in volume does not necessitate the same percentage increase in railroad service.

Q. Since what date has that increase taken place?

A. Well, that has taken place since 1936, the entire percentage-wise. About half of it has taken place within the last five years.

Q. Are you familiar with the term "intraplant switching," Mr. Conover?

1004 A. Yes, I know what it means.

Q. That means switching within the limits of one plant or a unit of a plant, doesn't it?

A. Yes.

Q. Has or does the South Buffalo Railway perform that kind of service for you?

A. Yes, sir.

Q. Can you give us an illustration of what that service is?

A. Yes, sir. We have on our property, well, what you might say is four tracks really—shortly we will have five, but as of this minute we have got four tracks. Two of these tracks parallel the south side of our plant, three parallel the north side of our plant—I mean two parallel the north side of our plant. The two that parallel the north side of our plant, one services a little plant that is adjacent to our main plant, which we call our dog food plant. One track exclusively—that is the new track that we put in that I mentioned previously—this plant is solely engaged in the manufacture of a particular kind of animal food for dogs, and on occasions—when I say "on occasions" I mean it happens at least once a week, maybe more, that we have a split car which will include 30 ton cars now, will include, say, from 10 to 20 tons

1005 of dog food, and the remainder of the car will be made up of dairy feed or poultry feed, etc. When there is so much of each in the car we spot the car at the dog food loading door. The dog food is placed in the car. The car is then braced and closed up; and the following day it is switched around to the afore-mentioned south side of our plant where the feed is put in in the usual manner the same as if it was an empty car. That is one phase of our intraplant switching. That is the most prevalent. We also have to, due to overguessing our production or slight delays in our production within out own plant, we quite frequently have emptied one or two cars that are not completed in a day's operation. They are what we call setbacks, and very often or usual—I will put it that way—we desire these cars spotted in a different position for the next day's operations, and they are brought out and put back in a different location on our unloading

tracks. Those would be the two main intraplant switching which occurs at our plant, and, as I said before, I don't mean to sit here and intimate that it is a major part of our operation, but it happens enough so that you could say that it is a regular feature.

Q. Both of these instances to which you have referred, the
1006 intraplant switching has been done by the South Buffalo Railway?

A. That is correct.

Q. Does it ever happen that loaded cars destined for your plant are delivered by connecting carriers to the South Buffalo in such numbers, large numbers, that you not able to handle them yourself?

A. Yes, sir. You mean on our track; not able to store them?

Q. Yes.

A. Yes.

Q. What happens to those cars; do they stand on the South Buffalo tracks?

A. Yes, sir.

Q. Does the South Buffalo hold the loaded cars for you?

A. Yes, the South Buffalo only brings up to our plant the various cars designated by car numbers that we request, and they hold the rest in their yards. We could not store them, anyway, in our plant. I mean if we didn't have that we would have to put in a lot more tracks or something.

Q. So that it is a fact, isn't it, that that results in the South Buffalo holding in storage on wheels some of your raw supplies?

Mr. Craig. May it please the Court, I object to that as calling for a conclusion.

The Court. He has already testified to that, Mr. Bromley.
1007 Mr. Bromley. All right.

Q. How long a period does this sometimes happen that your raw supplies are stored by the Railway?

A. Do you mean individual cars, specific cars? They have been stored there as long as a week. I mean, as I say, under present operations that has been necessary. As I explained before—and I can explain in detail again, if you desire——

Q. No; I just wanted to get some length of time that these loaded cars were held.

A. They have been there as long as a week. That is not usual, but it has happened.

Q. Now, on the other side of the picture what about empty cars which you desire for loading; do you know whether or not the Railway ever holds loaded cars on its lines in anticipation of your ordering them for the purpose of using them?

Mr. Craig. I object to what the Railroad does in anticipation of the shipper ordering them.

The COURT. Overruled.

The WITNESS. Yes, I do happen to know that they do that inasmuch as I explained previously the South Buffalo's branch dead ends just beyond our plant, and it goes to the Cousin's Boiler Works which is right next door to us, but they have very
1008 little railroad service. They handle more by truck and so on. And so you can see the empty cars which we have unloaded pulled out, and if we don't need them for the next day's operation. I mean the South Buffalo shoves them up there and waits until the next day. I mean in the last four years the empty boxcar situation has been a serious problem to secure a sufficient number, and we very carefully—I mean we would be rather upset if empty cars that we made were hauled off and then we were short. I mean that is how we get the large share of our empties which enables us to keep going is by unloading. We have done nothing but unloading on three or four days at particular times, so that we had empties when we were short. We can see the cars sitting out there and know the car numbers.

Q. Inside of your plant do you ever have a situation where you have automobile roads which cross your tracks?

A. Yes.

Q. Over which the switching is done?

A. Yes, sir.

Q. And are those roads used by trucks crossing over your tracks on which switching is done?

A. Yes, I mean they are used—as I explained before the
1009 tracks parallel our building and naturally are very close up, I mean within the required clearance, so that we can wheel hand trucks out of the cars into our building. When we get material by trucks, which we have been doing more in the last three or four years due to the terrible shortage of ingredients, these trucks unload by backing across the tracks. That is the only way they can get into the plant. We are hemmed in by tracks except in the front. They back across the tracks to the sides of our building. That is a common occurrence.

Q. Did I understand you to say that so far as empty cars put in there by the Railway for loading are concerned, that they are spotted by the Railway at specific points?

A. That is correct.

Q. What are those points and how many of them are there?

A. On our loading side where the bulk of the spotting is done, that is the south side of our plant, we have fourteen what we call doors into our plant. Above each of these doors there are chutes which on an angle go into the cars. Paralleling the tracks are conveyor belts where the finished product in bags travels along

and by the manipulation of what we call kick-offs, boards swinging out over the belt it deflects the bags into the cars, into these fourteen chutes which go into the cars. These chutes are
1010 not adjustable, the cars, of course, are different lengths, and hence it is impossible to just shove a row of cars in and have our chutes automatically be opposite the doorways of the cars. Hence the railroad starting at the door nearest the street, which we call No. 1 door, spots a car there and on up to the fourteenth door. Then on the other track, which parallels the one I just mentioned, our present method of operation and which has been since the plant was built is to spot as many as we want to up to fourteen directly opposite the doors of the inside cars. Then we have tow boards and the loading gangs load each car if it is on the outside track by going through, from the inside car over to the outside car. That is our method. And the railroad regularly spots fourteen cars on the inside and up to fourteen on the outside. I mean sometimes ten or twelve, depending, and then also on that outside track is where we take in our molasses, and that must be spotted so that the outlet of the molasses tank is directly over the hole in the ground where the molasses goes into our pump and it is pumped into the molasses tank.

Q. So that the fourteen or fewer cars on the outside track must be spotted so that the doors of the car are directly opposite
1011 the doors of the fourteen cars on the inside track; is that right?

A. Yes. That is the only way to get in them is from the inside car. There is no platform across.

Q. You put gangways from the inside to the outside row of cars?

A. Correct.

Q. That means, does it not, that the cars that have been pushed in there by the railway must be uncoupled?

A. That is correct.

Q. In order to be thus spotted in these exact positions?

A. That is right. They are generally uncoupled. Sometimes the size is just right.

The COURT. Are you speaking of the loading in bags or the loading in the chutes?

The WITNESS. Your Honor, the bags come off these conveyors into chutes shoulder high, so that our employees can take these bags off the chute and deposit them.

Q. And how do you load without the bags?

A. We don't load anything in bulk.

Q. I thought you meant you shipped it loose in the car?

A. No, sir.

By Mr. Bromley:

1012 Q. It is usual, isn't it, for one or more of your foremen to issue instructions to one or more of our conductors as to what you want us to do?

A. Yes. Our unloading foreman makes up what he calls the program and gives it to your conductors when they come in. Also what we call our inventory and quality control foreman instructs on the incoming material either direct with station C, as we call it, or the conductor, when he comes up if they haven't got it through the Station C, or anything new that comes up in the meantime.

Q. You said you had loading sheds?

A. That is correct.

Q. Does the railroad put the cars into those loading sheds?

A. That is correct.

Q. Have you some kind of a bell system of warning in order for the railway to warn you when they are going to make a movement?

A. Yes; our rules and regulations at our plant to our employees, which we endeavor at least to strictly enforce—and I think we do reasonably well—whenever the engine is on either the south side or the north side there is a bell, a rather loud signal bell, that is put on, and our orders are that all of our employees are to stay clear of the cars as long as the bell is ringing. That is merely a safety device on our part. There is a similar signal safety device on the unloading or the north side of our plant.

1013 Q. Is it the fact that it is necessary for the railway to place these cars at night because you start your work at 7 a. m.?

A. That is correct. As I said previously our biggest and most important switching service on the railroad comes between 3 a. m. and 6:30 or a quarter to 7 a. m.

Q. So that your desire and your instructions to the railroad are that they must have that work done at least by 7 a. m. at the latest?

A. That is correct. At the start off our tracks are not set up because the night crew, as we call them that complete their work at 4 a. m., on the loading side, on the south side, they fill up all the cars that are available unless we have had a break-down or something, but the normal operation is that all the cars are filled, the doors are closed and sealed while we are tied up completely as far as producing or loading anything, at least loading anything. We can't produce for more than a half hour unless we can load, unless those cars are pulled out and empty cars are put in there, and we have no way of getting them out. They are right there.

Q. So that to that extent your activities are pretty importantly dependent upon what the South Buffalo Railway does?

A. There is no question about that.

1014 Mr. BROMLEY. That is all.

Mr. CRAIG. For the record, the plaintiff moves that all the testimony of the Witness Conover in connection with the service rendered by the South Buffalo Railway to the Maritime Milling Company be stricken.

The COURT. The same ruling. Denied, and an exception.

Cross-examination by Mr. CRAIG:

Q. Mr. Conover, will you step up here to this map, please?

(Witness steps to map.)

Q. This map is Plaintiff's Exhibit No. 1, and due to the shape of the map, we have had to place it in a form different from the usual, in that north is to the left rather than to the top. Will you point out on the map and describe the location of the Maritime Milling plant or property?

A. You say this way is north [indicating]?

Q. Yes, to your left is north.

A. There is Hopkins Street right there [indicating]. There is Tifft Street [indicating]. I can see it on there.

Q. It is marked generally by the number 9, isn't it?

A. Yes, right there [indicating], and as near as I can guess— there is Tifft Street and there is the Cousin's plants that I was talking about, and our plant lies right in here [indicating],

1015 between this South Buffalo Railway and Hopkins Street, right in this place here [indicating]. Our plant extends not to the main line, but our property extends, as I understand it, up to the right of way that the railroad has. I mean our property here is on a circle. As I understand it, all these properties here are on—I mean they are not like a normal building lot, square. They have an arc in which I suppose when the property was bought, which was well before my time, was to enable the railroad service to come in there without cutting off a little square of your property, so that our property has a curve there [indicating] and a curve on the other side [indicating].

Q. So far as this map is concerned you propoerty generally is in the northeast portion of that map, isn't it?

A. Yes, right there [indicating]. That is right. This being north [indicating], it is up there, and that is east [indicating].

Mr. CRAIG. You may resume the stand.

(Witness resumes the stand.)

Q. Isn't it a fact, Mr. Conover, that there is no South Buffalo track on the Maritime Milling Company property?

A. As near as I know— I would have to check up. I never had that question put to me before and hence I never checked it up, but I would assume that is correct.

Q. As far you know——

1016 A. As far as I know the tracks that are on our property are maintained by us.

Q. You spoke about an instrument which I believe you described as a car puller; is that right?

A. That is correct.

Q. And I believe on occasion your Maritime Milling Company people will move a car from one point in your plant to another point in your plant?

A. That is correct. We only have one car puller, and that is located on the north or the unloading side of our plant, and they are the only ones that it can reach, and it is limited obviously as far down as it can go and its strength. It just moves four cars up to the loading pits and moves the empty cars on beyond.

Q. That is used solely, isn't it, in connection with moving a car from a point on one of your tracks to a point on perhaps the same track or at least to another one of your tracks?

A. It moves from one point on a track to another point on the same track, yes.

Q. That is your track?

A. That is correct.

Q. And you never use that, do you, to move a car from a South Buffalo Railway track onto your track?

A. No, you can't reach the South Buffalo tracks with it.

1017 That would be impossible. That is never done.

Q. When a South Buffalo Railway locomotive finishes a piece of work for your company, such as in connection with your loading and unloading, it goes away, doesn't it?

A. Yes, sir.

1018 Q. It does not stand by for any further orders from you, does it?

A. Well, the conductor comes into the office and——

Q. No. Can you answer that?

A. Stand by for orders?

Q. Yes.

A. Well, I mean I can answer—the answer, I mean, is yes, and then again no. I mean by that it all depends on the instructions that he has had from us or from the South Buffalo Railway prior to his beginning. Ofttimes the conductor comes into the office and advises us what he has done and says, "Is there anything else?" On the other hand, on this early morning switch, the program is all laid out. When he does it, he generally leaves. That is why I answered the question the way I did.

Q. Pardon me. Have you finished?

A. I mean, I was not trying to be funny or smart, I mean I just wanted to answer it the best I could.

Q. When the conductor comes in and asks, "Is there anything else?" he is asking, is he not, in connection with the particular job to which he has been assigned?

A. Yes; I would think that is correct.

Q. Yes. He does not come in and ask, generally, about anything else to be done, does he, other than the par-
1019 ticular job at hand?

A. That is right.

Q. When he finishes the job to which he is assigned he takes his locomotive away, does he not?

A. Well, when he finishes the program.

Q. Do I understand that South Buffalo makes a practice of taking cars which your company has unloaded out onto its own tracks which run to the north and to the west of your property and hold those cars there until you need them?

A. Well, they make a practice of—yes, of holding them there until we need them. I would have to qualify that, that we need them very shortly; I mean, within 24 hours we need them.

Q. Is that always the case?

A. That is—I would say, I think I could answer that question yes, that is always the case.

Q. Without exception?

A. Well, I would have to look my records over very carefully before I would wish to swear that never has been the case; but I would say very definitely that is generally the case, that those cars are used—those empty cars are used within 24 hours, because we never unload enough cars, or say, very rarely unload enough cars, to supply the empties which we need, due to the
1020 fact that the loaded cars come in heavier than the outgoing cars; hence if we had an accumulation at the end of those operations of ten or twelve or six or seven cars, empty cars, we then would not order as many empties the next day and would use those; we would not order up as many empties, we always—our normal practice, sir, is to order up—we will anticipate that we will have 12 empties that we will make, we will unload, and we will order up 12 empties from the South Buffalo to bring us up 12 empties.

Mr. CRAIG. That is all.

The COURT. What was the volume of your business, how many cars a day do you handle?

The WITNESS. Well, in tonnage the volume of our business is, roughly, a thousand tons a day. Naturally, that involves, if you pick out a length of time to average it, it means that we have to handle 2,000 tons, because for every thousand tons that goes out we have to take in a thousand tons, which, in our shipments that

means we normally load out, say, around—present operations around 24 to 26 cars; and the rest of the tonnage, up to a thousand, goes out by truck; and the incoming cars vary so radically in between them that I would hate to guess how many, but I just
1021 roughly say from 18 to 20; in other words, 18 to 20 cars bring us in about a thousand tons; and it takes 24 to 26 plus, probably 10% by trucks; in other words, about 100 or 150 tons by truck, 10 or 12 or 15%.

Redirect examination by Mr. BROMLEY:

Q. I wish you would look at this map again, Mr. Conover, because I have just been told something I did not realize before, and that is that no attempt has been made on the map to show the tracks of industries other than Bethlehem Steel. Will you look at that and see whether your tracks are shown——

Mr. CRAIG. Just a moment. What was that statement?

Mr. BROMLEY. You heard it, Mr. Craig. You did not ask us to prepare a map that showed any but the tracks to the west of the Hamburg Turnpike, so far as shippers were concerned. I am now told that is all that this thing does show.

Mr. CRAIG. On this map it has got other industries' track in green and they are all over this map, in connection with industries other than Bethlehem Steel Company.

Mr. BROMLEY. Yes, it shows the leads, the start of the tracks into other industries, but not the detail of the tracks into the industries; isn't that right?

1022 Mr. CRAIG. I know what the map says. It says "Other industries' tracks."

Mr. BROMLEY. Well, I now desire to make the point that it does not show it accurately, whether it says so or not.

The COURT. Your point is it does not show the tracks on the industry property? That is your point?

Mr. BROMLEY. That is right, sir. And I do not think it even shows all of our leads to the industry property.

Mr. CRAIG. Well, if they did not make the map properly, I don't know. They made it and supplied it to us. I don't know whether they made it accurately. I have never even seen this property.

The COURT. Well, it may have been forethought because—the position he takes now, with reference to the materiality of the testimony—he may describe it. Describe the location of these tracks on the property of the individual industries.

Mr. BROMLEY. I think his description is adequate. I still wanted to make sure that my information was correct, Mr. Conover, and that your tracks are not shown on the map.

The WITNESS. I mean, there is just three lines there, but I can-

not tell really—you know—the scale. I am not much of a map fellow.

1023 The COURT. Is there anything there indicating the tracks on your property?

The WITNESS. Well, your Honor, there is a few little dotted lines here that would indicate—I mean, if I would just look at that, they were to represent the tracks coming up. It isn't complete, because, I mean, it doesn't show—we got a little spur up there, and there is two tracks on the south side. In other words, there is one track missing. But there is a little indication there, little dotted lines; that is, when I looked at it before, to be frank, I thought those were what those little lines meant.

By Mr. BROMLEY:

Q. The fact is they are not complete, isn't that true?

A. No, they are not in detail complete.

Q. One other thing: I forgot to ask you, Mr. Conover, whether any of the traffic which you gave to the South Buffalo Railroad is traffic shipped entirely within Buffalo switching district?

A. You mean by that cars of feed which we load or which we purchase? In other words, we receive ingredients from certain suppliers in the Buffalo switching area, such as Washburn Crosby or General Mills, which is wholly within the Buffalo switching district. The reason I mean I hesitate in answer-

1024 ing the question, I cannot remember any place where we loaded a car out within the Buffalo switching district, but I would still have to qualify that. I am not too sure exactly how far the Buffalo switching district extends, and there may have been a case in the last ten years where we did switch a car of finished feed within the city, but——

Q. Looking at the other side of the picture, you do receive traffic which originates within the Buffalo switching district?

A. Yes; no question about that.

Q. In fact, that traffic which moves within the Buffalo district to your plant is substantial, is it not?

A. Yes; it is.

Q. Can you give me what percentage of the total traffic?

A. I could not do that with any degree of accuracy without looking it up.

Q. Well, would it amount to as much as five percent of the total?

A. Oh, it would amount to more than five percent.

Q. Do you know the difference, Mr. Conover, between absorbed and nonabsorbed switching charges?

A. Yes. I mean, I have a very rough idea as to what that is.

Q. Can you tell us what it is?

A. Well, on shipments or ingredients which come in
1025 under certain rules and regulations of the tariffs, or whatever they are called, if they are sent out on, outside of the city or outside of Buffalo switching district, the outgoing—what we call, make a claim on the carrier that hauled it away, the switching which we have paid to get it to our plant is refunded, then it means that that is absorbed. If it is unabsorbed, why, it means we paid the switching to your plant and that is the end of it. I mean, you paid it, just as if you had the stuff brought in by truck.

Q. So that a great part of your business, 95% or thereabouts, is made up, so far as the city of Buffalo is concerned, of absorbed switching charges?

A. Yes.

Q. Now, that means that you pay the whole freight rate to the trunk-line carrier?

A. That is right.

Q. And then you file a claim and get back a part of that that goes to South Buffalo—well, I will withdraw that. And South Buffalo gets a part of that freight rate from the trunk-line carrier?

A. That is my understanding. Of course, on this I mean you are kind of out of my field. I would like to have my traffic man-
ager here and he could answer this, talk about this for two
1026 hours and a half, and I would not know anything about what he is talking about.

Q. That is why I would not like to have him here.

A. I have been asking him these same questions you have been asking me for eleven years, and from my answers to you you see how much I have absorbed.

Q. Well, at any rate, for this small amount of traffic that moves to you within the Buffalo switching district you pay the South Buffalo directly, do you not?

A. Yes. I know about that because I see the checks.

Q. And you know that is called a nonabsorbed freight charge?

A. That is right.

Mr. BROMLEY. That is all.

Mr. CRAIG. If the Court please, for the record, on this redirect the plaintiff will move that there be stricken the testimony of the witness Conover concerning the service rendered to him by the South Buffalo Railway Company and the Maritime Milling Company.

The COURT. Denied. And exception.

Frederick R. Schultz, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Schultz?

1027 A. 214 Tuscarora Road, Buffalo, New York.

Q. Your business is what, sir?

A. I am Traffic Manager for the Buffalo Slag Company and all its affiliated companies, which is the Federal Portland Cement, Federal Crushed Stone, Hornell Gravel, Bituminous Products, Allied Bituminals.

Q. Of this group of affiliated corporations, the Buffalo Slag Company is the parent corporation, is it?

A. That is true.

Q. How many of these affiliated corporations are located on the line of the South Buffalo Railway, if any?

A. The Buffalo Slag Company's plant at Lackawanna and the Federal Portland Cement, and also the Bituminous Products have a plant out there also.

Q. The plant of the Federal Portland Cement is to the south, so far as the right-of-way of the South Buffalo Railway is concerned, is it not?

A. I would say, if that is the south there [indicating]; yes; the far end.

Q. It is down on the Hamburg Turnpike, south of the Lackawanna plants and south of Woodlawn, is it not?

A. That is correct.

Q. Where is the Buffalo Slag plant?

A. The Buffalo Slag Company would be east of the Hamburg Turnpike, on the branch that runs between the Bethlehem

1028 Steel Company and the Republic Steel, between the Pennsylvania Railroad and the Hamburg Turnpike.

Q. I put my pencil here, to the east of the Hamburg bridge, up near the Pennsylvania interchange tracks [indicating on map]. Is that about the location of the Buffalo Slag?

A. I will have to look. Is this the same map here [referring to Exhibit 2]?

Q. Yes.

The COURT. What number is that, Mr. Bromley?

Mr. BROMLEY. 13, sir.

A. That is the interchange track in the Buffalo Slag. This is the Pennsylvania [indicating].

The COURT. Indicating a certain point on the map, the point in question?

Mr. BROMLEY. Yes, sir.

Q. For how long a time have you been connected with the Buffalo Slag?

A. 27 years.

Q. And with Federal Portland Cement?

A. Since it was built, back in 1926.

Q. What railroads serve the Buffalo Slag plant?

A. The South Buffalo serve it from one end and the Pennsylvania Railroad from the other.

Q. What can you say about the amount of business that is given to the South Buffalo and to the Pennsylvania?

1029 A. In tonnage or in cars, or over what period?

Q. No. Do you give the majority of your business to one road or the other, and, if so, which one—take interline business?

A. I would say it is about a 50–50 break.

Q. Is that true of interline business?

A. Most of the interline business moves over the South Buffalo Railroad.

Q. And what is the reason for that?

A. Well, we have always felt that the service that is given us by the South Buffalo Railroad through the interline points has been more regular and more dependable and therefore it has been our established practice——

Mr. CRAIG. I move that that answer be stricken.

The COURT. Strike it out. Describe the service.

Q. Well, will you tell us what kind of interline service is rendered to you by the South Buffalo Railway?

A. Well, of course, in that respect the South Buffalo Railway bring the cars in, either by loads or empties, as we might need them, to an interchange point, and we handle them ourselves, of course, whenever we want them. They go over the Erie Railroad or South Buffalo or D. L. & W. or New York Central. Of course, we deliver them to the interchange track and the South Buffalo delivers them to the interline carriers.

1030 Q. Can you compare the service that is rendered to you by the South Buffalo with the service that is rendered to you by the Pennsylvania?

Mr. CRAIG. I object to that, your Honor.

The COURT. Comparison in what respect? If he is able to get cars more quickly, as needed, from one road than the other, he may so state. The question is indefinite and broad, it seems to me.

Q. Well, will you tell us that, Mr. Witness.

A. Well, as Traffic Manager, I know from our experience——

Mr. CRAIG. Wait just a moment, please. Do I understand—just what is the question, Mr. Bromley?

Mr. BROMLEY. The question is the question that his Honor asked, Mr. Craig.

Mr. CRAIG. Well, of course, I can get the record in shape so I can object to the question by Mr. Bromley.

The COURT. Read the question.

The reporter read the Court's question as follows: "Comparison in what respect? If he is able to get cars more quickly, as needed, from one road than the other, he may so state. The question is indefinite and broad, it seems to me."

1031 A. I answer in this respect, because the geographical location of our plant, where we are served by the Pennsylvania Railroad and its ore dock location where they have to render service to the connecting lines, is not as accessible, therefore it is always to our advantage and our customers' advantage to ship it over the South Buffalo Railway, because their location with the interchange lines is better located; and our experience has been that when we turn cars over to the South Buffalo Railroad they are delivered to the interchange lines by midnight, and we cannot depend on that service from the Pennsylvania Railroad.

Q. Does the Buffalo Slag Company have other plants that you have not mentioned?

A. Oh, yes; we have a slag plant on the River Road at Harriet, which is served by the New York Central, but it is on the Wonalancet Branch. It is down on the New York Central, the Delaware and Lehigh. Then we have a slag plant at Erie, Pennsylvania, which is served by the Pennsylvania Railroad. We have a sand and gravel plant at Machias, New York, which is served by the Pennsylvania Railroad.

Q. Can you tell us something about the character of the service rendered at those plants with regard to frequency and efficiency of service as compared to the service rendered to your Buffalo plant by the South Buffalo Railway?

Mr. CRAIG. I object to that question.

1932 The COURT. I think that is objectionable. I think conditions may be different at these other points to which he referred; a long distance from here. Objection sustained.

Q. When the plant of the Federal Portland Cement Company was opened, as you have stated, did the South Buffalo Railway make any extension of its tracks in order to serve that plant?

A. I believe they did, down as far as our property line; from there on we built our own tracks to tie in with it.

Q. Did you carry on negotiations and arrangements with the South Buffalo Railway in that respect?

A. Well, not directly. Our Engineering Department did. Of course, I was in with them on it.

Q. Who did you talk to on the South Buffalo?

A. I believe Mr. Benning was the man in charge at that time.

Q. Did you talk to anybody in the Steel Company?

A. No.

Q. What can you tell me, if anything, about special service, if you get it, at the Buffalo Slag plant from the South Buffalo Railway?

A. Well, we have what we call a normal service operation, the same as you do any other place. Our cars are loaded, we spot them with our own locomotive.

Q. Do you ever get special service from the Railway?

1033 A. Well, of course, occasionally we have rush cars, and we have called them up and they have come in and give us an extra switch, if that is what you call special service.

Q. That is what I mean. If you made a request of them they did come in and get a car for you and deliver it specially, or in a hurry, did they do that for you?

A. Oh, several times.

Q. At the plant of the Federal Portland Cement Company is there such a thing as a loading trestle that runs up in the air, with tracks on?

A. Well, we have what we call our trestle where we put hopper cars up there to unload, such as gypsum and limestone. That is our trestle track. Yes, we have that.

Q. That means that the track goes from the ground level up a grade up onto a trestle, does it not?

A. That is right.

Q. And that there are underneath the trestle track bins for the reception of gypsum and stone and things like that?

A. That is correct.

Q. And the cars are unloaded, hopper cars, by opening the——

A. The doors.

Q. [Continuing.] The doors in the bottom, and the raw

1034 material is allowed to run down onto the trestle into the bins; is that right?

A. That is right.

Q. Who pushes the cars up on top of the trestle?

A. South Buffalo Railway.

Q. Who spots them over the loading bins after they get them up on top of the trestle?

A. South Buffalo Railway.

Q. Does the Federal Portland Cement Company ship cars over the South Buffalo which are destined to points within the Buffalo switching district?

A. Why, a few. We do not have as many in late years as we used to have, because the trucking given us increased to the point where our local switching business is down to a minimum.

But we do have deliveries, we will still receive cement by cars in the Buffalo switching area.

Q. Do you receive loaded cars which originate in that area?

A. Yes; some.

Q. And can you tell me the difference between absorbed and nonabsorbed switching charges?

A. Well, the switching charges are when the cars move on the road-haul traffic where there is a published through rate and there is a rate upon the road-haul carrier to the South Buffalo and Pennsylvania, that switching or local switching that is not
1035 absorbed; and the combinational switching rates constitute the rate that you charge.

Q. Where the shipment originates and terminates on the lines of the South Buffalo, that is just one rate? That is a rate paid to that Railroad, is it not?

A. That is a local rate to the South Buffalo.

Q. Where the shipment originates and terminates within the Buffalo switching district, but passes over the South Buffalo and a part of some other carrier, still within the district?

A. Combination of the two.

Q. Then there is a combination of the two?

A. That is right.

Q. Where the shipment, however, goes out over a trunk-line carrier, to Chicago or New York City or Boston, then there is one freight rate paid by the shipper or consignee?

A. That is right.

Q. However, the trunk-line carrier pays to the South Buffalo a part of that freight rate for the switching terminal service rendered to the trunk-line carrier by South Buffalo; is that right?

A. I think that is the way it is handled between the trunk lines.

Q. What is the business of the Buffalo Slag Company, briefly?

1036 A. Why, we crush and screen blast furnace slag for chemical work, such as railroad ballast, road building, concrete work.

Q. From what suppliers, if any, on the South Buffalo do you get slag?

A. Republic Steel, Hanna Furnace, Bethlehem Steel.

Q. And that comes to you over the South Buffalo Railway Company, does it not?

A. From the Republic Steel; yes. The other lines, we handle them, out of Hanna Furnace we handle it in our own car; and at the Bethlehem Steel Company we have no plant, we used to load up cars and ship it, and now over there we just load it in trucks in rough form.

Q. Is the Buffalo Slag Company building any new plant out there?

A. We are contemplating a new crushing plant on the South Buffalo Railroad over at Woodlawn, just as soon as we can get the materials to build it.

Q. Will that plant be served by anybody else other than the South Buffalo?

A. South Buffalo only.

Q. Have you been satisfied with the service rendered to you by the South Buffalo at these two plants?

A. We have no complaints to offer. We have our problems with all lines.

1037 Mr. CRAIG. I object to that.

The COURT. Objection sustained.

Mr. BROMLEY. That is all.

Mr. CRAIG. Now, for the record, the plaintiff moves that all the testimony of the witness Schultz relative to the service rendered by South Buffalo Railway Company to Buffalo Slag Company, Federal Portland Cement Company, be stricken from the record.

The COURT. Overruled, with an exception to the plaintiff.

Cross-examination by Mr. CRAIG:

Q. Mr. Schultz, relative to the Federal Portland Cement Company, it is a fact, is it not, that there is no South Buffalo track within the limits of the Federal Portland Cement Company property?

A. Well, I can answer that; we have a private siding, and that is applicable to all trunk lines, that the sidings on the private property is your own and the railroads only build their track to your property line or to the clearance point. That is common practice in all lines.

Q. Now, I will ask you again whether or not there is any South Buffalo track on the Federal Portland Cement Company property?

A. No, there is not.

1038 Q. And isn't the same thing true in connection with Buffalo Slag Company?

A. That is true. We have our own private siding, interchange track.

Q. Isn't it true that when a South Buffalo locomotive and crew finish a particular job for either of these companies to which you have referred that the locomotive and crew depart?

A. Why, yes; naturally.

Q. That is, the crew does not stand by?

A. We line up the cars; we have our own locomotive at the Slag Plant; we line up the cars and place our empties on the interchange track, and our billing clerk makes up the bills, the

conductor comes in and gets his bill and hook onto the cars and take them out. And that applies to either end, whether it is the Pennsylvania end or the South Buffalo end.

Q. That is, when a given job is completed, why, the locomotive and the crew go about some other business, do they not?

A. I assume so.

Q. That is, they do not stand by, awaiting further orders from you for any other jobs?

A. Well, we do not have—it is not necessary for that.

Q. Well, you don't do it either. It is not done, is it?

1039 A. I would not say it is common practice, though.

Q. Is it ever done?

A. I would not say so. They might stand there on their own volition or wait for a particular car to get loaded; it happens only occasionally.

Q. You do not give them any orders to stand by there, do you, for them to stand by?

A. No; we do not give any orders.

Q. Are either of these companies engaged in any line of business which requires prompt move of any of your products, other than mere matter of convenience?

A. No; I would not say so; just the ordinary movement.

Mr. CRAIG. That is all.

Redirect examination by Mr. BROMLEY:

Q. How do our train crews receive instructions as to spotting on your Federal Portland Cement trestle?

A. How do they get the instructions? Well, first of all, of course, we call the South Buffalo Yard Department and give them an outline of what we want, and then the crew comes down and our yard man turns over to the yard conductor of the South Buffalo a list of what he wants done. And that is the way it is generally worked out.

Q. Does the Yardmaster oint out to the South Buffalo

1040 conductor just where he wants the cars put, with reference to the unloading bins on the trestle?

A. Oh, as a rule, yes; we tell them to spot them at this bin or that bin. Of course, they understand that from coming down so often, they know what we want.

Q. So it is no longer necessary to issue specific instructions to them from day to day; is that right?

A. Well, we do, because of the different commodities that are in the cars. They do not have to climb on the cars. We tell them "this car has got a car of gypsum; this car has a car of coal," and where to spot them.

Mr. BROMLEY. That is all.

WILLIAM B. FAULKNER, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Faulkner, please?

A. In Buffalo, New York.

Q. Your business is what?

A. Traffic Manager of the Donner-Hanna Coke Corporation.

Q. For how long a time have you been connected with that corporation?

A. 21 years.

Q. Its plant is located where, referring to the map here
1041 on the stand?

A. It is located at the north end of the South Buffalo Railway, connecting with what is known as the South Buffalo Station C Yard.

Q. It is shown on this map by a figure 2 and is at the left-hand edge near the north end of the Railway; is that right?

A. That is right.

The COURT. Near the No. 2?

The WITNESS. No. 2; yes, sir.

Q. What business is conducted at that plant of the Donner-Hanna Coke Corporation?

A. We manufacture coke and its chemical byproducts.

Q. In that process as raw materials you use what, sir?

A. Principally coal, bituminous coal.

Q. Anything else?

A. Acid, lime, soda ash, fuel oil, absorption oil; various other things.

Q. But all, or most all, of the raw products which you have mentioned come into that plant over the railroad?

A. Over railroad, yes; by rail.

Q. What railroads serve the Donner-Hanna Plant?

A. South Buffalo, Baltimore & Ohio, Delaware, Lackawanna & Western.

Q. Where does the coke which you manufacture from
1042 these raw products go?

A. In ordinary times, the majority of it to blast furnaces; coke goes 50% to Republic Steel Corporation and 50% to the Hanna Furnace Corporation.

Q. And are both the plants of both those companies located on the South Buffalo?

A. They are both on the South Buffalo Railway; but the coke for the Republic Steel Corporation goes to them from our plant over their own cross-over. It does not go onto the South Buffalo.

The Hanna Furnace coke moves over the South Buffalo Railway.

Q. What can you tell us, if anything, about the necessity for that coke to move regularly on schedule?

A. It is not exactly schedule, but it has got to move within a few hours after it is spotted for movement from our plant to the Hanna Furnace Corporation. Perhaps the normal rate would be 30 to 35 cars a day; and, depending on the weather and the power involved, they may pull it in drags of 10 or 15 or 20 cars, whatever they are able to take. And we try to tell them as near as possible each day when those drags will be ready for them to move.

Q. You mean you try to tell the South Buffalo Railway?

A. That is right.

Q. How much leeway do you give the South Buffalo
1043 Railway with respect to the time they have to move the coke after you tell them?

Mr. CRAIG. Now, your Honor, I will interpose my objections, as I have heretofore, in connection with service rendered by South Buffalo Railway to the Donner-Hanna Coke Company. I object to its admission on the ground it is irrelevant and immaterial.

The COURT. Overruled. Exception to the Government.

Mr. CRAIG. And may we have the same stipulation relative to not repeating the objection?

Mr. BROMLEY. I agree.

Mr. CRAIG. In case I have missed it relative to any other witness, may we have an understanding there too, rather than to go back?

Mr. BROMLEY. I agree. Will you read the question?

Q. (Question read by reporter as follows: "How much leeway do you give the South Buffalo Railway with respect to the time they have to move the coke after you tell them?")

A. That all depends on the amount of other business we have over the South Buffalo Railway, whether it is in-bound coal or whether it is empties to pull. We try to coordinate all of our business with the Road so as to prevent any interference. In other words, I would say, roughly, maybe four to five hours on the coke.

1044 Q. What is the necessity for the regular movement of coke to the consignee over the South Buffalo?

A. Because that is used in their blast furnaces for the manufacture of pig iron. It has to move regularly so that it can be moved to the furnaces regularly; and at the same time we have only so much room in our yard for the accumulation of cars.

Q. That consignee is what, the Hanna Furnace Corporation?

A. Hanna Furnace Corporation.

Q. And the Hanna Furnace Corporation manufactures what?

A. Pig iron.

Q. So they have blast furnaces?

A. That is right.

Q. And they use the coke in the blast furnaces?

A. Yes, sir.

Q. Isn't it a fact that the Hanna-Furnace Corporation has no stock pile of coke?

A. Ordinarily, no. They usually have a little, but it is not—cannot be used from day to day; it is not accessible.

Q. So they depend upon a regular receipt over the South Buffalo for cars of coke which you manufacture, load, and ship to them; is that right?

A. That is right.

Q. And would the failure of the South Buffalo to move
1045 this coke with regularity interfere with your schedule of production of the coke at your plant?

A. It would, if the cars piled up on track that we did not have room to store any more; yes.

Q. Likewise, would such a failure on the part of the Railway interfere with consumption at the Hanna Furnace of the coke and the resultant production of pig iron?

A. If the delay was of any appreciable extent; yes.

Q. How does the Donner-Hanna Coke Corporation get the coal from which it makes the coke?

A. In part some of it moves into Buffalo all rail from the mines; and during the season of navigation a certain amount of it comes in by water over the docks of Republic Steel Corporation and Hanna Furnace Corporation; then it is put into cars and switched into our plant.

Q. Does the coal which comes all rail come to you from the Pennsylvania or South Buffalo?

A. Comes into Buffalo over various railroads; under ordinary circumstances that that moves into Buffalo on the Pennsylvania we switch into our plant over the South Buffalo Railway.

Q. Turning your attention to coal coming in by boat, where is it unloaded from the ship?

A. Either at the docks of the Republic Steel Corporation or the docks of the Hanna Furnace Corporation.

1046 Q. And that coal is transported from those docks to the Donner-Hanna Corporation how?

A. In our own railroad equipment.

Q. You mean private cars?

A. Private cars, either from the Hanna Furnace Corporation over the South Buffalo Railway, and from the Republic Steel Corporation over their own cross-over.

Q. Are those private cars hauled by South Buffalo Railway locomotives over South Buffalo tracks?

A. Yes, sir; they are.

Q. What can you tell us about the necessity, if any, of special or frequent service during such time as a shipload of coal is being unloaded and shipped in your private cars to your own plant?

A. We try to give the South Buffalo Railway as much advance information as we possibly can as to the time of the arrival of the boat and when it will start unloading; we also try to give them information as to the number of empty cars that the Hanna Furnace Corporation will have available and how soon we will need coal, so that we can make the cars empty and get them back to the Hanna Furnace before the boat is unloaded. And, at the same time, we try to give an idea of the tonnage of the boat and how many cars will be required.

Q. Well, there is a necessity, then, for the Railroad to
1047 run the empties back to the loading boat dock promptly?

A. A certain number of them. In other words, it all depends on the size of the boat.

Q. Does that mean that the Railway must furnish extra power to accomplish that rapid movement of empties back?

A. At times they do; yes.

Q. And when you request that does the Railroad perform that service and furnish that power?

A. Well, I would not say it was just performing that; it is just that business that has to be performed within a certain length of time and the power is necessary to handle that additional number of cars.

Q. The Railroad always seems glad to do it, does it not?

A. Yes, usually.

Q. What about cars that are made empty, cars of coal that are made empty by dumping at the Donner-Hanna plant?

The Court. You mean dump those cars?

Mr. Bromley. No, I will withdraw that question.

Q. I want to direct your attention, Mr. Witness, to cars of coal that come in through interchange that are emptied at the Donner-Hanna plant by dumping the coal out of them. That does happen, does it, regularly?

A. That is right.

Q. Does it ever happen that those cars empty are not pulled away promptly, they are allowed to remain on
1048 South Buffalo tracks because the South Buffalo Yardmaster knows that you will have need of empty hoppers?

Mr. Craig. I object to that.

A. No.

Mr. Craig. Just a minute.

The Witness. Excuse me.

The Court. Well, he can state the facts.

Q. Will you state the facts about that?

A. Well, no, we do our own switching within our own plant and we handle the cars after they are delivered to us, we unload them and we spot them on tracks for delivery to South Buffalo Railway or other railroads to which they are going, and they pull them from our plant; and there is a physical limitation as to how long they can stay there. They usually have to get out of there within—it depends on the amount of business—within ten to twelve hours.

Q. You mean out of your plant?

A. That is right.

Q. The empties have to be pulled by the Railroad within ten or twelve hours?

A. That is right.

Q. Now, I was directing your attention to the situation after the Railway has taken these empties: Don't you find that
1049 the Railway holds them on its tracks for possible further use by you?

Mr. CRAIG. I object to that.

A. No, sir.

The COURT. The question is leading.

Mr. BROMLEY. I will withdraw it.

Mr. CRAIG. I don't know whether this witness is competent to tell about South Buffalo practice.

The COURT. He may state of his own knowledge. That is very true. The objection is sustained.

Q. What happens to those empty cars after the South Buffalo has taken them out of your plant?

A. I don't know what happens to them. That is, if this is railroad equipment you are talking about, or our own equipment?

Q. The Railroad interchange cars.

A. Interchange cars, I don't know what happens to them; they are either given to another industry or send them back to the Road from which the loads were received.

1050 Q. Hasn't the Donner-Hanna Coke Corporation plant need of foreign-owned hopper cars?

A. It all depends. Right now; yes. That is with the blast furnaces not working and us making coke we are shipping a lot of coke in railroad-owned equipment, but as we make those empty we cull out of those the ones that we want and use them immediately, and the cars that we do not need we send to the railroad. We have no room to hold any appreciable amount of equipment in our yard.

Q. What is the practice, if you know, with regard to giving instructions to a South Buffalo conductor? How does he get those instructions from your Company?

A. Ordinarily we work with the South Buffalo yardmaster of what is known as the Junction Yard, and the conductor gets his orders from him, but when he comes up to our plant he usually comes in and gets in touch with our yardmaster and gets instructions as to where to put his train.

Q. Your company does not have and cannot have always designated tracks on which you want cars put; is that right?

A. Not in all cases; no. Whatever tracks are available we will have him put his train away there.

Q. When that situation arises it is handled by someone
1051 from your company telling our conductor on the spot where you want the cars put; is that right?

A. Yes, sir.

Q. And it is likewise true that you will tell the South Buffalo Railway which cars you want to get first as between empties from Hanna Furnace and coal for Donner-Hanna Corporation?

A. At times; yes.

Q. And the South Buffalo does in that respect what you ask it to do, doesn't it?

A. In most cases.

Q. Can you tell me whether or not it is not the fact that Station C territory is a highly congested territory?

A. At times it is; yes. In other words, they haven't got very much room to do any classification there.

Q. You mean the South Buffalo hasn't?

A. That is right.

Q. What about its yard capacity in that territory?

A. I don't know what its yard capacity is, but I know ordinarily it is usually full and at times it embarrasses them.

Q. And how long a time is required for the service which the Railway performs in switching at Donner-Hanna as a rule?

A. On their in-bound it all depends on how fast a man
1052 can walk and get in touch with our yardmaster and put his train away. On the out-bound usually he has to pump his air and, when the train is ready for him, he can hook on and go when he gets his orders.

Q. Has the Donner-Hanna increased its capacity or facilities over the last 15 years?

A. About 40 per cent.

Q. And has the railroad furnished all the service you desire during that period of increase?

A. All that we have asked them to furnish; yes.

Q. In your dealings with the Railroad what is the fact as to whether or not you deal with any officials of the Bethlehem Steel Company?

A. No; we don't bother with the Bethlehem Steel Company. We deal with the South Buffalo Railway officials entirely.

Mr. BROMLEY. That is all.

Mr. CRAIG. For the record, the plaintiff moves that the testimony of the witness be stricken relative to service rendered by the South Buffalo Railway Company to the Donner-Hanna Furnace Company.

The COURT. Denied, and an exception to the plaintiff.

Cross-examination by Mr. CRAIG:

Q. Mr. Faulkner, are there any tracks of the South Buf-
1053 falo Railway Company on the property of the Donner-Hanna Coke Corporation?

A. No; they are not.

Q. Do I understand that your Company, the Donner-Hanna Coke Corporation, does its own switching?

A. That is right.

Q. Within your plant property which you have located how many of your own tracks are there?

A. 28.

Q. And what means do you use of doing your own switching?

A. We use locomotives. We have got two 100-ton locomotives and one 40-ton locomotive, and we probably use ordinarily five 8-hour tricks with those locomotives in 24 hours.

Q. Where do you receive from the South Buffalo Railway Company the cars which you do receive from it?

A. On our out-bound we usually build that up on certain designated tracks unless there is—if there is an overflow we will put it on others, and on the in-bound as the coal comes in—which in most cases it is coal—we tell them where to put the trains. That is without switching. They may make one or two cuts and in most cases put the whole train away without any switching.

Q. That is they spot those cars?

A. No; they don't spot them. They just shove them in on cer-
tain designated tracks.

1054 Q. After that is done you do your own spotting; is that right?

A. Yes.

Q. And any switching that is required you do yourself?

A. Yes, sir.

Mr. CRAIG. That is all.

CHARLES T. BOLDT, a witness called by and on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Boldt?

A. 214 Lisbon Street, Buffalo, New York.

Q. And your business is what?

A. Purchasing Agent and Traffic Manager of Bliss & Laughlin, Inc.

Q. Where is the Bliss & Laughlin plant in Buffalo located?

A. 110 Hopkins Street, South Buffalo.

Q. Is that on the line of the South Buffalo Railway?

A. Yes, sir.

Q. Does your company have only one or more than one plant on the South Buffalo Railway?

A. We just have the one.

Q. What is manufactured in that plant?

1055 A. Cold drawn steel shafting.

Q. Anything else?

A. That is all.

Q. What is the operation in the manufacture of cold drawn steel shafting?

A. Either drawing, turning or turning and grinding.

Q. What is the raw material or materials which you receive?

A. Hot rolled shapes, round, hexagon, squares, and flats.

Q. Where does that raw material come from?

A. Several hot roll mills.

Q. Such as what?

A. The Bethlehem Steel Company, the Carnegie-Illinois, the Republic, American Steel & Wire, Youngstown Sheet & Tube, and Timken.

Q. And how does it come to the Bliss & Laughlin plant?

A. Usually in gondola cars.

Q. Over the South Buffalo Railway?

A. Yes, sir.

Q. Is your plant served by any other railroad?

A. No.

Q. Now, looking at the map you say the plant is up near Hopkins Street?

A. Yes, sir.

Q. Can you see this map? I am pointing to No. 7 between

1056 Germania Street and Hopkins Street to the north of Colgate Avenue and the right of way of the railroad; is that it, No. 7 [indicating].

A. That is right.

Q. How many shifts or switches a day does that plant receive from the South Buffalo Railway Company?

A. Two to three.

Q. About what times do they occur?

A. There is one—we ask for one switch between midnight and

7 in the morning and another one around noon, and one around 6 o'clock at night.

Q. Do you ever ask for special switching or special service other than these three switches you have mentioned?

A. We have rarely, but not very often.

Q. Do you get it when you ask for it?

A. We have.

Mr. CRAIG. For the record, the plaintiff objects to the introduction of any service rendered by the South Buffalo Railway Company to Bliss & Laughlin, Inc., as testified to by this witness, and in connection therewith if the motion is overruled, we stipulate that it will not be necessary to repeat the objection.

The COURT. Overruled.

Mr. CRAIG. We make the same stipulation?

1057 Mr. BROMLEY. I agree.

By Mr. BROMLEY:

Q. Where does the South Buffalo place such empty cars as it switches into your plant?

A. We have what is known as a depressed track which is at the south end of our property.

Q. What kind of a track did you say?

A. A depressed track.

Q. What does that mean?

A. It is about three to four feet below car door level. It is even with the car door when the car is placed. It is similar to a platform.

Q. Do you have any unloading crane or cranes out there?

A. This is the loading now. The unloading is on the other track, which is the north track, and about 500 feet long, and on that we use all gondolas there, which cars are placed with a crane.

Q. Is that a moveable or a fixed crane?

A. That is a movable crane.

Q. Does the railroad spot cars on exact spots as ordered by your company?

A. They do.

Q. And so far as loading cars are concerned, are they placed under the crane runway?

A. They can only be placed where there is a track parallel

1058 to the crane. They don't do any special spotting of cars with the crane.

Q. But so far as empties are concerned they are especially spotted in special places; is that right?

A. That is right.

Q. And that is done by the Railway Company?

A. Yes.

Q. You have no means of doing your own intraplant switching, have you?

A. No, sir.

Q. Or in fact, you have no means of doing any switching at all, and all the switching that is done for you is done by the South Buffalo Railway Company?

A. Yes, sir.

Q. How are orders for the shifting of cars given to the South Buffalo Railway Company?

A. The production department places the order with what is known as Station C with the yard clerk or the yardmaster, designating what cars he wants placed for loading, either box or gondola. There is no specific spotting of them, but on the north track the cars are unloaded by car number, taking the oldest car first usually.

Q. What do you mean by "taking the oldest car first usually"?

A. We have not enough room at our plant to store all the
1059 cars that come in, and they have facilities down there for storing cars at the station which we order out by number.

Q. When you say you order out the oldest car, you mean the one that has been on the South Buffalo Railway tracks the longest time?

A. Constructively placed.

Q. Constructively placed the greatest length of time?

A. Yes.

Q. And you order those cars out by car number?

A. That is right.

Q. Do you ever order South Buffalo to deliver cars, later arrived cars, ahead of earlier arrived cars?

A. We may have to, yes. We have.

Q. Will you give us an illustration of the kind of a situation which would cause that kind of an order?

A. It may have been delayed somewhere on the trunk line. We urgently needed it to finish other cars that we were making up and we would bring that car in ahead of the other car.

Q. And when you give that kind of an order to the Railway does it execute the order as requested?

A. It does.

Q. What do you know about whether or not the Railway holds empties for you in advance of your ordering them in
1060 for loading?

Mr. CRAIG. I object to that, what the railroad does. I do not think this man is competent to testify about that practice.

Mr. BROMLEY. Well, if he knows.

The COURT. He can only state his personal knowledge, that is all.

The WITNESS. It is common practice for different railroads to hold cars for you so that you can get your loading done.

Mr. CRAIG. I move to strike that out.

The COURT. Strike it out.

Q. Does the South Buffalo Railway Company hold empty cars for you in anticipation of your need for them?

A. Yes, they do.

Q. And have they done that right along?

A. Yes, sir.

Q. Have you any connection as assistant traffic manager with any other railroad?

A. No, sir.

Q. Serving any of your plants?

A. No, sir.

Q. When was this plant at Buffalo built?

A. In the Fall of 1928.

Q. And can you tell me whether in order to reach your
1061 plant it was necessary for the South Buffalo Railway Company to extend its lines?

A. It was not.

Q. What was done?

A. I believe there was a little exchange of land to get our switching points into our spur. I am not familiar with it. That was taken up with Mr. Benning and Mr. Carpenter, who was the engineer in charge at that time.

Q. And you don't know whether the South Buffalo Railway had to build additional tracks or not?

A. They didn't have to build any additional tracks; no, sir.

Q. You built your own tracks?

A. We put our own spurs in, yes.

Q. Did the South Buffalo Railway do that work for you, do you know?

A. No, not at that time. They do now.

Q. Has there been any increase in the output of the plant since it was built and opened in 1929?

A. It is about two and a half times larger now than it was when we originally built it.

Q. And has that necessitated increased service from the South Buffalo Railway Company?

A. Not too much. It gives us a few more cars to come in. We have also increased our unloading facilities down
1062 there at the same time.

Q. Have you got the increased service that you needed from the South Buffalo Railway Company, Mr. Boldt?

A. We have so far; yes, sir.

Q. What is the situation with respect to whether or not the South Buffalo Railway holds cars that are consigned to you loaded on its tracks?

A. We are notified when they are down there and they are constructively placed, and we are charged demurrage for them.

Q. Are there instances in which you are unable to take those cars?

A. Yes, sir.

Q. And when you are unable to take them isn't it a fact that the South Buffalo Railway Company holds them loaded on its tracks?

A. Yes, sir.

Q. Can you give us any idea how long that holding by the South Buffalo Railway of cars consigned to you amounts to?

A. From three to five days.

Q. Have you ever dealt with any official of the Bethlehem Steel Company so far as your relationships with the railroad are concerned?

A. No, sir.

1063 Q. Have you got any bell system down there for the opening of doors or gates?

A. No, sir.

Q. Have you got any gates across our tracks as they come into your property?

A. No, sir, we have not. They come into our property which is enclosed throughout on both tracks. They come in inside of our building. We have an electric roller door on each track.

Q. That is what I was trying to develop. Is your property enclosed by a fence?

A. No; it is in a building.

Q. And the South Buffalo pushes cars into the building; is that right?

A. Yes, sir.

Q. There is a rolling door across the tracks?

A. That is right.

Q. What kind of a door, a solid door?

A. A shutter-type. I can't think of the name of it. It is a roller-type door. It folds up. It gives you ample clearance. I think it gives you about 14 feet of clearance.

Q. Do you normally keep those doors closed?

A. Yes, sir.

Q. And those doors go right across the tracks?

1064 A. Yes. They are our own tracks, by the way.

Q. How do you get the doors open?

A. There is an automatic switch there. You just press the button. The South Buffalo conductors have keys to that with

their own locks on it to open that door. They are always available for people to come in.

Q. And the South Buffalo Railway Company conductors with the keys open the doors?

A. That is right. There is a regular switch lock on there.

Q. Do they personally use any warning button?

A. No, sir.

Q. They just open the doors whenever they want to?

A. Yes, sir.

Mr. BROMLEY. That is all.

Mr. CRAIG. For the record, the plaintiff moves that the testimony of the witness be stricken as relates to services rendered by the South Buffalo Railway Company to Bliss & Laughlin, Inc.

The COURT. The same ruling. Denied, and an exception.

Cross-examination by Mr. CRAIG:

Q. Mr. Boldt, there are no South Buffalo tracks on the Bliss & Laughlin, Inc., property, are there?

A. No, sir.

Q. You do not manufacture pig-iron at your plant, do you?

1065 A. No, sir.

Q. Or steel?

A. We cold-finish steel. We don't manufacture it.

Q. You don't have any blast furnaces on your property? You don't have any open hearths on your property, do you?

A. No.

Q. You spoke, I believe, about notification being given to you by the South Buffalo Railway Company when you were unable to accept delivery and the cars were being held on South Buffalo tracks; is that right?

A. That is right.

Q. I believe you referred to that situation as being constructive placement. You are notified that these cars are constructively placed in writing, are you not?

A. Yes, sir.

Q. By the South Buffalo Railway Company?

A. Yes, sir.

Mr. CRAIG. That is all.

The COURT. We will recess until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock p. m.)

1066 After recess, 2 o'clock p. m.

Appearances: Same as before noted.

WALTER B. CAYLOR, a witness called by and on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Caylor?

A. Hamburg, New York.

Q. What is your business?

A. I am Superintendent of Transportation of the Republic Steel Corporation, Buffalo District.

Q. And what plants, if any, has the Republic Steel Corporation on the line of the South Buffalo Railway?

A. The plant formerly known as the Donner Steel Company, the Donner plant of Republic Steel Corporation.

Q. How long have you been with the Republic Steel Corporation in the Buffalo plants?

A. I was with the Donner Steel Company since 1916, 30 years, until it was taken over by the Republic Steel Corporation.

Q. When was it taken over by the Republic Steel Corporation?

A. In 1930, I think.

1067 Q. What railroads serve the plant of the Republic Steel Corporation?

A. The D. L. & W., South Buffalo, and B. & O.

Q. Is that plant, looking at the map, on the north end of the railroad?

A. It is at the north end of Station C yards of the South Buffalo Railway.

Q. It is right here on the curve of the main line of the South Buffalo where it curves to the north [indicating]?

A. No; this is it down here [indicating]. That is property that we own out there for dumping purposes. This is the plant here [indicating].

Q. The No. 5 figures which occur twice on the map, once to the south of Marilla Street and once to the north of Marilla Street, with the legend "Republic Steel Corporation" at both places, indicates land owned by that Company; is that right?

A. That is correct.

Q. Is that land used in connection with the operation of your main plant?

A. Yes; we dump our steel plant refuse there.

Q. Does that mean slag?

A. Open-hearth slag, not blast-furnace slag.

Q. Open-hearth slag?

1068 A. That is right, and other refuse materials.

Q. Other refuse materials that are created by your steel manufacturing process in your plant; is that right?

A. That is right.

Q. Does open-hearth slag differ from blast furnace slag?

A. Yes.

Q. In what respect?

A. Well, it is much heavier and it is harder. It is not possible to crush it for ballast for road building purposes, the same as they do with blast-furnace slag.

Q. So that all you can do is to throw it away and make new land out of it?

A. We use a certain portion of it, but the output is much greater than our needs.

Q. So that you throw it away?

A. Yes.

Q. Your plant is located up here to the north and is indicated on the map by the figure 1, is it?

A. That is correct.

Q. And that is at the extreme north end of the South Buffalo Railway Company?

A. Yes, sir.

Q. Will you tell us what you manufacture at the Republic Steel plant?

A. We manufacture pig iron, ingots, blooms, billets, bars,
1069 and special sections.

Q. It is then what is ordinarily described as a steel mills?

A. That is correct.

Q. How much acreage do you have?

A. In the plant proper my guess is somewhere around 60 or 70 acres. I don't know exact.

Q. And how far away are the pieces of property on either side of Marilla Street on which you dump your open-hearth slag?

A. Approximately a mile and a half.

Q. What kind of cars are used to transport the slag from your steel mill to the dumping grounds?

A. Known as air dump cars owned by ourselves.

Q. They are then what we have been here calling private or industry owned cars?

A. Yes, sir.

Q. And they are so fixed that by the application of air from some source the car bodies can be tipped over and the contents dumped out?

A. That is correct.

Q. Who hauls those cars owned by Republic from loading place to dumping place?

A. The South Buffalo Railway hauls them from our interchange track; not from the loading place, but from the
1070 interchange track to the dumps.

Q. Where is the interchange track with reference to your property?

A. It is in the southwest corner of our property.

Q. Is it on your property?

A. Yes, sir.

Q. The South Buffalo locomotive or locomotives and crew haul those cars from that interchange track over to your dump grounds; is that right?

A. Yes, sir.

Mr. CRAIG. The Government makes an objection to that question on the ground that any service rendered by the South Buffalo Railway to the Republic Steel Corporation is irrelevant and immaterial, and in conjunction with this motion asks that the answer given by the witness be stricken from the record.

The COURT. The objection is overruled. The motion is denied.

Mr. CRAIG. May we have the same stipulation as heretofore that this objection will apply to other questions concerning operations?

Mr. BROMLEY. I agree.

By Mr. BROMLEY:

Q. When the cars are hauled up to your dumping grounds and placed for dumping, where do they get the air necessary
1071 to dump them?

A. From the South Buffalo locomotives.

Q. That air thus furnished by South Buffalo locomotives performs the same function as is sometimes employed in the form of steam to dump cars; is that right?

A. Usually ladles are dumped by steam and dump cars by air as far as I know.

Q. At least your privately owned dump cars are dumped by air?

A. Yes.

Q. And the air comes from the South Buffalo locomotive?

A. Yes, sir.

Q. Does that mean then that the locomotive has to stand there while the car is being dumped?

A. It does.

Q. And then does it haul them back when the dumping is over?

A. That is correct.

Q. Is there any regularity to that movement? When does it occur?

A. Almost universally we order the run at noon today for the run tomorrow morning and the engine starts at 7 o'clock, and usually is in our plant at 8. It goes and completes the job and brings the empty dump cars back to us.

Q. Do you run them only once a day?

1072 A. Yes, sir.

Q. What about what you have referred to as other refuse in addition to open-hearth slag; how is that carried and where?

A. You mean what that is comprised of?

Q. Yes.

A. We waste all our refuse at Marilla Street, but there is in addition brickbats, that is worn out brick, and some ashes that accumulate at the plant, and just general dirt and refuse, but the open-hearth slag is the bulk of it.

Q. In what cars is this just general refuse carried?

A. The same as the other cars.

Q. It moves along with the other cars?

A. Yes, sir.

Q. And when those cars are emptied they are returned to your plant by the South Buffalo Railway; is that right?

A. Yes.

Q. What happens to the blast furnace slag?

A. Our blast furnace slag is loaded in hoppers and shipped to the Buffalo Slag Company.

Q. What kind of hoppers?

A. Foreign railroad hoppers.

Q. Who performs the movement of that slag from Republic to the Buffalo Slag Company?

1073 A. South Buffalo.

Q. By the way, can you tell me what slag is?

A. Do you mean blast-furnace slag, for instance?

Q. Yes.

A. There is roughly just about twice as much material that is turned out that is charged into a furnace, and what is not iron comes out in the form of a limestone flux and ash out of the coke, and the other half of the iron ore that is not ironed, that comes out in a running liquid form and cooled, and then is loaded in our case with an electric shovel.

Q. What is open-hearth slag?

A. Open-hearth slag is the result of the lime and various other things that are put into it at the time they charge scrap and pig iron. It is a lighter material that is tapped off the top of the furnace, and it has some iron in it, a higher percentage of iron in the open-hearth than there is in the blast-furnace slag.

Q. Generally speaking, both types of slag are waste material involved in the process of making either pig iron or steel?

A. That is correct.

A. A blast furnace makes pig iron, doesn't it?

A. That is correct.

Q. And an open-hearth makes steel?

1074 A. That is correct.

Q. And in the open-hearth furnace you pour the iron in in order to make the steel?

A. And scrap.

Q. So that the molten iron and the scrap when melted down and solidified and being poured out of the furnace makes the steel; is that right?

A. That is correct.

Q. How many cars will your interchange track hold?

A. 25 to 28 cars, depending on the length of the car.

Q. And does that interchange track handle all your in-bound and out-bound cars of all commodities?

A. Practically so. Occasionally we ask them to put them on another track adjacent to that on property that we have within the confines of the plant, but usually unless there is something exceptionally heavy, the 28-car track will do the job.

Q. And when you say "we ask them" you refer to the South Buffalo Railway?

A. Yes, sir.

Q. When do you dig your slag?

A. We usually start in the morning and dig until the pits are completed. If the pits are not equal in size, sometimes we get 16 to 18 cars and another day we will only get 12. And the
1075 digging necessarily can only be done when the shovel is operating. If there are repairs on it, it is sometimes after 8 o'clock in the morning before we start.

Q. And that necessitates the railroad pulling the slag when?

A. If it is dug today it is pulled tonight.

Q. And those movements always take place at night, do they?

A. Pretty uniformally it is done at night. If there is something happens they can't do it this night, we are after them to pull it the next day, and if due to interchange the track is filled up, then we have to ask them to pull them the next day also.

Q. Does the railroad furnish that service when you ask it?

A. Yes, it is set up the night before.

Q. In your business relationship with the South Buffalo Railway do you deal with anybody from the Bethlehem Steel Company?

A. We never have.

Q. Are your dealings in so far as that railroad is concerned always with officers or employees of the Railway Company?

A. Usually the yardmaster, and if no results then the assistant superintendent or the superintendent.

Q. And how are your orders to the South Buffalo Rail-
1076 way Company transmitted; from whom to whom?

A. Our orders for the pull that is to be made tonight is sent over to the Station C office, to the yard clerk there, and they

pull the loads out on that, and all empties which are on that track which are the cars going back to the South Buffalo.

Q. Does the Republic Company have track scales inside of its plant property?

A. Two of them.

Q. And you use them to weigh empty or loaded railway cars, do you?

A. That is correct.

Q. Is it necessary for the South Buffalo Railway Company to cross either or both of these scales in order to get at your interchange tracks?

A. We have to cross over No. 2 scale to reach the interchange track.

1077 Q. And that is the only one in which the South Buffalo Railway Company can get in there, is that right?

A. Only connection we have; yes, sir.

Q. And that is your scale, owned and operated by you?

A. Yes, sir.

Q. And not by the Railway?

A. No, sir.

Q. Has there ever been any occasion, Mr. Caylor, in which the South Buffalo Railway Company has allowed the Republic Company to unload cars on Railway tracks?

A. When we opened up what we call the new dump, which is south of Marilla Street, we had to start the dump there, which was only an elevation of some 32 feet, we had to dump off the main track until we could have enough room to dump on our own property, on tracks on our own property?

Q. On whose main line track?

A. South Buffalo Railway's.

Q. For how long a time did that continue, do you remember?

A. As I recall it did continue some six weeks until we were clear, so that the track could be put in, clear the main line of the South Buffalo.

Q. During all that time you used the South Buffalo Railway tracks to dump your slag?

A. Yes, sir; daily.

1078 Q. What per cent of the Republic's freight business is handled by the South Buffalo?

A. That is the refuse business, the total car loads amounting to some 31,000 cars in the year 1945; about 10% of it was refuse material; some 31,000 cars for the year 1945.

The COURT. 3,000?

The WITNESS. Yes, sir; 3,148, to be exact.

Q. You have given the total number of all your cars handled by the Railway, is that right?

A. By the South Buffalo?
Q. Yes.
A. Yes, 3,145 cars of refuse; and there was 7,938 cars in-bound and out-bound car loads, South Buffalo. The 31,000 comprises the interchange of car loads both in and outbound, with all Railroads.
The COURT. What period of time are you speaking about?
The WITNESS. The year 1945, your Honor.
The COURT. The total of South Buffalo Railway was how much, aside from the refuse?
The WITNESS. 7,838 cars.

By Mr. BROMLEY:

Q. Have you increased over the past 10 or 15 years your capacity or facilities at this Republic plant?
A. Yes, blast furnaces were enlarged and open hearths
1079 were enlarged also.
Q. And did that cause you to ask for a reasonably increased service from South Buffalo?
A. I would say the service was proportioned to the increase in production.
Q. Do you ever have occasions to ask for what has been called special service from South Buffalo?
A. Yes.
Q. Of what nature is that?
A. It so happens that most of our refractories and recarborizers and all alloys originate on the Pennsylvania and New York Central, are interchanged to the South Buffalo, and we frequently have to ask them for some certain commodities, due to the plant operation, either delayed on other Railroads or they are out at the end of the connection of the Pennsylvania, we ask to get them in to carry out our operations.
Q. Does the Railroad give you that special service?
A. Pretty generally.
Q. And promptly?
A. Pretty generally.
Mr. BROMLEY. That is all.
Mr. CRAIG. For the record, the plaintiff moves that the testimony of the witness Caylor, relative to service rendered
1080 by South Buffalo Railway Company to Republic Steel Company be stricken from the record.
The COURT. Denied, and exception.

Cross-examination by Mr. CRAIG:

Q. Mr. Caylor, are there any South Buffalo tracks on the land of Republic Steel Company?
A. None; no sir.

Q. How many tracks does Republic Steel Company own in its plant that you have described, approximately?

A. Some 75 tracks; 18 miles of trackage within the plant.

Q. You do your own switching, do you not?

A. Yes, sir.

Q. South Buffalo does none of that switching for you?

A. No, sir.

Q. That means, of course, does it not, that in the moving of molten metal from the blast furnaces to the open hearths that that movement is made by Republic Steel Company, is it not?

A. Well, I had better answer that by telling that we do not have very much of that, for the reason we cast directly in the mixer which is in the open hearth building.

Q. You spoke of having blast furnaces, I think?

A. That is correct.

1081 Q. You do produce some pig iron, don't you?

A. That is right.

Q. And the movement of that molten metal, such as it is, is made by you, is it not?

A. Goes to the pig machine; that is correct, yes, sir; by our power.

Q. The movements of the product of the open hearth is made from the open hearth by Republic Steel Company power, is it not?

A. Correct; yes, sir.

Q. South Buffalo Railway Company has nothing to do with that?

A. No, sir.

Q. To the best of your knowledge, has Republic Steel Company in the past ever sold any of its track in the plant to South Buffalo Railway Company?

A. Not to the best of my knowledge, in thirty years—22 years on this job.

Q. I take it, then, you don't know of any purchases of South Buffalo Railway Company track by Republic Steel Company within the Republic Steel Company's plant, do you?

A. No, sir.

Q. So far as you know, always the track within the Republic Steel Company plant has belonged to Republic Steel Company, has it not?

A. That is correct.

1082 Q. And South Buffalo has never owned any track in there?

A. No, sir.

Q. This land of which you speak at the curve of the South Buffalo Railroad and the territories which you have indicated, which are marked "5" on the map, which is Plaintiff's Exhibit

No. 1, do you know whether any of that land—that land, as I understand it, is used for dumping your refuse?

A. That is correct.

Q. Do you know whether any of that land was purchased by Republic Steel Company from South Buffalo Railway?

A. I think there was a certain portion of it when we developed what we call the new dump, which is south of Marilla Street, there was quite a wide area at the base of it when we got filled up level which served no purpose and we bought over to what was a clearance on the tracks.

Q. Do you recall the extent of the land which was purchased from South Buffalo Railway Company by Republic Steel Company?

A. No, I don't.

Q. Do you recall when that purchase was made?

A. My guess would be about 1935.

Q. It might have been 1934?

A. It could have been.

1083 Q. But in that general time, 1934 or 1935?

A. The reason I say that, we put the dump in in 1937 and this question came up about our acquiring a little bit of a strip of land there where our tracks would be which was formerly South Buffalo property.

Q. On the purchase of that land, so far as you know, Republic Steel Company dealt only with South Buffalo Railway Company, did it not?

A. I have no knowledge of who it was dealt with.

Mr. CRAIG. That is all.

The COURT. You were asked, you have interchange tracks, what you call interchange tracks, in your property there, on your property?

The WITNESS. Yes, sir.

The COURT. Where the different Railroads pull the cars in there?

The WITNESS. The South Buffalo is on property that we have always owned, so far as I know. The D. L. & W. is on a sort of development upon which we lease the property. The B. & O. is on the B. & O. property outside of the property lines of the plant.

The COURT. How about the B. & O.?

The WITNESS. The B. & O. is out on their property where we interchange.

The COURT. How about the Delaware?

1084 The WITNESS. The D. L. & W. tracks are—interchange tracks are parallel to the South Buffalo track and the fence was put in the old days just outside of the South Buffalo

track; then, through a lease of the land, additional land; from the D. L. & W., and in addition to some other services the interchange tracks are located on that land.

The COURT. Well, when deliveries are made, delivery made on those interchange tracks——

The WITNESS. With all the Railroads, the designated interchange tracks, we deliver cars to them and take cars from them from all three railroads; yes, sir.

The COURT. You say how many miles, 18 miles?

The WITNESS. About 18 miles of track within the plant.

The COURT. That includes the tracks outside of these main interchange tracks?

The WITNESS. That is right.

The COURT. Interchange tracks run north to south or east to west?

The WITNESS. The D. L. & W. and the South Buffalo are east and west; the B. & O. tracks, which were the old B. R. & P. run pretty generally north and south.

The COURT. How much trackage does your Company own in there of the 18 miles?

The WITNESS. Of the 18 miles?

1085 The COURT. Yes.

The WITNESS. All of it. That is all our tracks.

The COURT. You spoke about this part that was leased from the Delaware-Lackawanna; what about that?

The WITNESS. We put the tracks in and own those tracks also.

The COURT. All the tracks inside of your yardage, your property there, is owned by the Donner-Hanna Company?

The WITNESS. Republic Steel Company.

The COURT. Republic Steel Company?

The WITNESS. Yes, sir.

The COURT. All right.

Redirect examination by Mr. BROMLEY.

Q. Do those tracks join right onto the tracks of the South Buffalo or the respective other trunk-line railways at some point or other?

A. I just don't get what you mean, if you please. The tracks—maybe I can say this: That the tracks of the South Buffalo is parallel to what we call our stock house, running east and west; and the next two tracks from there, which is on this leased property from the D. L. & W. are right adjacent to that, also run east and west.

Q. Well, the cars get from the South Buffalo tracks onto
1086 your tracks at some point where there is a continuous strip of track in which the tracks owned by you and the tracks owned by the Railway join; isn't that right?

A. That is correct. But north of Station C there is a connection off the track that runs over our rails and back to our scales, in that cinder track.

Q. Is there any fence across the track at that point?

A. No, sir.

Q. Any mark on the ties where you can tell where our tracks end and yours begin?

A. No, sir.

Mr. BROMLEY. That is all.

Re-cross-examination by Mr. CRAIG:

Q. Mr. Caylor, you effect the transfer of cars between you and South Buffalo Railway Company by interchange, do you not?

A. They deliver and pull from that interchange yard, yes, sir; South Buffalo power deliver on that track cars coming to us; we line up the cars going out, and they pull them from that same track.

Mr. BROMLEY. That is all.

1087 CHARLES D. DUNHAM, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Dunham?

A. 51 Humphrey Road, Buffalo, New York.

Q. What is your business?

A. I am Traffic Manager of the Buffalo Tank Corporation.

Q. How long have you been connected with that Company?

A. A little less than four years.

Q. What is its business?

A. We are fabricators of steel tanks.

Q. What raw materials do you use?

A. Steel plate.

Q. Where do you get the steel plate from?

A. Bethlehem Steel.

Q. Where is the Buffalo Tank plant located?

A. We are on the end of Lincoln Avenue and South of the south end of South Buffalo Railway, right near No. 8 s ale of the South Buffalo Railway.

Q. Is that down near the Hamburg Turnpike?

A. No; Lincoln Avenue starts at the Hamburg Turnpike and we are at the other end of Lincoln Avenue.

Q. It is indicated on this map by the figure "17" and it
1088 shows that it runs along Birch Street?

A. That is right.

Q. Birch Street is on the west and this plant is to the east of Birch Street; is that right?

A. That is right.

Q. So that it is located on the south side of the South Buffalo branch which runs out to the Pennsylvania and the Lehigh Valley interchanges; is that right?

A. That is right.

Q. What are the necessities of your operations, so far as the time in which the Railroad Company does the switching necessary to serve your plant?

A. Well, the Railroad does the switching at night.

Q. And why is that?

A. Well, we are through work at 5:30 and they have the program to do the switching for morning so we come in in the morning, it is usually done.

Q. So that your plant is all set up at the nighttime so you can operate in the daytime; is that right?

A. That is right.

Q. Does the Railway spot, the South Buffalo Railway Company, spot cars for you?

Mr. CRAIG. Once again, for the record, the plaintiff makes an objection to the question on the ground that the matter of
1089 rendition of service by the South Buffalo Railway Company to Buffalo Tank Corporation is irrelevant and immaterial.

The COURT. Overruled; exception.

Mr. CRAIG. May we have the same stipulation relative to its not being necessary to repeat the objection to each of the questions relative to this service?

Mr. BROMLEY. Yes, sir.

Mr. CRAIG. Thank you.

Mr. BROMLEY. Was the question answered? Read the question.

Q. (Question read as follows: "Does the Railway spot, the South Buffalo Railway Company, spot cars for you?")

A. Yes.

Q. Who, on behalf of Buffalo Tank, gives those instructions?

A. Gives the instructions to spot these cars?

Q. Yes.

A. I give the instructions.

Q. And who contacts the South Buffalo conductor, you or somebody else?

A. The Yardmaster contacts the conductor. We give the Yardmaster of No. 8 scale the program of what we want in and he, I presume, in turn, gives it to the conductor to do our work.

Q. Is it necessary in carrying out those orders for in-bound loaded cars to be moved through any part of your plant buildings by the Railway?

1090 A. Yes.

Q. Will you describe that movement to us, please?

A. Well, the in-bound cars are all unloaded at what we call the house, which is a building; the track runs on the east side of the building and through this house. They are spotted there and we unload them. The cars for loading are spotted on the same track which is outside, this track continues on, is out in the open.

Q. But the in-bound cars are unloaded in the house?

A. That is right.

Q. And they are spotted by the Railway in the house?

A. That is right.

Q. And when the Railway spots empty cars the Railway has to run through the house?

A. That is right.

Q. Now, is there any place where cars must be placed under a crane runway?

A. Yes.

Q. And where is that, inside the building or outside?

A. When they spot the cars in the house, they are automatically under the inside crane for unloading. When we ask for cars to load we ask them to be put in the back yard under the crane.

Q. And you use the crane to load them, do you?

A. That is right.

1091 Q. And to unload too?

A. Two different cranes.

Q. Two different cranes?

A. That is right.

Q. Is there any obstruction across the track which must be removed before the Railway train can enter the building?

A. We have a fence, gate, at our property, across the tracks. It has to be opened before they could come in.

Q. What is the procedure for the Railway to get through that gate?

A. Either the conductor or the yardmaster, or whatever Railroad employee it is, contacts our night watchman by telephone at night and asks that the gate be opened, that they are ready to come in. He opens the gate and they go on with their work.

Q. And then he locks it again after they leave?

A. That is right.

Q. Do you have occasion to order in cars by car number?

A. No.

Q. As a matter of fact, you have any knowledge as to what in-bound loads are going to be brought in to you by the Railroad?

A. Well, we have our advance shipping papers. We know that a load is coming. But we are in a position where we have
1092 not got to ask for any special moves or ask for a car by number to be put in.

Q. The Railway, then, delivers whatever loads it has received for you as it wants to?

A. That is right.

Q. It does sometimes happen that there are delivered for your account to the South Buffalo Railway cars in excess of your plant track facility to hold them?

A. I will say no. Only one instance and that was the last snowstorm, when they couldn't move cars fast enough, there was three or four cars accumulated and we had to wait a couple of days for them to put them in.

Q. Where were they held during the period of delay?

A. On the South Buffalo tracks.

Q. Have you had any extension of facilities or production during the time you have been with the Company?

A. No.

Mr. BROMLEY. That is all.

MR. CRAIG. The plaintiff moves that the testimony of this witness, relative to service rendered by South Buffalo Railway Company to Buffalo Tank Corporation be stricken from the record.

The COURT. Motion denied. Exception to the Government.

Cross-examination by Mr. CRAIG:

Q. Are there any South Buffalo Railway tracks on the
1093 property of Buffalo Tank Corporation?

A. No, sir.

Q. And is South Buffalo the only railroad serving the Buffalo Tank Corporation?

A. Yes.

Q. Relative to these cars to which you referred, which were held on South Buffalo track because of your inability to receive them, did you receive notice of constructive placement of those cars?

A. Yes, sir.

Q. Was that notice in writing?

A. Notice from the Yardmaster.

Q. I didn't hear you, sir.

A. Notice from the Yardmaster at No. 8 scale.

Q. The Yardmaster of South Buffalo Railway?

A. That is right.

Q. To Buffalo Tank Corporation?

A. That is right.

Q. Do you have any products which, except for a matter of convenience, have to be moved with promptness or regularity?
A. No.
Q. Your answer is no?
A. "No."

Mr. CRAIG. That is all.

1094 The COURT. What type of tanks do you make?
The WITNESS. Steel storage tanks for gasoline and oil.
The COURT. Steel storage tanks?
The WITNESS. Yes.
The COURT. What kind?
The WITNESS. Gasoline storage, gasoline and oil.
The COURT. Large tanks?
The WITNESS. That is right.
Q. You do not make glass-lined tanks?
A. No, sir.
The COURT. How large a plant do you have there?
The WITNESS. Oh, we have normally about 50 to 55 shopmen.
Mr. BROMLEY. Thank you. That is all.

1095 MICHAEL MAY, a witness called by and on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. May?
A. 70 Whitehall Street, Buffalo.
Q. Your business is what?
A. We treat iron ore.
The COURT. What is the name of your company?
The WITNESS. The Buffalo Sintering Corporation.

By Mr. BROMLEY:

Q. What position do you hold with the Buffalo Sintering Corporation?
A. Manager.
Q. How long have you been connected with that company?
A. 16 years this coming month.
Q. Where is this plant located, looking on this map which is up here [indicating]?
A. It is right at the foot of Marilla Street.

By the COURT:

Q. What is the number there?
A. 4.
Q. At the foot of Marilla Street you said?
A. Yes, sir.

1096 By Mr. BROMLEY:

Q. It does not look as though it were at the foot of Marilla Street to me. It looks as if it were at the north of Marilla Street.

A. It is about 600 feet from Marilla Street.

Q. 600 feet north of Marilla Street?

A. That is right.

Q. And it is on the east side of the South Buffalo Railway right-of-way?

A. That is right.

Q. And it indicated by a No. 4 on the map?

A. Yes, sir.

Q. Now, sir, will you tell us what sinter is?

A. We treat the iron ore from various steel plants, the Republic, the Wickwire, the Tonawanda, the Port Colborne, the Bethlehem, we treat it, we burn it into a hard clinker, and it is used in open-hearth steel and blast-furnace pig iron.

Q. You take the ore as it comes down the Lakes from the ships or the cars, from the mines?

A. Yes, sir.

Q. And you do something to it?

A. Yes.

Q. What do you do with it?

A. We burn it into a hard clinker.

1097 Q. You burn it into a hard clinker so that it becomes a solidified mass, do you?

A. That is right.

Q. How big a mass?

A. In chunks 6 inches up to 2 feet in diameter.

Q. And then you deliver it to steel mills so that they can use it in blast furnaces?

A. That is right.

Q. Will you tell us what purpose it serves to sinter the ore and get it from the form of dirt which I assume it is when you get it into these big clinkers?

A. It is a fine ore, too fine for a blast furnace, and when we treat it it is made into a hard clinker. It is used in a blast furnace and it melts much faster than a dense ore. We take the moisture out of it, too, and during the war there has been a lot of it used for open-hearth steel direct.

Q. When you sinter the ore, you don't take the impurities out of the ore, do you?

A. Yes; we do.

Q. You do that, too?

A. Yes, sir.

Q. So that the sintered ore is all ore or pretty near all ore?

A. It is all ore.

1098 Q. That puts it into such form that the steel mills can use it in the mills more effectively and efficiently?

A. Yes, sir.

Q. Isn't ore ever put into your blast furnaces just in the form in which it comes from the mines?

A. Yes; some of it.

Q. But most of it is sintered?

A. Most of your ore today is getting to be real fine, and if it is sintered it works much better and faster in blast furnaces.

Q. So that the business of your company is to sinter the ore, and that is all you do?

A. Yes, sir.

Q. How many separate switching services during a 24-hour period do you receive from the South Buffalo Railway Company?

A. Three.

Q. And about what time in the 24-hour period?

A. 9 o'clock——

Mr. CRAIG. Just a moment, please. For the record, again the Plaintiff objects to the question on the ground that the rendering of services by the South Buffalo Railway Company to the Buffalo Sintering Company is neither relevant nor material.

The COURT. Objection overruled.

1099 Mr. CRAIG. And may we have the same stipulation that this objection be considered as being made to the other questions concerning the furnishing of such services?

Mr. BROMLEY. Yes.

By Mr. BROMLEY:

Q. Now, will you answer the question, please?

A. 9 o'clock in the morning and about 5 in the afternoon and about 12 midnight.

Q. Midnight?

A. 12 midnight.

Q. A single switching operation, a single one of these three, taken on an average from three to five hours to perform, doesn't it?

A. That is about right.

Q. Does that mean that the South Buffalo Railway Company locomotive and crew is there all that time?

A. That is correct.

Q. Attending to your business?

A. Yes, sir.

Q. The in-bound raw material which you receive is cars of ore; is that right?

A. That is right.

Q. In hopper cars?

A. Yes, sir.

1100 Q. And those hopper cars loaded with ore come from the various steel mills or plants for which you are going to sinter the ore; is that right?

A. That is right.

The COURT. What you sinter is only the fine ore, isn't it, that is all you sinter?

The WITNESS. That is right, the fine ore.

The COURT. That is only a small part of the part that is used, though?

The WITNESS. Well, about 50,000 tons, forty to fifty thousand tons a month.

By Mr. BROMLEY:

Q. Now, is it necessary—I assume it is—for you to unload these hopper cars that come to you loaded with ore?

A. Yes, sir.

Q. And how do you unload them and where?

A. We have a shed, an unloading shed we call it. It is more of a protection for the men. And it is unloaded by hand and shovel.

Q. And is it located in the hoppers?

A. Yes, it is.

Q. Do you call upon the South Buffalo Railway to spot these ore cars over the hoppers into which the ore is unloaded?

A. There is probably 10 or 12 put in a line, and the one head car is spotted on the hopper. After that is unloaded

1101 we pull them in with a car haul that we have ourselves. It is a winch.

Q. So that all the Railway Company does is to spot the lead car over a hopper?

A. Yes.

Q. And then thereafter you winch them in with a car puller?

A. Yes, sir.

Q. Have you only got one hopper to unload in?

A. Two.

Q. So that the railroad spots two cars at the start?

A. Yes, sir.

Q. Then you pull the others up to that and move the empties?

A. That is right.

Q. How do you order the delivery of in-bound cars?

A. We get a shipping notice from various steel plants and furnaces and then we order them in by car numbers from the South Buffalo.

Q. Why do you order them in by car numbers?

A. Well, that varies. There is a fine ore, too, and some of it runs finer than others. We have to line our cars up to make a certain product.

Q. So that you have to have the loaded cars that are consigned to you delivered to you in a certain order which you determine?

A. That is right.

1102 Q. And that order depends upon the nature of the contents of each car?

A. That is right.

Q. Do you tell the South Buffalo Railway Company to arrange your cars in that order?

A. That is right.

Q. And you give them a list of the car numbers and tell them you want your cars delivered in the order in which the numbers appear on the list?

A. That is right.

Q. That means that the South Buffalo Railway Company must marshal and arrange your cars in that order before delivering to you?

A. That is right.

Q. And does the Railway do that?

A. They do.

Q. And then the Railway delivers the cars in the order in which you have predetermined and which you have told them?

A. Yes, sir.

Q. That is the general practice, is it?

A. Yes, sir.

Q. Are there any occasions when you request of the Railway special switching service?

A. Yes, we have, because there are times we run short of

1103 empty cars and they have to make a special trip.

Q. And does the railroad do that for you when you ask it?

A. Yes; they do.

Q. When was the plant built?

A. In 1925.

Q. And is it larger now than when it was built?

A. Yes; it was increased in 1930.

Q. And how much is it larger now?

A. It was increased, I should say, about 60 per cent in 1930.

Q. How many cars did you ship a day when you first went into business about, can you remember?

A. I wasn't at this plant. I run another plant in Ohio at the time. I didn't come here until 1930.

Q. How many cars about do you ship a day now?

A. From 55 to 65, that is in-bound and out-bound. We handle in-bound and out-bound 55 to 65 cars a day.

Q. After you came here did you have any dealings with the South Buffalo Railway Company with respect to their extending their service to you on account of your new building?

A. I think our Vice President did that; yes.

Q. Did you have anything to do with it yourself?

A. No; I didn't.

Q. And you don't know with whom he dealt?

1104 A. I think it was Mr. Benning.

Q. The Superintendent of the South Buffalo Railway?

A. I think it was.

Q. Did the Railway Company extend its service at that time, do you know?

A. They did.

Q. And by extending its service, you mean it built new tracks?

A. That is right.

Q. Are you familiar with the term, and do you know what it means, "intraplant switching"?

A. Intraplant switching?

Q. Intraplant switching.

A. I think I do.

Q. Well, that is the movement inside of one of your plants of your car, isn't it?

A. Yes.

Q. And I want to find out from you whether the South Buffalo Railway Company performs that kind of switching for you when you ask it?

A. Yes, sir.

Q. Is that a regular course of procedure?

A. Yes, sir.

Q. That is done on your tracks, isn't it?

A. That is right.

1105 By the COURT:

Q. Do you have any power in the engine yourself?

A. No, sir.

By Mr. BROMLEY:

Q. Does the South Buffalo Railway Company hold a 24-hour supply of cars all the time for you on the Railway tracks?

Mr. CRAIG. I object to that, your Honor, about what the South Buffalo Railway Company does relative to holding a supply of cars for this industry.

Mr. BROMLEY. Well, if he knows.

The COURT. Overruled.

The WITNESS. Yes, they do.

Q. And are those loaded or empty cars?

A. Loaded.

Q. Do they do that right along for you?
A. Yes, they do.
Q. They keep on their track ahead of you always enough cars to last you 24 hours?
A. Near to 24 hours.
Q. How do you order those cars in when you finally get ready to use them?
A. By the car numbers.
Q. Is that the regular course of business between you and the Railway?
1106 A. Yes, it is.
Q. Does your plant have what is known in the business as a sweathouse?
A. Yes, sir.
Q. What is a sweathouse?
A. Ore freezes—there is moisture in it—in the wintertime, and we have to put it in to thaw so that we can unload it.
Q. Is the sweathouse an enclosed building into which the cars of ore are run and placed?
A. Yes, it is.
Q. And who makes that movement for you?
A. The South Buffalo Railway Company.
Q. After the cars of ore have been thawed out in the sweathouse are they then moved to other buildings for use?
A. To our unloading track.
Q. And who moves the car from the inside of the sweathouse to your unloading tracks?
A. The South Buffalo Railway.
Q. That is another example of intraplant switching, is it?
A. That is right.
Q. Is that a matter of every-day occurrence?
A. From about the middle of December to the middle of March.
Mr. BROMLEY. That is all.
1107 Mr. CRAIG. For the record, the plaintiff moves that the testimony of the witness concerning service by South Buffalo Railway to the Buffalo Sintering Corporation be stricken from the record.
The COURT. Denied, and an exception.

Cross-examination by Mr. CRAIG:

Q. There are no south Buffalo tracks on the Buffalo Sintering Corporation property, are there?
A. Well, I don't think so; no.
Q. Is the South Buffalo the only railroad which serves the Buffalo Sintering Corporation?
A. That is right.

Q. You do business with the Bethlehem Steel Company, don't you?

A. Yes, sir.

Q. What proportion of your business is with the Bethlehem Steel Company?

A. Well, we ship, I would say, out of the 50,000 tons about 25,000 to Sparrows Point, Maryland.

Q. What do you mean by Sparrows Point, Maryland?

A. That is part of the Bethlehem Steel Company.

Q. The Bethlehem Steel Company plant at Sparrows Point, Maryland?

A. Yes, sir. And altogether I would say about 12,000
1108 tons or 15,000 tons to the Republic and other industries.

Q. To the Republic Steel Company?

A. And Wickwire, Tonawanda, and Port Colborne. I would say two-thirds of our business would be Bethlehem Steel.

Q. You referred, I think, to a car hauler, which you said, I think, is used after the South Buffalo has spotted two cars over the hoppers, which car hauler is used after those two cars have been unloaded; is that right?

A. Yes.

Q. Isn't it a fact that that car hauler is used in moving cars only from one point on your track to another point on your track?

A. We pull them in the shed to be unloaded. After they are unloaded we pull them on and load them up again.

Q. But the use of your car hauler is in connection with a movement of a car from one point on your track to another point on your track?

A. That is right.

Q. You don't use it in connection with any movement to or from a South Buffalo Railway track, do you?

A. No.

Q. Isn't it a fact that after the South Buffalo locomotive and crew have completed a given operation for you that they depart?

1109 A. That is right.

Q. The crew doesn't wait around there for any further orders from you, does it?

A. No.

Q. I think you spoke of giving notice to the South Buffalo when you would want cars; is that right?

A. That is right.

Q. How much notice do you give?

A. It is an hour to two hours; something like that.

Q. And generally the cars are delivered?

A. Just whenever it suits us.

Q. And are the cars delivered in that time as a rule?

A. Just about on time.

Q. Are any of those cars that you order and give that amount of notice in connection with Bethlehem Steel Company business?

A. Well, the iron ore from Bethlehem Steel.

Q. You referred, I think, to what was styled a thaw house; is that correct?

A. Yes, sir.

Q. Or a sweathouse?

A. Or a sweathouse.

Q. Is it known as either?

A. Either one.

Q. Do you recall when that was built?

1110 A. One of them was built in January 1931.

Q. Is there more than one thaw house or sweathouse?

A. Yes, the other one was built about 8 years ago.

Q. About 8 years ago?

A. Yes, sir.

Q. Did you have any dealings or conversations with the South Buffalo Railway Company as to where that thaw house should be located?

A. Not as I can recollect. I didn't have the doings of that.

Q. Were you manager at that time?

A. I was, but our Vice President took care of it.

Q. Do you know of any conferences or conversations that he had with the South Buffalo Railway Company about that thaw house?

A. I don't recollect.

Q. Do you know of any conference or conversation that he had with the Bethlehem Steel Company about that thaw house?

A. Well, you see part of that is on the Republic property. We leased part of that land from the Republic Steel.

Q. I am asking you if you know of any conversation had with anybody connected with the Bethlehem Steel Company about that thaw house?

A. The Bethlehem Steel I don't remember.

1111 Q. And that applies, I suppose, not only to the Bethlehem Steel Company, but to the Bethlehem Steel Corporation?

A. All I heard him talking about was Mr. Benning.

Q. But you don't know of any communications had with either the South Buffalo Railway Company and the Bethlehem Steel Company. or the Bethlehem Steel Corporation about that thaw house, do you?

A. I don't recollect.

Mr. CRAIG. That is all.

MAX PRESSLER, a witness called by and on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Pressler?

A. 780 Forest Avenue, Buffalo, New York.

Q. What is your business?

A. I am Resident Manager of Summer & Company, Buffalo Operations.

Q. How long have you been with that company?

A. Pretty close to 20 years.

Q. And its plant is located on the lines of the South Buffalo Railway Company?

A. We have one plant on the South Buffalo Railway
1112 Company at Lackawanna, New York.

Q. Have you any other plants?

A. One in Cheektowaga and one in New Haven, Connecticut, and Columbus, Ohio, and Cleveland, Ohio.

Q. The plant that is located here in Buffalo on the South Buffalo Railway is where, to the north, or to the south? It is shown by No. 21 on the map, isn't it?

A. Yes. It is shown by No. 21; that is right.

Q. That plant is on the west side of the South Buffalo Railway Company right-of-way; it is in the City of Lackawanna and is to the north of the Buffalo Brake Beam Company?

A. That is correct.

Q. Is it served by any railroad other than the South Buffalo Railway Company?

A. No.

Q. And what is the nature of its business?

A. The handling of scrap iron principally.

Q. And does it receive hopper cars, I mean gondola cars or hopper cars loaded with scrap?

A. Mostly, yes. A few box cars now and then.

Q. And that is the nature of its inbound freight receipt, is it?

A. That is right.

Q. Then what does it ship outbound, if anything?

1113 A. The scrap after it has been prepared.

Q. Prepared for use in open-hearth furnaces?

A. Preparation for use in steel mills or foundries.

Q. And of what does that preparation consist at your plant, Mr. Pressler?

A. Our preparation consists of cutting the scrap into proper size so that it can be used in charging boxes and in cupolas in foundry and steel mill practice.

Q. Then do you bundle it up?

A. We have no bailing presses.

Q. And then you reload it into cars and ship it to your customers?

A. That is correct.

Q. For that purpose, the purpose of loading or unloading, do you use any cranes?

A. We have our own steam locomotive cranes in our yard.

Q. A locomotive crane?

A. That is right.

Q. That means a self-propelled crane?

A. Yes, a crane that operates on tracks and is self-propelled.

Q. And that is so it can move around over your tracks in your yard?

A. Yes.

Q. Does it ever happen that you operate that crane on
1114 tracks owned by the South Buffalo Railway Company?

A. On rare occasions we have occasion to load for a couple of our neighbors.

Q. Who are they?

A. Well, one would be the Buffalo Brake Beam Company, and the other would be the Lehigh Auto Wrecking Company.

Mr. CRAIG. Again, for the record, in connection with the answer to the previous question I move that that be stricken, and I enter an objection to questions concerning any service rendered by the South Buffalo Railway Company to Summer & Company as being irrelevant and immaterial.

The COURT. Motion denied. Objection overruled.

Mr. CRAIG. May we have the same stipulation that it is not necessary to repeat the objection to each question as we go along, but to have this objection apply generally to those questions?

Mr. BROMLEY. Yes, sir.

By Mr. BROMLEY:

Q. In the movement of the crane to which you have referred from your plant to the other two plants does it travel over the track of the South Buffalo Railway Company?

A. I would say, yes, in part.

Q. How far is the distance, do you know?

A. Well, I would say the distance to the Buffalo Brake
1115 Beam Company would be about 200 yards and probably a little less to the other plant.

Q. Do you ever use a locomotive crane of yours to move cars which have been spotted by the railway on your tracks at loading or unloading points?

A. The railroad company spots the cars just outside of our yard, and we use our own crane to bring the cars in and after they are loaded to take them out.

Q. Now, in order to accomplish that movement by your locomotive crane, do you again go out on the South Buffalo tracks?

A. I would answer yes.

Q. Is there any fence around your property?

A. Yes, sir.

Q. Does it cross the tracks, too?

A. We have a gate that crosses the switch track, that enters our plant.

Q. Do you keep it closed or open?

A. We keep it closed.

Q. How does the railroad get in through it?

A. The railroad does not come into our yard. Do you refer then to the South Buffalo locomotive?

Q. Yes.

A. They don't come into our yard.

Q. So that they never have occasion to come through the gate?

1116 A. No, sir.

Q. Your locomotive crane goes out through the gate?

A. That is right.

By the COURT:

Q. Do you do anything except to cut the material up?

A. That is our business.

Q. Cut it into proper shape or size?

A. Cutting the scrap to proper size.

By Mr. BROMLEY:

Q. Are there ever occasions when cars come into the South Buffalo consigned to you in such numbers that you do not have room to hold them on your own tracks?

A. On rare occasions; not very often.

Q. What happens when that occurs?

A. The railroad company spots the cars just on the track which runs parallel to our fence at the rear of the yard, and which is a side track, I think.

Q. Of the South Buffalo Railway?

A. Of the South Buffalo Railway.

Q. And keeps them there until you are ready to take them?

A. That is right.

Q. You have traffic on the South Buffalo Railway Company which is purely local and moves only from one point to another on the South Buffalo Railway, don't you?

A. You refer to switching traffic?

1117 Q. Yes.

A. We send cars from our plant to the Bethlehem Steel Company, also to the Republic Steel Corporation, both of whom are on the South Buffalo Railway.

Q. Is there much of that traffic?

A. Well, I would guess about 50 per cent of the material that we send out goes to either one or the other.

Q. Are there ever occasions when you request and receive special switching services from the standpoint of speed of delivery, or anything like that?

A. Not usually.

Q. Whenever you request it have you gotten it from the Railway?

A. Yes, sir; we have.

Mr. Bromley. That is all.

Mr. Craig. For the record, the plaintiff moves that there be stricken from the record the testimony of the Witness Pressler relative to service rendered by the South Buffalo Railway to Summer & Company.

The Court. Same ruling as heretofore. Motion denied.

Cross-examination by Mr. Craig:

Q. There are no tracks of the South Buffalo Railway Company on the Summer & Company property, are there?

A. No, sir.

1118 Q. Does Summer & Company do its own switching inside its own property?

A. Yes, sir.

Q. Now, I believe you said that you do business with the Bethlehem Steel Company?

A. Yes, sir.

Q. What is the nature of that business?

A. We sell them scrap iron.

Q. I believe you said that about 50 per cent of the scrap iron which is shipped out of your plant or property goes either to the Republic Steel Company or the Bethlehem Steel Company?

A. I meant that a total of 50 per cent of the scrap we produce would go to both of those plants.

Q. That is the local plants of those companies?

A. Yes, sir.

Q. Of that 50 per cent how much of the business is done with the Republic Steel Company and how much is done with the Bethlehem Steel Company?

A. I would say—I wouldn't know the exact figure, but I would say that we ship about equal quantities to both places.

Q. I want to be sure whether or not you stated that the South

Buffalo Railway is the only railroad which serves you; is that correct?

1119 A. That is right; at that particular location.

Q. Yes. You spoke of rare occasions when you were unable to accept a shipment of cars to you and the cars were held by the South Buffalo Railway Company on its tracks until you were ready to receive them; is that right?

A. Yes.

Q. That is what is known as constructive placement, is it?

A. That is right.

Q. And isn't it true that on those occasions you receive a written notice from the South Buffalo Railway Company that the car has been constructively placed?

A. Yes, sir.

Mr. CRAIG. That is all.

The COURT. That is all.

Mr. BROMLEY. May it please the Court, I should like to read into the record a short deposition, chiefly because there is an exhibit connected with it, which I shall desire to offer. This is the deposition of Harry C. Crawford, taken by the plaintiff in this case in October 1944.

Mr. CRAIG. May I have an opportunity to examine it before he reads it?

The COURT. Yes.

(Mr. Craig examines deposition.)

Mr. CRAIG. You may proceed, Mr. Bromley.

1120 Mr. BROMLEY. May I call upon you for the document which I referred to in this deposition at the top of page 88, dated March 13, 1942?

Mr. CRAIG. I will have to look through my papers. I don't know if I have a copy. I may or may not have.

Mr. BROMLEY. Perhaps you will permit me to use a photostatic copy.

1121 Mr. CRAIG. I suppose this is a copy of that document. I raise no question about it, although I do not recall.

Mr. BROMLEY. I will read it. If I use it, you may correct it or substitute what you believe to be a correct copy.

Mr. CRAIG. That is agreeable. I do not say it isn't. I just don't recall.

Mr. BROMLEY. I know.

(Mr. Bromley reads deposition of Harry C. Crawford as follows:)

Harry C. Crawford

"Q. Will you please state your name and address?

A. Harry C. Crawford, Bethlehem, Pennsylvania.

Q. What is your connection with the Bethlehem Steel Company?

A. General Traffic Manager.

Q. As such, what are your duties?

A. Traffic and transportation problems in connection with the inbound and outbound shipments at the various Bethlehem Steel Company plants in so far as those problems relate to movements of materials over trunk line carriers.

Q. What about connecting carriers?

A. Connecting trunk line carriers, yes.

Q. Well, what about problems arising concerning movements over the South Buffalo Railway Company?

1122 A. I have no jurisdiction.

Q. And the same applies to the other subsidiary railroad companies of the Steel Corporation?

A. That's correct, sir.

Q. Within whose jurisdiction do those problems fall, if you know?

A. You mean the problems of the short-line railroads, subsidiaries of the Bethlehem Steel Corporation?

Q. Yes; including South Buffalo Railway Company?

A. They fall under the jurisdiction of the South Buffalo.

Q. I mean, on the side of the Bethlehem Steel Company, is there anyone dealing with those problems?

A. I don't know of anybody.

Q. Mr. Crawford, counsel for all the Defendants in this case have furnished counsel for the Plaintiff a photostatic copy of a document dated March 13, 1942, from H. C. Crawford, and I now ask you to look at it?

(Witness complies with counsel's request.)

Q. Are you familiar with that document?

A. Yes; I am familiar with this.

Q. Now, to whom was that document sent, if you recall?

A. It was prepared for the information of the Works Accountants at our various plants all over the country, at Bethlehem.

Q. When you say 'Bethlehem' what do you mean?

1123 A. Bethlehem Steel Company.

Q. Was that document sent to any of the subsidiary railroad companies of the Bethlehem Steel Corporation?

A. Not to my knowledge; this is marked as having been received in the Comptroller's Office—I don't know who it may have been sent to.

Q. As far as you know, it wasn't sent to any of the railroads?

A. I don't think so.

Q. You would know, wouldn't you, if it had been sent to the railroads?

A. Well, I didn't prepare the document; it is a—well, I have no knowledge where it was sent; I can't see any reason for it; it is a paper which gives instructions as to the disposition of a fraction in figuring freight rates; really, anybody might have it; it's public property—as a matter of fact, it's information that may be obtained from some of the latest rate cases.

Q. Do you know whether it was sent to employees of the Bethlehem Steel Company at the various plants?

A. Yes.

Q. But you don't know whether it was sent to the railroads?

A. No.

That's all.

1124 Cross-examination by Mr. BROMLEY:

Q. Will you look at this document of March 13, 1942, which bears your signature. You were therein described as being the 'General Traffic Manager,' were you not?

A. Yes, sir.

Q. Anybody receiving that document on that letterhead, 'Subsidiary Companies of Bethlehem Steel Corporation,' would understand you were then signing the document and sending it out as the General Traffic Manager of the Bethlehem Steel Company?

A. Yes, sir; I have never held another position.

Q. You were never Traffic Manager of the South Buffalo Railway Company, were you?

A. Not of any railroad subsidiary.

Q. This document was not sent out by you in behalf of the South Buffalo Railway Company in any sense whatsoever, was it?

A. No, sir.

Q. It was sent out by you to the Bethlehem Steel Company plants in order to enable them to accurately calculate the freight rates which they would have to pay on outgoing shipments of their materials, is that right?

A. On all shipments of their materials handled by those various railroads.

Q. That is, outgoing shipments?

1125 A. It might be outgoing shipments; it might also be shipments from one point on the railroad to another point on the railroad. The Bethlehem Steel Company has to pay the railroads a certain sum of money for the transportation service, and this shows the amount of the increase.

Q. You didn't send this out for the purpose of information or informing the South Buffalo Railway Company about anything?

A. No; it was to inform the Steel Company's employees about charges they were going to have to pay after a certain date.

Q. The South Buffalo Railway Company, you assumed, was able to keep up with the Interstate Commerce Commission's

rulings without any instructions or information from you, isn't that correct?

A. Yes.

Q. You didn't send this out in behalf of the South Buffalo Railway Company in any sense whatsoever, did you?

A. Absolutely not.

Q. There wouldn't be any reason at all to send a circular of this kind to any railroad, including the South Buffalo Railway Company, would there?

A. None whatever.

Q. So far as shipments are concerned which are charged
1126 to Bethlehem Steel Company, the railroad company that makes the shipment renders a bill to the Bethlehem Steel Company?

A. That's correct, sir.

Q. The purpose of this circular of March 13, 1942, was to inform Bethlehem Steel Company employees of the proper basis on which the freight bills which it received from the railroads should be calculated from and after its effective date?

A. Yes.

Q. And that was the only purpose?

A. That was the only purpose, absolutely.

Q. You have never exercised or attempted to exercise any control or supervision over any of the affairs of the South Buffalo Railway Company at any time?

A. None whatever."

Mr. Bromley. I ask that the document referred to of March 13, 1942, be received in evidence as Defendants' Exhibit 9.

Mr. Craig. If the Court please, the plaintiff moves that all of the testimony of Mr. Harry Crawford, just read, be stricken from the record as being irrelevant and immaterial.

The Court. Does it identify the gentleman in the evi-
1127 dence, this individual Mr. Crawford, that this individual was connected with or acting for the Railroad Company?

Mr. Craig. No, your Honor.

Mr. Bromley. Nothing at any time?

Mr. Craig. I do not recall that we have, Mr. Bromley. I was trying to find out something when we were at Bethlehem, but I did not find anything and I did not offer his deposition in evidence. And I don't recall in this case that we have contended that Mr. Crawford ever had anything to do in any way with South Buffalo Railway Company.

The Court. That is the question we are trying in this examination. The cross-examination would seem to show this was an error. This letter was written over this heading here in this paper of the Railroad Company.

Mr. CRAIG. No, we could not tell from the document to whom it had been sent. And I made inquiry of Mr. Crawford and he stated very specifically that he had not sent this document to South Buffalo Railway Company; that it had gone only to Bethlehem Steel Company, so I dropped the matter.

The COURT. I think, then, Mr. Bromley, with that stipulation, what is the importance of the testimony?

Mr. BROMLEY. Well, I want Mr. Craig to be sure that he
1128 understands that this gentleman was General Traffic Manager of Bethlehem Steel Company for the period indicated. And he has letters which he has put in evidence which, as I understood, were signed, that is, endorsed "General Traffic Manager," without any signature. And his purpose is to show that——

The COURT. He just made the statement that he does not intend to say General Manager of the Railroad at all.

Mr. BROMLEY. Or acted as such?

Mr. CRAIG. No. We inquired into that and are satisfied and never pursued the matter. We do not contend he is or acted as such for South Buffalo Railway Company.

Mr. BROMLEY. Or exercised any control over the affairs of South Buffalo Railway Company in his capacity as General Traffic Manager of the Steel Company?

Mr. CRAIG. The only communication I recall we put in evidence is one that Mr. Crawford sent to Bethlehem Steel Company at Lackawanna; and then the Manager of the Lackawanna Plant wrote to South Buffalo people asking his opinions concerning that
matter. But in that connection we are not contending that
1129 Mr. Crawford was exercising or attempting to exercise any dominion over South Buffalo Railway Company. Now, in the instance of which I spoke, whether or not the Bethlehem Manager at Lackawanna did anything after he got Mr. Crawford's message is another problem, of course.

The COURT. Of course, that brings up the question of the authority of Mr. Crawford to give him any instructions.

Mr. CRAIG. I think there is no question about Mr. Crawford's authority to write the Bethlehem Plant Manager at Lackawanna. It was after that Plant Manager got this document that the Plant Manager then communicated with the South Buffalo people. That is the only thing I recall in this case when Mr. Crawford, from our standpoint, has figured, directly or indirectly. We never contended there was any direct connection between Crawford and South Buffalo Railway Company.

The COURT. Well, that would seem to answer any question here. I mean, why should we extend the record here by the reception of this testimony, which, under the stipulation, is clear?

Mr. BROMLEY. I do not think we should, and in view of
1130 the stipulation I will withdraw the deposition and the offer of Exhibit D-9.

Now, with your Honor's permission, I should like to turn to a very short deposition of Mr. Robert F. Maguire, taken at the same time.

Mr. CRAIG. Where is that?

Mr. BROMLEY. Page 215.

(Mr. Bromley reads deposition of Mr. Robert F. Maguire as follows:)

Robert F. Maguire

"Mr. ROBERT F. MAGUIRE, called by the Plaintiff, sworn, and testifies as follows:

Direct examination by Mr. CRAIG:

Q. Will you state your name and address, please?

A. Robert F. Maguire, Bethlehem, Pennsylvania.

Q. I believe you are the Purchasing Agent for the South Buffalo Railway Company?

A. Yes.

Q. Where is your office?

A. 1275 Daly Avenue, Bethlehem.

Q. You are also Purchasing Agent for the other six subsidiaries—the other six subsidiary railroads of the Steel Corporation?

A. Yes.

Q. And do you do your work for all the railroad companies from the same office?

A. That's right.

1131 Q. When did you become Purchasing Agent for the South Buffalo Railway Company?

A. I think it was December 1st, 1942.

Q. At that time did you become Purchasing Agent for the other six subsidiary railroads, also?

A. Approximately, as they had meetings, I was.

Q. As their Boards of Directors met, you mean?

A. Yes; that's right.

Q. What was your occupation prior to becoming Purchasing Agent for these several railroad companies?

A. I worked from June 1940 to the time I was made Purchasing Agent, under Mr. Petty as his private secretary, and also handled all of the Government War Production Board contacts in Washington.

Q. Was that while Mr. Petty was president of these seven subsidiary railroads?

A. Yes.

Q. What was your occupation prior to that?

A. From 1937 to 1940 I worked for the Bethlehem Steel Company under Mr. Petty, doing cost accounting and efficiency work in the Service Division of the Bethlehem Steel Company.

Q. That's from 1937 to 1940?

A. Yes—until I went to the railroads.

Q. Were you in intimate contact with him in that period?

1132 A. I worked directly under him.

Q. Prior to 1937, what was your occupation?

A. I was with the Vanadium Corporation at Lynchburg as accountant, purchasing agent, and office manager.

Q. Had you been with the Bethlehem Steel Company prior to 1937?

A. I started with the Steel Company in 1914, but I was away three times.

Q. During what periods did you work with the Steel Company and what were your duties?

A. From 1914 to 1919 I worked in the General Manager's office as chief clerk to one of his assistants.

Q. General Manager of what?

A. General Manager of the Bethlehem Plant of the Bethlehem Steel Company.

Q. Where?

A. At Bethlehem. From 1921 to 1931 I worked as chief clerk, under the same man, in the Alloy Division of Bethlehem Steel.

Q. Where?

A. At Bethlehem. Then from 1931 to 1937 I was with the Vanadium Corporation at Lynchburg, Virginia.

Q. Did Mr. Petty ask you to come with him to the South Buffalo Railway Company?

A. Well, let's say that I approached him.

1133 Q. And he was agreeable?

A. That's right.

Q. Now, can you tell us generally of what your duties consist as Purchasing Agent of the South Buffalo Railway?

A. Purchasing of the supplies that are used in the maintenance of the right-of-way, maintenance of locomotives, general supplies used in railroad work, and also placing contracts for construction, purchase of oil, coal, etc.

Q. Are your duties the same for the other subsidiary railroads?

A. That's right.

Q. Now, do you ever purchase supplies for all seven roads at the same time?

A. You mean in bulk?

Q. In any way?

A. Well, right at the moment we are going to purchase ties for all of the railroads.

Q. For all seven railroads?

A. All of the information will come to me about the same time; the orders, however, are placed separately by each of the railroads.

Q. In such a transaction, will you make the purchases from the same vendor?

A. Not necessarily; as a matter of fact, on the tie situa-
1134 tion we are definitely going to split the business and try to have one vendor supply the needs of one railroad, if possible.

Q. Has that been your custom in the past?

A. Since I have been on the job—I would say 'No'. Last year we did not do that; we bought to the best advantage from a price standpoint from one main supplier; there were more than one, naturally; but there was one main supplier on that and he would get the bulk of the business.

Q. Isn't it correct to say that you could get a better price by pooling the business of the railroads?

A. I have never made an attempt to pool the business; the inquiries are sent out approximately at the same time; there never has been any attempt on my part to do any pooling to get a better price.

Q. The inquiries are sent out at the same time for all of the railroads to all the various vendors?

A. Twelve or fifteen suppliers will get those inquiries; that's right.

Q. And they are all sent out in your name for the various companies?

A. Yes; that's right—on each railroad's form.

Q. They go out together?

A. Not necessarily together; they go out separately.

Q. But at the same time?

1135 A. About the same time; that's right.

Q. Do you purchase rails for the South Buffalo Railway Company?

A. That's correct.

Q. From whom do you purchase rails?

A. We have been purchasing rails from the Bethlehem Steel Company.

Q. Do you recall that you purchased rails for South Buffalo Railway Company from any producer other than Bethlehem Steel Company?

A. Not since I have been Purchasing Agent.

Cross-examination by Mr. BROMLEY:

Q. For what other companies did you work besides the Vanadium Corporation?

A. I worked for the Crucible Steel Company of America in Midland, Pennsylvania, under the general manager there.

Q. Any other company?

A. That's all.

Q. You testified that from twelve to fifteen different suppliers would get the inquiries of the various railroads?

A. That was my testimony regarding ties.

Q. Do I understand from your answer that you invited bids from those suppliers?

A. That's correct.

Q. Is it your purpose as Purchasing Agent to accept
1136 the lowest bid on such supplies, all other things being equal?

A. That's correct.

Q. Is that your general practice in the buying of supplies since you have held that position, to send out inquiries and have competitive bidding?

A. Yes, except probably in the case today on the buying of certain products from Bethlehem where we are buying—well, first of all, because the War Production Board practically tells us that that's the place to buy it because of the location and because of the tying up of equipment if we went to the other places for it, and, of course, then you have your price to which is added a certain freight rate——

Q. Do you mean that when you buy rails from the Bethlehem Steel Company for use by the South Buffalo Railway, that you can buy them more cheaply from Bethlehem Steel Company than from anybody else because they are made right in a plant near the railroad?

A. Yes; because rails are sold f. o. b. mill, and you have to add your freight.

Q. When you buy rails, you must pay the supplier's price as well as the freight rate, and you can generally get a better price from Bethlehem Steel Company because of the advantage in the freight, is that right?

1137 A. Yes.

Q. If you could buy rails from some company other than Bethlehem Steel Company to better advantage you would buy from such other company, is that true?

A. Yes; in many cases we place orders outside for steel.

Q. In many cases you buy steel for your railroads from sources other than the Bethlehem Steel Company?

A. Yes; even steel that's made by Bethlehem itself.

Q. What do you mean?

A. It's made and sold by Bethlehem to the supplier from whom we buy it.

Q. When you are talking about such a supplier, you are talking about——

A. A warehouse.

Q. You go to the distributor and buy the goods from him?

A. Yes.

Q. Why?

A. Because it's more easily gotten from him from a delivery standpoint—from the warehouse—and because of the fact that the quantities which we buy in that particular line of product is not attractive enough to Bethlehem Steel.

Q. Does the Bethlehem Steel Company have a General Purchasing Agent here in Bethlehem?

A. Yes.

1138 Q. Who is he?

A. As far as I know today, it's Paul Killian.

Q. Does anyone in Mr. Killian's office, or any other officer or employee of the Steel Company exercise any supervision over the purchases which you make for the South Buffalo Railway Company?

A. Absolutely not.

Q. Does any person—any officer, employee, or director of the Bethlehem Steel Corporation, or any of its subsidiary companies, other than the railroads, have anything to do with where you buy or what you buy regarding the supplies you have in hand to purchase?

A. Nobody whatsoever.

Q. Are you accountable only to the Board of Directors and the President of the South Buffalo Railway Company in your purchases for that company?

A. Yes.

Q. And has that been true since you have been connected with the Railway Company?

A. That's absolutely correct.

That's all.

Redirect examination by Mr. CRAIG:

Q. Do you buy your steel rails from various suppliers?

A. No; rail we buy from the steel plant of the Bethlehem Steel Company.

1139 Q. You buy that item direct?

A. Yes; that's right.

Q. Do you know if the prices are uniform on that item with all manufacturers?

A. Yes; since 1940 there has been a standard price of so much per ton, f. o. b. mill, on No. 1 rail.

Q. But on other supplies, you get them from railroad supply houses?

A. Yes; wherever we get the best delivery and price—delivery today is one of the most important things.

Q. You get better delivery from Bethlehem Steel at Buffalo than from other places, is that correct?

A. Well, on steel products at Buffalo, other than steel rail, we buy from a big warehouse concern in Buffalo.

Q. You don't buy anything else, other than rail, direct from Bethlehem Steel Company?

A. No, sir; not at Buffalo.

Q. Well, as far as you know?

A. That's right.

Re-cross-examination by Mr. BROMLEY:

Q. The warehouse you speak of in Buffalo is not a Bethlehem Steel Company warehouse, is it?

A. Definitely not.

Q. It has no connection with Bethlehem Steel Company?

A. None.

1140 Q. No matter what the respective rail manufacturers charge for rail, you can generally buy rail more cheaply from Bethlehem Steel Company than from any otlier supplier?

A. Yes.

Q. That is because you must pay the freight from the supplier to destination?

A. Yes.

Q. When you buy the rail from the Bethlehem Steel Company, the freight is less than what you have to pay elsewhere, or nothing at all?

A. Yes—however, if some other steel company would be willing to absorb the freight, we would purchase from them.

Q. If you were to find a steel company who would be willing to cut the price below Bethlehem Steel Company's price, you would buy from such other steel company, isn't that correct?

A. Absolutely.

That's all."

DAVID M. PETTY, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

1141 Q. Where do you live, Mr. Petty?

A. Bethlehem, Pennsylvania.

Q. You are the President of the South Buffalo Railway Company, are you?

A. Yes, sir.

Q. And your deposition has heretofore been taken in this case?
A. Yes, sir.
Q. There has been some reference to the fact that the Directors of the Railway Company elected a new Chief Engineer in 1940. Is that a fact?
A. Yes, sir.
Q. Who was he?
A. Hugh M. Dalziel.
Q. Has he since that time been the Chief Engineer of the South Buffalo Railway Company?
A. Yes, sir.
Q. Does he devote all of his time to service as Chief Engineer of the South Buffalo Railway Company?
A. No, sir. He is also Chief Engineer of six other railroads.
Q. Does he devote all his time to his work as Chief Engineer of these seven railroads?
A. Yes, sir.
Q. Does he work for the Steel Company at all?
A. No, sir.
Q. Or the Steel Corporation?
1142 A. No, sir.
Q. Or any other company or person?
A. No, sir.
Q. Where did you get him from? Where did he come from?
A. He was in the Engineering Department of the Bethlehem Steel Company at Buffalo.
Q. Here at Buffalo?
A. Here at Buffalo.
Q. For how long a time before you hired him?
A. He had been there quite a few years. I don't recall exactly how many. Ten or more. And prior to that he had been on the Lehigh Valley Railroad in engineering work.
Q. At any time since you have had any connection with the South Buffalo Railroad, Mr. Petty, have any of its officers or directors been officers, directors, or employees of the Bethlehem Steel Corporation?
A. No, sir.
Q. I ask you the same question with respect to the Bethlehem Steel Company?
A. The answer is also no.
Q. Have any of the officers, directors, or employees of the Bethlehem Steel Corporation been directors, officers, or employees of the South Buffalo Railway?
A. Not at the same time.
Q. And I ask you the same question with respect to the
1143 Bethlehem Steel Company?

A. The answer is the same.

Q. So that never at any time since you have been connected with the Railroad has there been a common director or a common officer as between the Steel Corporation and the Railway Company or the Steel Company and the Railway Company; is that right?

A. That is right.

Q. Does the South Buffalo Railway Company serve shippers on its line, which are in competition with the Bethlehem Steel Company at the Lackawanna Plant?

A. Yes, sir.

Mr. CRAIG. I object to that, your Honor, "any competition." In the first place, I do not think it is relevant to the controversy; and, in the second place, he speaks of being in competition. I don't know whether this witness knows who are in competition with Bethlehem Steel Company.

The COURT. He stated they sell the same material.

Mr. BROMLEY. Yes.

Q. Are there shippers on the line that sell the same materials as Bethlehem; and, if so, what are they?

A. Yes, sir.

Mr. CRAIG. That is, I take it the objection is overruled?

The COURT. The question as to the form is all right. It
1144 does already appear.

Mr. BROMLEY. I think it already appears.

The COURT. The fact already does appear in the testimony. Receive it. Say what companies there are that sell the same materials.

The WITNESS. The Republic Steel Company, Donner-Hanna Coke and the Hanna Furnace Company, and Bliss & Laughlin could also be considered a competitor or selling the same products. That is all I can think of. There may be others. That is all I can think of just now.

Q. Has anybody connected with the Bethlehem Steel Corporation ever given or attempted to give you any instructions as to how you shall run the South Buffalo Railway Company?

A. No, sir.

Q. And I ask you the same question with respect to anyone connected with Bethlehem Steel Company?

A. No, sir.

Q. Do you report your actions, prospective or past, as a President of this Railroad Company, to anyone connected with the Bethlehem Steel Corporation?

A. No, sir.

Q. Or with the Bethlehem Steel Company?

A. No, sir.

1145 Q. Is there anyone in the Bethlehem Steel Corporation or in the Bethlehem Steel Company who gives you any instructions or any instructions to any of your other officers, so far as you know, as to how to run the Railway or what its policy shall be?

A. No, sir. I think I would know it if they were given to anybody else.

Q. Do you give any instructions to your subordinates that they shall consult any employee of the Steel Company so far as to how the Railroad shall be run, other than in normal shipper relationship?

A. Giving instructions that they shall not consult with anyone as to what our policies are to be, any more than anyone else.

1146 Q. And as far as you know is there anyone connected with the Bethlehem Steel Company, either plant manager or otherwise, who attempts to exercise any control over any of your subordinates in the operation of your railroad either as it relates to the Bethlehem Steel Company or other shippers on your line?

A. I have no knowledge of any such action.

Q. Does the Bethlehem Steel Corporation exercise any control over the finances of the Railway Company in any respect whatsoever?

A. No, sir.

Q. Do you or have you ever deposited any of your surplus funds with the Bethlehem Steel Corporation or Company?

A. We have not.

Q. Does your Treasurer make any reports to the Bethlehem Steel Corporation or the Company?

A. No, sir.

Q. To whom does he report?

A. He reports to the Board of Directors of the various railroads, and to me, and to Mr. Trageser.

Q. Is there any requirement that the South Buffalo Railway Company shall secure before making capital expenditures any approval from the Steel Corporation or the Steel Company?

A. No, sir.

1147 Q. There has been mention here of a relief plan for the benefit of South Buffalo Railway Company employees. What is that relief plan and whose is it?

A. Well, the relief plan of the employees of the Bethlehem Steel Corporation and its subsidiary companies is a mutual plan. The plan is operated by the employees themselves through elected representatives, and it is their money. It does not belong to any-

body else. They pay monthly dues and collect certain benefits when they are sick, and certain death benefits.

Q. Is there any requirement that South Buffalo Railway employees must join that relief plan?

A. No; there is nothing compulsory about joining it as to any member.

Q. They may do so if they desire?

A. They may do so if they so desire.

Q. But the membership in the relief plan is made up or is open to employees of any subsidiary of the Bethlehem Steel Corporation, whether railroad company or not?

A. Yes; that is right.

Q. Now, mention in the testimony has also been made of a pension plan. Is that similar in nature?

A. Yes; inasmuch as it is open to all employees of subsidiaries of the Bethlehem Steel Corporation, but it is not a mutual
1148 plan. It is a plan in which all the funds are supplied by the corporation and by the individual companies, the subsidiary companies in the corporation.

Q. Is membership in that pension plan voluntary or required?

A. Well, it is voluntary entirely.

Q. Your employees don't have to join it unless they want to?

A. No.

Q. But if they do join it they get the benefit from a fund which is contributed to by all the subsidiary companies of the Bethlehem Steel Corporation?

A. They are all automatically a member as far as the pension plan is concerned if they qualify. There is no obligation on their part to go in or stay out.

Q. But they are all eligible and can qualify and take advantage of it if they want to?

A. Yes.

Q. Is it the fact that your Board of Directors is elected each year at a meeting in which the stockholder is represented in person or proxy?

A. Yes, sir.

Q. We have seen here on the stand five directors of the company. We have heard testimony that there are nine directors. What are the names of the other four at the present time?

A. I am a director. Mr. Trageser is a director, and Mr.
1149 Dullenkopf, the Superintendent here, and Mr. Sellers, who is Secretary-Treasurer.

Q. Have there been any changes so far as those four men are concerned since you came to the office of President?

A. Yes; Mr. Dullenkopf has succeeded Mr. Royer, in 1942, I believe it was, or 1943, and Mr. Royer had succeeded in turn Mr.

St. Clair who died, and who succeeded Mr. Benning when he retired.

Q. With the exception of that sequence of changes the other three, you and Trageser and Sellers, have been on the Board since you became President?

A. Yes, sir.

Q. And as testified I believe the only change in the five other directors was the fact that Mr. Flershem resigned and Mr. Smith took his place?

A. That is right.

Q. Some time in 1942?

A. Yes; I guess it was in 1942.

Mr. BROMLEY. That is all.

The COURT. Has the deposition been offered yet?

Mr. BROMLEY. Yes; it was offered as part of the Government's case. It is their own deposition. I don't think it was read—or was it?

Mr. CRAIG. Yes, it was read.

The COURT. Part of it was read.

1150 Cross-examination by Mr. CRAIG:

Q. Isn't it true that the Board of Directors of the South Buffalo Railway Company each year elects an Auditor?

A. Yes; they elect all the officers each year.

Q. Including the Auditor?

A. Yes, sir.

Q. And that includes also the Purchasing Agent, doesn't it?

A. Yes; and the Chief Engineer, and so forth.

Q. I want to ask you concerning whether or not the South Buffalo Railway Company does all of the switching in connection with the Bethlehem Steel Company's business west of the Hamburg Turnpike?

A. The Bethlehem Steel Company own and operate a few locomotives on their tracks only in certain departments. I don't believe I could name them all.

Q. So that your Railway Company, that is the South Buffalo Railway Company, does not do all the switching in that area west of the Hamburg Turnpike, does it?

A. No.

Mr. CRAIG. That is all.

The COURT. What is the number of that exhibit, the deposition?

Mr. CRAIG. I do not believe, your Honor, that it has a
1151 number. We read it. Some of the depositions were introduced as exhibits, but some of them were read into the record, the depositions of Mr. Petty and Mr. Trageser.

The COURT. And a few others here?

Mr. CRAIG. Mr. McMath.

Mr. BROMLEY. It was read on the second day at the end of Wednesday afternoon, the 23rd of January, and the reading continued over to the next day, the 24th of January.

The COURT. As to these two exhibits, the maps here, what is claimed to be the difference in these maps?

Mr. BROMLEY. The map on the left of you nearest the back wall is just brought down to a date which is more closely the present date.

The COURT. It shows the changes in the tracks inside of the grounds?

Mr. BROMLEY. Yes, sir; but there is no purpose we had in doing it except to show the actual situation as it existed as near this date as we can.

The COURT. Those are exhibits 1 and 2?

Mr. CRAIG. Yes, your Honor.

Mr. BROMLEY. It shows changes all over the railway wherever there were any; not only confined to Bethlehem.

1152 PAUL A. TRAGESER, recalled as a witness in behalf of the Defendants, having been previously sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. You are the same Mr. Trageser who has been called heretofore by the Government?

A. Yes, sir.

It is a fact, isn't it, Mr. Trageser, that so far as the tracks of the South Buffalo Railway Company are concerned west of the Hamburg Turnpike, they are all located not on land of the Bethlehem Steel Company, but on land which is under lease to the Railway Company?

A. Not all of the tracks west of the Hamburg Turnpike; no, sir.

Q. Well, what is the fact?

A. That is the fact except for the main line and also except for those tracks of the South Buffalo Railway Company which are located on what had been referred to in this proceeding as the 450-foot strip which is west of the Hamburg Turnpike.

Q. But I want to disregard the main line because I think we all understand or know that land. I want to disregard the 450-foot strip and speak only generally of the area west of the

1153 Hamburg Turnpike where these white lines are shown merging into the yellow and the red lines or near them. The white lines show South Buffalo Railway tracks west of the Hamburg Turnpike, don't they?

A. Yes, sir.

Q. As a general matter, isn't it true that those tracks are on land which is leased by the Railway Company?

A. That is true.

Q. So that it is not correct to say that your railroad tracks west of the Hamburg Turnpike are on property of the Steel Company, is it, in that sense?

A. No; the property is leased from the Steel Company.

Q. And that lease is a 99-year lease, isn't it, or was when it was taken out?

A. Yes; I think the present lease is a 98-year lease.

The COURT. Of course, there are the tracks of the Bethlehem Steel Company itself; there are tracks of the Bethlehem Steel Company also west of the Hamburg Turnpike?

The WITNESS. Yes, your Honor.

Mr. BROMLEY. I was coming to that.

By Mr. BROMLEY:

Q. There are two kinds of tracks belonging to the Bethlehem Steel Company over there west of the Hamburg Turnpike, aren't there, narrow-gauge and standard-gauge?

A. That is right.

1154 Q. What can you tell us in answer to the question which was addressed to Mr. Petty about the amount of plant switching which the Bethlehem Steel Company does itself as distinguished from what is done by you? First, does it do any?

Mr. CRAIG. If he knows. I do not know whether this man is competent to tell about the switching that the Bethlehem Steel Company does for itself.

Mr. BROMLEY. Of course, he has got to know that.

The COURT. He should be able to tell if they do any.

Mr. CRAIG. I should not think that he would be in position to know, but I am willing to go along and find out.

The COURT. He would not be in position to know the amount; that is probably so. Limit it first to the question if he knows if there is any.

By Mr. BROMLEY:

Q. Do they do any?

A. Yes, sir.

Q. How many locomotives, about, have they got which they operate over there themselves which belong to them as distinguished from your locomotives?

A. All I know about that is the testimony which they gave in Ex Parte 128, and I believe that they testified——

Mr. CRAIG. I will object to anything further, your Honor.

1155 The COURT. Yes. Can you tell from your own knowledge about how many they have?

The WITNESS. 25 locomotives.

By Mr. BROMLEY:

Q. And those locomotives are all used by the Steel Company in the area west of the Hamburg Turnpike to do their own switching, aren't they?

A. Yes; but they do switching also with other devices than locomotives.

Q. I want to exhaust the locomotives first, please. They do switching with their own locomotives on their own standard-gauge tracks, don't they?

A. Yes, sir.

Q. And they do switching with their own locomotives on narrow-gauge tracks, don't they?

A. Yes, sir.

Q. Will you give me an illustration of the kind of switching they do on their own narrow-gauge tracks with their own narrow-gauge locomotives?

A. Well, they handle semifinished materials, ingots, for instance, from the open-hearth furnaces to the rolling mills, and semifinished steel blooms from one rolling mill to another.

Q. Give me an illustration of the kind of plant switching they do on their standard-gauge tracks. Perhaps coal
1156 would be the best illustration.

A. Well as far as the coal is concerned that goes to the coke ovens, and they use a mule to take the coal from the place where the South Buffalo Railway Company delivers it in the car dumper yard of the Steel Company to the final unloading point at the car dumper.

Q. So that so far as that coal is concerned all your Railway Company does is put it into a Steel Company interchange yard; is that right?

A. That is right.

Q. And you leave it there?

A. That is right.

Q. And then they come along with a mule and move it to the final point of unloading?

A. Yes; but I don't mean an animal.

Q. What do you mean when you say "mule"? It is an electric power device, isn't it?

A. Yes.

Q. It moves on wheels?

A. It has an arm which drops down and pushes the car around.

Q. It is powered by an electric motor and is on wheels and moves along the track?

A. Yes, sir; on the standard-gauge track. That is the car dumper yard.

Q. That is the car dumper yard?

1157 Q. Have you got any other illustrations where Bethlehem Steel Company uses these 25 locomotives of theirs to do their own switching?

A. At their No. 3 open-hearth plant they take cars delivered on to interchange tracks by the South Buffalo Railway Company and handle those cars from those tracks up to the open-hearth floor where the cars are unloaded at their beam and column shop on the south end of the railroad. They have their own locomotive which takes the cars from the track where the South Buffalo Company delivers them and hauls them in to the points of unloading and brings the cars out that are loaded and leaves them on the track where we get them.

Q. Have you any other illustrations that occur to you?

A. No; I think those are the outstanding ones.

Q. You said they had other means of conveyance. To what did you refer?

A. They had winches at some places where they winch the car along from the place where we leave it to the final point of unloading.

Q. By winches you mean what have been referred to by some of these preceding witnesses as car pullers?

A. Yes; steel ropes with a hook on the end of them.

Q. And an electric-powered winch to pull the cable through the pulley?

1158 A. Yes, sir.

Q. Are those car pullers used in connection with your tracks or the Bethlehem Steel tracks?

A. Well, the cars might be left standing on our tracks adjoining a structure, an overhead crane, and they put the winch on the car-step, or usually there is a hook provided on the side of the cars where those winches are attached, and those cars may sometimes be left on the South Buffalo tracks close to the Steel Company tracks and be pulled up by the Steel Company to the point of unloading.

Q. Is there anything wrong about the practice of their pulling the car off your track?

Mr. CRAIG. I object to that, your Honor.

The COURT. Sustained.

Mr. BROMLEY. Perhaps Mr. Craig will concede that there is not anything wrong about it?

Mr. CRAIN. Not at all will I concede it.

Mr. BROMLEY. What does it violate?

Mr. CRAIG. I will bring it out on cross-examination.

Mr. BROMLEY. I wish you would.

Mr. CRAIG. I shall.

By Mr. BROMLEY:

Q. How many locomotives has your Railway?

A. 35, I think.

1159 Q. Part steam and part Diesel?

A. That is right.

Q. Has your Railway any cars, passenger cars, first?

A. No, sir.

Q. Has it any freight cars of any type whatsoever?

A. It has a few freight cars that are used to haul Company material owned by the South Buffalo Railway Company on the railroad in connection with track work, hauling ties around.

Q. But no freight cars of any kind which are used to transport freight for customers; is that right?

A. That is right.

Q. Have you any cabooses?

A. No, sir.

Q. So that all you have is locomotives; is that right?

A. That is right. You mean rolling stock?

Q. I mean rolling stock. Yes; I am talking about rolling stock. Does any of your equipment of any kind move beyond your interchange points with your line-haul carriers?

A. No, sir.

Q. Does any of your equipment move outside of Erie County?

A. No, sir.

Q. Is any of it employed or used by line-haul carriers?

A. No, sir.

1160 Q. And your service consists of and is limited to the movement of cars received from the line-haul carrier at interchange, moving those cars to a point to be unloaded for a shipper, and then moving the cars back again to interchange, empty or loaded, to be picked up by the line-haul carriers; is that so?

A. Yes.

Q. For this service from and to interchange how is your railroad compensated and by whom?

A. Well, for cars that move in line-haul service coming to or going beyond points in the Buffalo switching district the South Buffalo Railway Company receives that portion of the line-haul rate that covers the terminal switching service, and it receives its payment for the service it renders for the trunk lines in the terminal switching transportation by absorptions in all cases.

Q. I don't know what you mean by "absorptions." Who pays you your money; how do you get it?

A. It is paid to us by the line-haul carrier.

Q. And the fact that they receive it from the consignor or the consignee as a part of their complete rate and then pay part over

to you what you refer to as an absorption of your charge by them; is that right?

A. That is right.

Q. So that practically all of the charges which you make
1161 and receive on your railroad are of the nature of absorbed charges in the sense that they are paid to you by trunk line carriers; is that right?

A. That is right.

Q. Are there nonabsorbed charges?

A. Yes; there are.

Q. What are they?

A. They are the charges of the South Buffalo Railway Company for handling cars which originate in or destined to points within the Buffalo switching territory and do not move on a through line-haul rate.

Q. Those movements are of two classes, aren't they; first a movement from one point on your line to another point on your line?

A. To the interchange points; yes.

Q. No; I wasn't talking about that. I was talking about a movement for which you receive a nonabsorbed charge, otherwise known, as I understand it, as a local movement; isn't that right?

A. No; a nonabsorbed charge is a charge on a movement that moves through interchange; the charge for the movement from one point on the railroad to another point on the railroad, from a point of loading on the railroad to a point of unloading on the railroad is a local charge.

Q. So that there are three charges then, absorbed
1162 charges, non-absorbed charges and local charges?

A. That is right.

Q. Will you please define a nonabsorbed charge then?

A. A nonabsorbed charge is the switching rate of the South Buffalo Railway Company on a shipment moving through interchange which is destined to or comes from a point within the Buffalo switching territory.

Q. But which moves in part over the line of another carrier?

A. That is right.

Q. To whom is the charge paid for that kind of a movement?

A. The South Buffalo's charge is paid to it and the line beyond the interchange that performs the rest of the service receives its switching charge for that service. In other words, it is a combination of two switching charges on a nonabsorbed movement.

Q. And they are paid to the two roads involved in the nonabsorbed movement directly by the consignor or the consignee?

A. Well, I don't want to be technical. It could be more than

two. It might be three, depending on where the shipment is going.

Q. But regardless of the number of lines involved in that nonabsorbed payment the payment is made to the railroads concerned by the shipper or the consignee?

A. That is right.

1163 Q. A local movement is any movement from one point on your line to another?

A. From a point of loading to a point of unloading on the railroad; yes, sir.

Q. For that you are paid directly by the shipper or the consignee?

A. Under a tariff filed with the New York Commission.

Q. Coming back to the question of all movements other than local movements, that is absorbed and nonabsorbed charge movements, can you give us any idea what proportion of the total is represented by the nonabsorbed?

A. The nonabsorbed charges run about 5 percent of the total in a year.

Q. What is the Buffalo switching district?

A. May I refer to this map that I have? The Buffalo switching district generally speaking is a district which is bounded on the north by the plant of the Remington Company at Franklin Street in Tonawanda and on the east by the plants of the General American Equipment Company on the west Shore Railroad, the plant of the Lackawanna Steel Construction Company on the New York Central Railroad, and the plant of H. W. Ratzell on the D. L. & W. Railroad, the plant of the Federal Crushed Stone Company on the Lehigh Valley Railroad, and I may say

1164 that all of those plants are just a short distance west of Depew and bounded on the south by the plant of the Federal Portland Cement Company on the South Buffalo Railway and on the west by the Niagara River.

Q. Who defines that, the railroads or the Interstate Commerce Commission, or who?

A. Of course, in the first instance the railroads would define it, but it may well be that the Interstate Commerce Commission has over the course of time changed the limits of the Buffalo switching area.

Q. Is there any difference so far as classification is concerned and reports to the Interstate Commerce Commission are concerned in the designation as between a terminal switching carrier and a trunk railroad, for instance?

A. Yes, there is.

Q. What is the difference?

A. Well, the South Buffalo is designated and classified by the

Interstate Commerce Commission as a S-1 switching and terminal company, and that designation means that it is a company which performs terminal switching service.

Q. What is the designation for a trunk line carrier?

A. Well, Class 1—it depends on the kind of service they are performing, if they have got a lot of passenger service and
1165 mixed freight service and straight freight service. There are different classifications. And depending on their gross revenues, too.

Q. In addition to the movements that you have described does your Railway perform what I have referred to as intraplant switching for anybody who wants it?

A. Yes, sir.

Q. Do you make a charge for that?

A. Yes, sir.

Q. And that charge is paid by the industry for whom you make the movement?

A. Yes, and published in the tariff, of course.

Q. I notice that there has been received here in evidence a weighing tariff. What weighing service does the railway perform?

A. It owns a number of scales and weighs shipments for—outbound shipping services for billing purposes to obtain the weight on which the freight charges are based. It also performs weighing services on local movements that move on a per car rate for which a weight does not have to be obtained for billing purposes, and the weighing is paid for by whoever orders it, and on in-bound shipments where there is a shortage, or where we are requested to weigh the car on arrival and before placement such cars are weighed.

Q. So that wherever the weighing service is done for the
1166 convenience of information of the shipper or consignee, it is paid for by the shipper or consignee?

A. That is right, but our tariff provides that where the weights are not used for billing purposes, the weighing charge applies.

Q. And that applies to all shippers for whom the weighing is done?

A. That is right.

Q. How many scales does your railroad have?

A. I think at the present time we have eight scales.

Q. Now, aside from weighing are you lines used for anything other than terminal and switching purposes?

A. Only for local movements, that is all.

Q. Well that is within the classification terminal and switching?

A. Yes, sir. No, they are not used for any other purpose.

Q. Are your services and facilities available on the same terms to anyone that applies for them and all who apply?

A. It is our obligation to see that that is so.

Q. Have you ever refused to perform any services or provide any facilities to anyone who has applied for them?

A. No, sir.

Q. Is it the policy of the Railway, Mr. Trageser, to attempt to induce new shippers to come into the territory
1167 and on the line of the railroad?

Mr. CRAIG. I object to what the policy is. What they do is something else.

The COURT. I think it appears from the testimony that such efforts have been made, Mr. Bromley.

Mr. BROMLEY. I think that is right, sir.

By Mr. BROMLEY:

Q. Does the Railway Company manufacture anything, Mr. Trageser?

A. No, sir.

Q. Does it mine anything?

A. No, sir.

Q. Has it any purchasing or selling or manufacturing or other business than transportation?

A. No, sir.

Q. Does it own any stock in any concerns, any stock or securities of any kind other than securities kept as temporary investments?

A. No, sir.

Q. Do you or any of the officers or employees of the Railway take part in any of the producing or manufacturing activities of the Bethlehem Steel Company at its local plants?

A. No.

Q. And do you take part in the production or manufacture
1168 of any of the other subsidiaries of the Bethlehem Steel Corporation?

A. No, sir.

Q. How many shippers other than the Bethlehem Steel Company did your railway serve in the last year, if you know?

A. 75 last year.

Q. How many shippers are there over your lines other than the Bethlehem Steel Company who have plants manufacturing, fabricating, or other plants on your line?

A. There are about 35.

Q. Does your Railway maintain a public team track for team track delivery?

A. Yes, sir.

Q. Where is that?

A. Well, it is shown on the map as No. 23, and it is at the

southern end of what we call our Shenandoah branch, just beyond the north of the plant of Sumner & Company.

The COURT. Will you indicate on the map where that No. 23 is? (Witness indicates.)

By Mr. BROMLEY:

Q. Now, can you tell us whether the switching services which you perform for all shippers, including Bethlehem
1169 Steel Company, are performed at their convenience or your convenience?

Mr. CRAIG. I object to that. That is one of the questions here. The question was "Including the Bethlehem Steel Company." That is one of the questions, your Honor, the operation, the interrelationship between the Bethlehem Steel Company and the South Buffalo Railway Company as to whose convenience does prevail in the relationship between those two companies.

The COURT. Will you read the question?

(Question read.)

The COURT. Do you mean by your inquiry whether they could perform it if they wanted to or whether they had to perform it as directed by some one else?

Mr. BROMLEY. Yes, sir; that is what I mean.

The COURT. I will let him answer that.

The WITNESS. Performed at our convenience.

Mr. CRAIG. I move that that answer be stricken, your Honor. It is a conclusion.

The COURT. I think it is, too. I will strike it out. Motion granted.

By Mr. BROMLEY:

Q. Now, can you answer the question in the form in which his Honor put it, whether——

1170 The COURT. I was trying to illustrate what I thought your inquiry meant. I think we have gone all over this, have we not, as to the manner in which this service is performed?

Mr. BROMLEY. Yes, sir. All I wanted to show is whether the Railway Company had issued instructions as to whether the services would be performed at the direction of the Railway officials or at the direction of somebody else.

The COURT. That is an entirely different question.

Mr. CRAIG. The question should be "What was done?"

The COURT. He may show whether instructions were given in that direction.

Mr. BROMLEY. Will you answer that question.

The WITNESS. No such instructions were given that the service was to be performed at the convenience of the Steel Company.

1171 Q. What instructions were given?

A. No instructions were given. Instructions are, of course, the way the Railroad is operated is to perform the service in the most economical way from the standpoint of the Railroad, to coordinate the services with the needs of the shippers, but not to subordinate the affairs of the Railway Company to anybody.

Q. Has the Railroad at all times, since you have been familiar with it, always discharged its own employees in its own discretion?

A. Yes.

Q. Did you hear read the other day the deposition of Mr. McLean, in which he testified that he observed, some time in 1943, that your engine and train crews moved empty ladles to the ladle repair house?

A. I heard that read; yes, sir.

Q. And, furthermore, did you hear him say that your Railroad made no charge for that service?

A. Yes, I heard that.

Q. Did you hear Mr. McLean when he gave that testimony actually on the deposition in Washington?

A. Yes; not only on the deposition in Washington but when he gave it in Ex Parte 128.

Q. Had he given it before?

A. Yes.

1172 Q. When did he give it before, what date?

A. September 1944, I think it was.

Q. Following the first time you heard that testimony and in 1944, did you attempt to investigate to find out whether that was true or not?

A. Yes, I did. Of course, I had no car numbers. When Mr. McLean learned that from the investigation, the records of the Railway, he did not make any information available to the Railway Company as to the numbers of the cars, because he worked under cover. And when I heard him first make the statement I discussed the matter with the local people of the Railway Company at Lackawanna. Not having specific car numbers, we couldn't check to see just when the movements occurred or what they were. I called the attention of the local people to the tariff provisions that such movements were to be charged for, and instructed them to see that such movements were charged for.

Q. Did you hear his testimony, given at the same time and in the same connection, that he observed 115 ladle cars placed for loading and that he noticed that 14 of them were not loaded or were not loaded completely but were taken away and moved to another loading location?

A. I heard that testimony; yes, sir.

Q. Did you ever check up to see whether that charge was true?

1173 A. Well, I could not, of course, check that specific charge, because we did not have the car numbers. But, again, I discussed with the local people at Lackawanna the charge that he had made, that we had not charged for the movement of those 15 empty cars placed and not used; called their attention to the tariff provision, and instructed them to see that the charges called for by the tariff were made. Their excuse for any that were missed were that they were not reported on the conductor's switch list and, therefore, due to that error, if there was an error, the charge was not made.

Q. Under your system of records is there any way that you can check up to see whether you should make charges against Bethlehem Steel Company, for instance, any way other than merely referring to these shippers' orders, which they give you; and, if so, what is it?

A. The fundamental purpose of establishing the conductor's switch list in the very beginning was to put in the hands of the Railway Company's people a record made by Railway Company employees of the movement of all cars on the Railroad, as reported by the conductor who was performing the service, and that the switch list was to be checked against the switch orders furnished by the consignee to see that we had a switch order of all the

1174 movements that were reported by the conductor on the switch list.

Q. To see that you were paid for the movements reported by the conductor, for which charges should be made?

A. That is right.

Q. Did you hear Mr. Booth's testimony given here the other day, in which he said, as I understood him, that your Company did not show in its records, or he was told that your Company did not charge any demurrage to Bethlehem Steel Company on cars owned by Bethlehem Steel Company?

A. Yes, sir; I heard that testimony.

Mr. STRANGE. May it please the Court, the testimony in that regard, of Mr. Booth, I think was that the South Buffalo Railway Company made no charge for cars owned by the Bethlehem Steel Company, regardless of whose tracks the cars were on.

The COURT. Well, he is inquiring into that.

Mr. STRANGE. I just want to get that clear.

By Mr. BROMLEY:

Q. Now, you agree with Mr. Booth, do you not, that no demurrage should be charged on Bethlehem Steel-owned cars unless and only if they stood loaded on South Buffalo Railway tracks for a period of time in excess of 48 hours from the first 7 a. m.?

A. That is one of the things I agree with Mr. Booth on; yes, sir.

1175 Q. What about his charge that he was told that you did not collect demurrage in 1938?

A. Well, the records of the Railroad Company did not disclose that the Bethlehem Steel Company private cars were standing loaded on South Buffalo Railway Company tracks beyond the free time.

Mr. STRANGE. May it please the Court, the witness is now testifying what the records show; and we contend that the records are the best evidence as to that. That is exactly the same objection Counsel for the defendants made.

Mr. BROMLEY. This is testimony of what they did not show.

The COURT. But the books are the best evidence, Mr. Bromley.

Mr. STRANGE. And we ask that so much of the answer as the witness made be stricken out.

The COURT. Strike it out.

Q. Mr. Booth said you made some change or he had heard that you made some change in that practice of charging demurrage subsequent to 1939. You did not make any change in anything, did you?

A. No. When the records disclosed that the cars were standing on the South Buffalo Railway Company tracks beyond the free time——

Mr. STRANGE. Just a moment.

The COURT. The answer "No" may stand. The rest may

1176 be stricken out. You cannot say what the books disclose.

Q. Well, did you, as a matter of fact, charge demurrage to Bethlehem Steel Company on Bethlehem Steel-owned cars?

The COURT. You mean on the Buffalo tracks?

Q. Standing on Buffalo tracks, in excess of 48 hours?

A. Yes.

Q. That has always been your practice, has it not?

A. Whenever the charges were accessible.

Q. That is what I mean.

The COURT. Whether they were accessible—you mean whether they were on your tracks?

The WITNESS. Beyond 48 hours' free time provided for in the tariff.

By Mr. BROMLEY:

Q. In that respect your practice, with respect to consignees, other than Buffalo Steel Company, who received Bethlehem Steel-owned cars; was the same, was it not?

A. Yes, sir.

Q. You did not treat Bethlehem Steel in that respect any differently from what you treated other shippers on your line, did you?

A. No.

Q. Did you hear Mr. Booth testify that he was told that in 1938 your interchange cars, that is, cars owned by
1177 other railroads, were on continuous demurrage from the time they left interchange until they got back there?

A. Yes.

Q. Is that the fact?

A. Well, I was a little bit confused about that, because certainly in-bound and out-bound demurrage, as anyone who has any knowledge of the situation knows, cannot be commingled in the same account. The record must be split. It cannot be on continuous demurrage. And the in-bound car that comes in loaded is in the in-bound account. If that car is used for an out-bound loaded move it must go in the out-bound account.

Q. Must go off the in-bound account?

A. That is right.

Mr. STRANGE. May it please the Court, it was the testimony of Mr. Booth that the demurrage accounts were handled just as the witness has just testified, that it came in on the in-bound, then moved over to out-bound consecutively without any time being lost from the removal of one and placing on the other. That, I think, the testimony will show.

Mr. BROMLEY. I do not think so at all.

Mr. STRANGE. That is the record as to that.

Mr. BROMLEY. However, without regard to what it shows, I want to know what the fact is.

1178 By Mr. BROMLEY:

Q. In 1938 when were these cars released from in-bound demurrage?

A. When they were unloaded.

Q. And that is the normal practice with anybody; is it not?

A. Yes.

Q. And when were they released from out-bound demurrage?

A. When they were delivered to trunk-line connection.

Mr. STRANGE. May it please the Court, we would like to know whether the witness is testifying from his own recollection and memory or whether he is testifying from the records?

The COURT. Well, he is testifying to the practice. I suppose his testimony relates to what he claims the practice was, what he did; not as to the amount.

Mr. BROMLEY. That is right.

The COURT. That is a matter for the books to show.

Mr. Strange. Insofar as these are matters that the records would show, we object to his oral testimony in regard thereto.

The Court. I will let him state that they did not charge under these conditions, but the amount is another question. The books will be the best evidence of what the actual charges were.

1179 By Mr. Bromley:

Q. When were they released from out-bound demurrage?

A. When they were delivered to the trunk-line connection.

Q. Did you make any change in that practice, subsequent to 1938 or 1939?

A. Yes.

Q. And what was that change?

A. As far as out-bound loaded cars were concerned, they were released in the out-bound demurrage account at the time the billing was delivered to the Railway Company and the car was ready to go.

Q. When was that change made?

A. 1942.

Q. And what were the circumstances attendant upon the change?

A. The Bethlehem Steel Company, with which we had an agreement respecting the old practice, asked for a review of the situation, which was held here at Lackawanna, in conference with their representatives; and they produced records which convinced me that they were being unduly penalized by the old system; and they asked for a change in it, which I was convinced was justified, and agreed to release the cars in the out-bound demurrage account at the time the billing was furnished to us and the car was ready to go. And insofar as in-bound loaded cars, which went

1180 out empty, were concerned, to release those cars at the time the pull order was delivered to the Railway Company and the car was ready to be pulled off the track.

Q. This agreement that you had with the Bethlehem Steel Company as to the method in which you were to assess demurrage prior to 1939, is there any bureau or authority that checks over the method in which you charge demurrage?

A. Yes. This Railroad Company is a member of the Eastern Car Demurrage & Storage Bureau and its records are checked periodically by inspectors of the Bureau, who report to the Manager in New York; and following each such inspection a report of exceptions that are taken to the methods or computations in the demurrage account is made by the Field Inspector to the Manager, who transmits it to the Railroad. And where the Bureau feels the computations were wrong or the methods followed were improper, they ask for a change and a correction of whatever mistakes have been made.

Q. Did the Bureau ever take exception to this method of computing demurrage which you had by agreement with Bethlehem Steel Company?

A. No.

Q. Was it disclosed to them?

A. Yes.

1181 Q. With relation, further, to Mr. Booth's testimony, so far as you know did your Railroad ever hold on wheels three days' supply of coal for the benefit of Bethlehem Steel Company?

A. On the South Buffalo Railway?

Q. Yes.

A. No, sir.

Q. Were there ever occasions in which cars of coal consigned to the Steel Company were held on your Railroad because of inability of the Steel Company to take them?

A. Yes.

Q. That is a common occurrence with all shippers, is it not?

A. Yes.

Q. In that situation did you charge demurrage to Bethlehem Steel Company the way you would to any other shipper?

A. Yes, indeed.

Mr. BROMLEY. That is all.

Mr. CRAIG. If the Court please, this examination of Mr. Trageser brought up some questions which Mr. Strange and I would like to talk over. If it will be agreeable, I should ask an adjournment at this time.

The COURT. I think we had better adjourn at this time until tomorrow morning.

(Whereupon a recess was taken until Friday, February 1, 1946, at 10 o'clock a. m.)

1184 Proceedings of Friday, February 1, 1946, to 10 o'clock a. m.

Appearances: Same as before noted.

PAUL A. TRAGESER, resumed the stand in behalf of the Defendants, testified further as follows:

Direct examination (continued) by Mr. BROMLEY:

Q. I call your attention, Mr. Trageser, to line 4 on page 1157 of the transcript of your direct testimony given yesterday afternoon, and ask you if you have any comment or change to make with respect to that line?

A. The answer to the question starting on the fourth line of page 1157 as transcribed reads: "At their No. 3 open-hearth plant they take cars delivered on to interchange tracks by the South

Buffalo Railway Company." What I said is, and that should read: "At their 3 open-hearth plants they take cars delivered on to interchange tracks by the South Buffalo Railway."

Q. And you desire to make that correction in that line of that page, do you?

A. If you please. Further on down in the answer also a correction should be made. The answer says "and handle those cars from those tracks up to the open-hearth floor where the cars
1185 are unloaded at their beam and column shop on the south end of the railroad." There should be a period after the word "unloaded" so that it will read "and handle those cars from those tracks up to the open-hearth floor where the cars are unloaded. At their beam and column shop on the south end of the railroad they have their own locomotive which takes the cars from the track where the South Buffalo Company delivers them," and so on.

Q. In all of those comments you have been referring to the answer of yours contained on page 1157 between line 4 and line 13, inclusive, have you not?

A. Yes, sir.

Mr. BROMLEY. That is all.

1186 Cross-examination by Mr. CRAIG:

Q. I believe you said, Mr. Trageser, that Bethlehem Steel has 25 locomotives; is that right?

A. Yes, sir.

Q. Do you know how many of those locomotives are Diesel locomotives?

A. No; I do not.

Q. I believe you said that South Buffalo has 35 locomotives?

A. Yes; I said that was my best recollection.

Q. Do you know how many Diesel locomotives South Buffalo has?

A. I think they have 19 Diesel locomotives.

Q. Are Diesel locomotives more powerful than the other locomotives you have?

A. I do not think I am qualified to answer that question, Mr. Craig. I am sorry. It all depends on what you mean by "more powerful." They probably are when they start to pull.

Q. How old, generally, are your Diesel locomotives?

A. The first Diesel locomotive we acquired in the year 1937.

Q. What is the age generally of your other locomotives?

A. Well, 30 years, some of them; some of them younger than that. I would say that thirty years is the oldest steam locomotive.

Q. Have you bought any steam locomotives since 1937?

1187 A. No, sir, I don't think we have.

Q. All of your steam locomotives are older than your oldest Diesel?

A. Oh, yes—all of the steam locomotives are older than the oldest Diesel?

Q. Yes.

The COURT. As of the time of purchase.

Q. As of the time of purchase?

A. Yes.

Q. Mr. Trageser, of all the switching which South Buffalo does on its line, what percentage, or approximately what percentage, is done for Bethlehem Steel Company in its property; that is, Bethlehem Steel Company property west of the Hamburg Turnpike?

A. Sorry, I cannot answer that question. I do not know what the division is of the interplant and intraplant switching done for Bethlehem Steel Company west of the Hamburg Turnpike.

Q. Well, can you state what percentage or what approximate percentage of your total switching on your line is done for Bethlehem Steel Company at all of its properties?

A. Well, according to the stipulation we agreed to the other day, or which was agreed to, about, I think the figures were about 70% of business done by the Railroad is business that is
1188 handled for account of Bethlehem Steel Company and 30% for industries other than Bethlehem Steel.

Q. Well, do you mean by that that you are of the belief, based on your knowledge, that 70% of all the switching you do on your line is done for Bethlehem Steel Company?

A. Yes.

Q. Are you not able to give an approximation in connection with that 70%, as to which part of it is done west of the Hamburg Turnpike and that which is done at other places for Bethlehem Steel Company?

A. I am sorry, I am not able to give you that.

Q. Wouldn't you say that substantially more than half of that switching is done west of the Hamburg Turnpike; that is, of the switching you do for Bethlehem Steel Company?

A. I won't say.

Q. Mr. Trageser, I wish you would come to the map, which is Plaintiff's Exhibit 1, and point out and describe the location of the car dumper yard to which you have referred.

The COURT. Indicating what number is that.

The WITNESS. It has no number, your Honor.

Mr. CRAIG. We will try to define the location.

A. The car dumper yard of Bethlehem Steel Company,
1189 according to Exhibit 1, is a series of six tracks, just west of the number indications 56 and 57 on the map.

The COURT. I do not know whether you have defined what car jumper means.

Mr. CRAIG. It is a car dumper yard, your Honor. It has been referred to in the previous testimony.

Q. Well, is it not the first series of Bethlehem Steel tracks east of Lake Erie and west of the Ship Canal? That is, it is between Lake Erie and the Ship Canal, and the first series of tracks east of Lake Erie?

A. It is the first series of tracks east of Lake Erie; not the first track of Bethlehem Steel Company, however, because there is another track along here [indicating], you see. It is the first series of tracks.

Q. And the series consists of six tracks; does it not?

A. Yes; as I said, six tracks.

Mr. CRAIG. Yes. Resume the stand.

1190 Q. The South Buffalo Railway Company delivers coal to the Bethlehem Steel Company at the car dumper yard, doesn't it?

A. Coal intended for consumption at the coke ovens of Bethlehem Steel Company; yes, sir.

Q. I don't mean all coal. And, in connection with the delivery, the South Buffalo Railway Company, does it not, places the loaded coal cars on the Bethlehem Steel Company tracks?

A. Yes, sir; shoves them into the tracks.

Q. And isn't that system followed generally in delivering cars to the Bethlehem Steel Company; that is, you place the loaded cars on Bethlehem Steel Company tracks?

A. Yes; I would say that is so. Not necessarily the unloading tracks.

Q. But on Bethlehem Steel Company tracks?

A. Yes, sir.

Q. Now, to go back to the car dumper yard for just a moment. As I understand it from your testimony after the cars of coal are placed by South Buffalo on the car dumper yard tracks of Bethlehem Steel Company, the Bethlehem Steel Company then by its own power takes those cars of coal to the car dumper itself; is that right?

A. That is right, Mr. Craig.

Q. The car is unloaded and dumped, isn't it?

1191 A. It is put on a mechanical dumper and turned over and dumped; yes, sir.

Q. What happens to that empty car?

A. It drifts down by gravity and is pulled away by the South Buffalo Railway.

Q. Of course, the Bethlehem Steel Company in moving the car of coal from the car dumper yard to the car dumper moves that car in a northerly direction, doesn't it?

A. Yes, sir.

Q. After the car is dumped, do I understand that by gravity the car continues in a northerly direction?

A. No; it continues by gravity in southerly direction.

Q. Do I understand that the car dumper itself is at a point north of what is indicated on the map here as a South Buffalo Railway track immediately east of the car dumper yard?

A. I am sorry, I don't follow that. May I have the question?

Q. Perhaps we can get at it in this way: Will you point out and define the location of the car dumper itself?

A. [Stepping to map.] The car dumper is at the northerly end of the series of six tracks known as the Bethlehem Steel Company's car dumper yard about which I testified a few moments ago.

The COURT. Is there a number there?

1192 The WITNESS. I am sorry, there is not.

By Mr. CRAIG:

Q. Well, at any rate, by gravity after the car has been dumped it goes in a southerly direction?

A. That is right. It may go a few feet northerly and then start back.

Q. At any rate it reaches a South Buffalo Railway track, doesn't it?

A. It is delivered by the Bethlehem Steel Company onto a South Buffalo Railway track empty.

Q. Then is it not true that the South Buffalo Railway Company picks up that empty car and takes it away?

A. It is true.

Q. Now, you have described this method of delivery to Bethlehem Steel Company by the South Buffalo Railway Company of cars by placing cars on Bethlehem Steel Company tracks. Isn't that the same system which you follow in delivering cars to Summer & Company?

A. In principle, yes.

Q. And to the Spring Perch Company?

A. The Spring Perch Company?

Q. Yes. Don't you place those cars on Spring Perch Company tracks when you deliver them?

A. Yes; at the point of unloading.

Q. What I am interested in in this connection is whether
1193 or not you in delivering the cars you place them on the consignee's tracks, whether at the point of unloading or other-

wise? You do place them on the Spring Perch Company track; is that right?

A. That is right; but if that is your question I have got to go back to the Summer situation which you spoke of, because the cars are not delivered on Summer & Company's tracks.

Q. That is the instance where the consignee brings in the car itself?

A. The cars are left on the South Buffalo Railway track outside of the Summer's plant.

Q. Now, in connection with the Buffalo Sintering Corporation, you deliver cars there by placing them on the tracks of the Buffalo Sintering Corporation, don't you?

A. Yes, sir.

Q. Isn't the same thing true of the Maritime Milling Company?

A. Yes, sir.

Q. And Bliss & Laughlin, Inc?

A. Yes, sir.

Q. And with the exception of the Republic Steel Company, isn't it true that that system is followed in connection with other consignees whose representatives have appeared here as witnesses for the defendant?

A. Cars for the Republic Steel Corporation are delivered
1194 onto Republic Steel Corporation tracks.

Q. But you have an interchange there, don't you?

A. Yes. That is no different than the car dumper yard.

Q. You don't deliver those cars inside the plant of the Republic Steel Company, do you?

A. Yes; I think Mr. Caylor testified that the interchange tracks are inside the plant of the Republic Steel Corporation.

Q. But they are interchange tracks?

A. Yes; they are interchange tracks.

Q. Yesterday you testified concerning absorbed charges. Will you again define what they are?

A. The absorbed charges are that part of the through-line-haul rate which is paid to South Buffalo Railway Company by its line-haul connections for the terminal switching service which the Railway Company performs in placing cars or taking them from its line-haul interchange connections.

Q. I believe in you previous testimony you testified that your basic tariff in connection with that charge was your I. C. C. tariff No. 62, which is in evidence as Plaintiff's Exhibit 151; is that correct? Would you care to look at this copy [showing to witness]?

A. That is it.

Q. And it is true, isn't it, that under that basic tariff

1195 that for most of the commodities which you move to and from interchange you receive 18 cents per ton?

A. Yes, Mr. Craig, not only under that tariff, but as I testified before under the tariffs published by the trunk-line railroads.

Q. Yes; I understand that. Which, of course, coincide with your tariff in that respect?

A. That is right.

Q. And I believe you testified generally that one of the factors taken into account in the fixing of the rates set forth in this tariff is the point to which delivery is made and the point of loading on the out-bound track; is that true?

A. That is true; yes, sir.

Q. Now, you testified as to the point of delivery of certain coal to the Bethlehem Steel Company at the car dumper tracks. Can you give us any further illustrations of where commodities are delivered to the Bethlehem Steel Company west of the Hamburg Turnpike?

A. I answer that question as it is asked. Cars are delivered to the Bethlehem Steel Company on its tracks west of the Hamburg Turnpike at many different locations.

Q. Can you give us a few illustrations?

A. Where cars are delivered to the Bethlehem Steel Company west of the Hamburg Turnpike?

1196 Q. Yes.

A. Cars are delivered to the Bethlehem Steel Company, west of the Hamburg Turnpike, at all of the plants shown on this map.

1197 Q. By all of the plants, you mean as indicated by various numbers on the map?

A. Yes, sir. They are delivered to the Steel Company at all of those plants.

Q. Isn't it a fact, Mr. Trageser, that if delivery, instead of being made at all of the plants indicated by the numbers west of the Hamburg Turnpike, as shown on Plaintiff's Exhibit 1, if, for instance, a delivery were made to the Steel Company at a point, for instance, near the car repair shop to which we have referred heretofore, in the neighborhood of the WYE, that that would be a factor in determining the amount to be set forth in the tariff for the service to which we have referred?

A. Might be, if you shove over to the trunk lines all of the classification work the South Buffalo Railway Company is now doing in sorting and marshalling cars for delivery at Bethlehem Steel Company plants and also at the other plants on its Railroad.

Q. Well, I am talking about your basic tariff.

A. May I have the question again?

Q. (Question read by reporter as folows: "Isn't it a fact, Mr. Trageser, that if delivery, instead of being made at all of the plants indicated by the numbers west of the Hamburg Turn-
1198 pike, as shown on Plaintiff's Exhibit 1, if, for instance, a delivery were made to the Steel Company at a point, for instance, near the car repair shop to which we have referred heretofore, in the neighborhood of the WYE, that that would be a factor in determining the amount to be set forth in the tariff for the service to which we have referred?")

A. It could be a factor.

Q. Well, as a matter of fact, if delivery were made at that point, wouldn't there be a tendency to decrease the amount as set forth in the tariff?

A. I cannot answer that question.

Mr. BROMLEY. I object to that as incompetent.

The COURT. Well, "a tendency," sustained.

Q. I believe in your testimony you referred to conductors' switch lists and switch orders, furnished by the consignee. Do you recall that?

A. Yes, sir.

Q. That conductors' switch list is what we referred to previously in this case as being the record made out by your conductor of switch moves, is it not?

A. That is right; yes, sir.

Q. Those consignees, as I read it, the consignees' switch order is the same as the R–115?

A. R–115; yes, sir.

Q. The shipper's order, we call it?

1199 A. Yes, sir.

Q. And it is your understanding, isn't it, Mr. Trageser, that in the case of Bethlehem Steel Company, after billing has been made, that your Company retains both those switch lists and the shipper's orders?

A. They retain the switch list, of course; that is our record; and the shipper's order that is delivered to us is retained by South Buffalo, yes, sir.

Mr. CRAIG. Your Honor, if it is agreeable to have Mr. Strange ask just a few questions concerning testimony with which he is more familiar than I am?

The COURT. Yes.

Cross-examination by Mr. STRANGE (continued):

Q. Mr. Trageser, yesterday afternoon I think you testified that some arrangement that South Buffalo Railway Company had with Bethlehem Steel Company with regard to demurrage had been modified or changed in 1942; is that correct?

A. Yes, sir.

Q. Now will you tell us what demurrage tariff was in effect at the time that change was made?

A. Sorry, I cannot tell you.

Q. Was any change in the demurrage tariff that was effective at that time made as the result, or as a cause, of the change in the agreement?

1200 A. Any change that was made in the demurrage tariff?

Q. That is right.

A. No relation whatever. That assumes that we could change, the South Buffalo Railway Company could do something to get the demurrage charge changed. No relation whatever.

Q. And you testified, did you not, that in 1942 an agreement that had provided that cars continued on demurrage to out-bound interchange was changed to provide that cars came off of demurrage at the time they were loaded; is that right?

A. I don't understand the question. I am awfully sorry.

Mr. STRANGE. Will you read the question?

Q. (Question read by reporter as follows: "And you testified did you not, that in 1942 an agreement that had provided that cars continued on demurrage to out-bound interchange was changed to provide that cars came off of demurrage at the time they were loaded; is that right?")

A. May I take the liberty to ask you if you mean cars that were loaded for out-bound delivery were continued to the point of time of interchange in the out-bound demurrage account?

Q. That was the old agreement, was it not?

A. That is right; yes, sir.

Q. To what extent was that changed?

A. As I testified yesterday, it was changed to the extent

1201 that when the Railway Company received billing instructions and the car was ready to go, after the early part of 1942, the cars were released as of that date from the out-bound demurrage account with Bethlehem Steel Company—in the out-bound demurrage account.

Q. Was there any change in the tariff made at that time?

A. I can't tell, Mr. Strange, whether there was a change made in the tariff or not. But I can say this: That any change that was made in the tariff, if there was a change, had nothing whatever to do with the modification of the agreement with the Bethlehem Steel Company, in the respect that I have just testified to.

Q. You testified, likewise, with regard to a change that was made with regard to in-bound cars at that time?

A. In-bound loaded cars made empty.

Q. And there was a change in 1942 made in your agreement with the Bethlehem Steel Company as to that?

A. That is right; that the cars were released at the time the Railway Company was furnished a pull order showing that they were empty and ready to be pulled off the track.

Q. Was there any change made in the applicable tariff at that time as to that situation?

A. Well, again, I can't say. I don't know.

Q. You handle traffic matters and matters including rates and tariffs for the South Buffalo Railway Company to
1202 some extent, do you not?

A. Yes, sir.

Q. You keep posted with regard to tariffs and the provisions thereof, as they apply to South Buffalo Railway Company, do you not?

A. I try to, to the best of my ability.

Mr. STRANGE. That is all, may it please the Court.

Redirect examination by Mr. BROMLEY:

Q. Whatever your arrangement was with Bethlehem Steel Company with respect to demurrage prior to 1942, it was your understanding that it was permitted by the applicable demurrage tariff, was it not?

A. That is right.

Q. And that is likewise true so far as your arrangement is concerned subsequent to 1942, isn't it?

A. That is right.

Q. And were your practices for both periods regularly inspected or reported to the Bureau to which you referred yesterday?

A. They were.

Q. And the name of that Bureau was what, please?

A. Eastern Car Demurrage and Storage Bureau, I think it is, 30 Vesey Street, New York City.

Q. Was any exception or criticism taken by that Bureau,
1203 with respect to your demurrage practices, either before 1942 or after?

A. Not to the best of my recollection.

Mr. BROMLEY. That is all.

Re-cross-examination by Mr. CRAIG:

Q. I will just ask you a few more questions about this Republic Steel Corporation: Regardless of who owns or on whose property the interchange tracks are located, it is a fact, is it not, that all the in-bound and out-bound cars of Republic Steel Corporation are handled on those interchange tracks?

A. As far as South Buffalo Railway is concerned; yes, sir.

Q. That is, you do not deliver to Republic Steel Corporation inside of its property the way you have described that you de-

livered to Bethlehem Steel Company west of the Hamburg Turnpike?

A. Only, Mr. Craig, in respect of delivering the cars on interchange tracks that are on the property of the Steel Company.

Q. Yes; but all of your deliveries, all of your taking away, is done at the interchange tracks, isn't that right, with Republic Steel Company?

A. That is right; and in the area west of the Hamburg
1204 Turnpike, for some of the plants there, all of the delivery and all of the taking is from interchange tracks.

Q. Yes; but all of your delivering for Bethlehem Steel Company west of the Hamburg Turnpike is not done at one place, is it?

A. No, sir.

Q. It is done at a number of places, as indicated by the map and by the numbers indicating the various plants west of the Turnpike?

A. That is right. Of course, as the map shows, South Buffalo Railway Company has a trackage between all of those plants.

1205 Q. I don't dispute that, but you don't have any trackage other than the interchange tracks possibly on or in connection with the property of the Republic Steel Corporation?

A. No, sir.

Mr. Craig. That is all.

Mr. Bromley. That is all.

Willard M. Sporleder, a witness called by and on behalf of the Defendants, having been first duly sworn testified as follows:

Direct examination by Mr. Bromley:

Q. Where do you reside, Mr. Sporleder?

A. Hamburg, New York.

Q. And your business is what?

A. Railroad Transportation.

Q. Connected with what railroad?

A. The Buffalo Creek Railroad.

Q. What is your position with that railroad?

A. Superintendent.

Q. For how long a time have you been connected with the railroad?

A. Since January 1st, 1941.

Q. And prior to that time what did you do?

1206 A. I was in the same field, railroad transportation.

Q. With whom?

A. The Erie Railroad Company.

Q. How long a time were you with the Erie?

A. Since 1915, October 20th.

Q. And prior to that time were you in the railroad business?

A. I was not.

Q. What is the Buffalo Creek Railroad Company?

A. The Buffalo Creek Railroad Company is the owner of the properties of the Buffalo Creek Railroad.

Q. And in what business is the railroad engaged?

A. Terminal switching operations for, generally speaking, the lake-front area of the City of Buffalo.

Q. How long is the railroad?

A. Between extremes about 4¼ miles.

Q. About how many customers does it serve?

A. Approximately 25 or 26.

Q. Does it own any passenger cars?

A. It does not.

Q. Does it own any freight cars for revenue use by shippers or consignees?

A. None.

Q. Any cars of any type for revenue use?

A. No.

Q. Does it own any cabooses?

1207 A. None.

Q. It does own locomotives?

A. Yes, sir.

Q. About how many, sir?

A. 13.

Q. Steam and Diesel?

A. 9 steam and 4 Diesel.

Q. And its work is confined to terminal switching in this area, is it?

A. That is right, sir.

Q. With respect to demurrage, Mr. Sporleder, do you set up any arbitrary time so far as placing loaded cars for consignees on demurrage is concerned?

Mr. CRAIG. I the Court please, I object to this question. We are getting into the practices of the Buffalo Creek Railroad in dealing with its customers or shippers, and I think that that has no place in this case. It is irrelevant and immaterial. If there is any question of the propriety of the service which is rendered by this railroad to its customers, whether the service is lawful or unlawful or reasonable or unreasonable is a matter for the Interstate Commerce Commission.

The COURT. How is it material, Mr. Bromley, what the practice of another railroad is?

1208 Mr. BROMLEY. It seems to me that it is material for this reason, may it please the Court: The Government has introduced a considerable amount of proof with respect to the

character of service rendered by the South Buffalo Railway Company to its customer, Bethlehem Steel Company. Let me take one illustration: It has introduced evidence which tends to show that for a period of a few months in 1943, the South Buffalo Railway Company kept a locomotive in constant attendance at some one of the Lackawanna plants of the Bethlehem Steel Company, that is, assigned it there to take care of that business, and do nothing else, and if, perchance, that caused it to sit idly by for some period of time it sat idly by. Now, if that testimony has any materiality or relevance to this controversy at all it must be that the South Buffalo Railway Company was doing something abnormal, unusual, not done by the railroad generally, and it must be that counsel intended to compare it to some standard and to show that it was unusual and favored service which would not ordinarily be rendered by a railroad to a customer. Now, as I said yesterday, true it is, my friend does not see fit to inform your Honor as to whether that practice is normal or abnormal,
1209 and you therefore have no standard against which to test it, but what I am worried about is that your Honor may infer from the testimony itself that it is abnormal and unusual, and therefore convict this railroad on a charge of favoritism to its stockholder, which, if your Honor had the benefit of the testimony of men skilled in the art, connected with other railroads, you might find that this practice, for instance, was common on other railroads, and was not unusual; that railroads always render the kind of service that their shippers ask of them, and if they wanted, if they had enough business to justify the assignment of a locomotive at a particular place for a shipper that the railroad assigned it there, and if the railway made arbitrary arrangements with customers about demurrage the railroad made the arrangement. It was normal. All railroads try their utmost to please their shippers, and they go to great length to render satisfactory service, and that is my only purpose in offering this. I have a half a dozen or more railroad men from railroads in this area prepared to testify about the practices which Mr. Craig has introduced as having been indulged in by the South Buffalo Railway.

Mr. Craig. For the purpose of argument let us assume that
1210 the Buffalo Creek Railroad does have a locomotive stand-by for special service to some customer, I still do not know whether that is lawful or unlawful, nor do I know if the Buffalo Creek has any set-up at all with any of its shippers comparable with what the South Buffalo has with the Bethlehem Steel Company. That is what we are interested in. The testimony which we introduced was for the purpose of showing the correlation of activity between the operations of the Bethlehem Steel Company and the South Buffalo Railway Company. It must be considered

in the light of the particular situation which the testimony has developed which exists between the South Buffalo Railway Company and the Bethlehem Steel Company. I do not see how in this case we could pass on the practices of other railroads. He said that railroads go to great length to please their shippers. It may be that the Interstate Commerce Commission is continually investigating that situation—I don't know whether they ever get caught up—to do away with those practices. We cannot tell anything about those practices between another railroad and another shipper; indeed I do not know that we can tell anything about the practices between the South Buffalo Railway and the
1211 shippers on its line other than the Bethlehem Steel Company.

The COURT. Do you claim that this practice of maintaining an engine to stand by—it is not claimed that it is in violation of any tariff regulation, is it? As I understand it, it is intended to show, as you expressed it yourself, a favor extended by the defendant railroad to the company.

Mr. CRAIG. Well, we contend that it is part of the proof; indeed a small part of the proof; to show the integration of the operations of the Steel Company and the South Buffalo Railway Company. Of course, Mr. Dullenkopf testified that he ordered it stopped, as I recall it, because he said among others things it was not proper. But we are not in this proceeding getting into the question of legality. We are taking all of the circumstances relative to operation and considering the physical connection between the Bethlehem Steel Company and the South Buffalo Railway Company plus the circumstances concerning the stock ownership and all the circumstances of the case in order to show that integration. That is as far as we go.

The COURT. Of course, the legality has a bearing. If it were illegal to do it, that is one thing. If it is done as a matter
1212 of practice that is common to all railroads, that is another thing. As you say, there is testimony here that this practice was discontinued. I don't recall that it was from the standpoint of whether it was illegal, or from the standpoint of economics, economical operation of the railroad.

Mr. BROMLEY. The latter, I think, clearly. Mr. Dullenkopf said he thought the men were loafing on the job, and that therefore it was not economical.

Mr. CRAIG. That is part of what he said, but he went beyond that.

The COURT. Do you claim that it was illegal for them to maintain a stand-by engine there, or on the other hand, do you claim—the most that you claim for it is that it is an act of favoritism by the company?

Mr. CRAIG. It is an indication of the coordination between the operations of the Bethlehem Steel Company and the South Buffalo Railway Company, a fragment of our evidence relative to the integration of the operations of the two companies.

The COURT. If that is true, I think it is competent, then. Objection overruled, if that is your position, and an exception to the Government.

By Mr. BROMLEY:

Q. I will ask you what your practice is with respect to
1213 any practice of arbitrarily dividing a demurrage time with respect to in-bound loaded cars?

A. Well, any in-bound loads which are received up to 3 p. m. are put on the constructive notices as of that time, and are available to the industry for placement at any time to or at 7 a. m. of the succeeding morning. Any loads received after 3 p. m. are held off of the constructive notice until the 3 p. m. notices of the succeeding day.

Q. Is that done for the purpose of convenient operation of your railroad?

A. Yes, we don't feel that we can accept business any later than 3 p. m., switch it up and classify and get it in shape for placement for 7 a. m. the succeeding morning.

Q. Is that done by arrangement with the shippers or consignees on your line?

A. No, I would say that time is determined entirely by our operating conditions and our operating convenience.

Q. And you notify the shippers on your line of that determination?

A. That is true.

Q. And they don't object to it?

A. They do not.

Q. And ordinarily under the demurrage tariffs, a loaded car received by you at any time without regard to the
1214 3 p. m. dividing line that you use would be placed on demurrage, an in-bound demurrage at 7 a. m. of the appropriate day, would it not?

A. Ordinarily, yes.

Q. And you use this system of picking out 3 p. m., and any car that is received prior to 3 p. m. is placed on demurrage the following 7 a. m., and any car received after 3 p. m. waits another day's period?

A. That is true, and that is entirely for our operating convenience, due to the physical lay-out and the necessary operating restrictions of the railroad.

Q. Now, we have had some testimony here while we are on this subject about a practice of the South Buffalo Railway Company which has been referred to as post dating, and as I recall it, that referred to interchange and the relationship between the South Buffalo Railway Company and connecting carriers, and the practice was that the South Buffalo Railway Company had an arrangement with the connections whereby for the purposes of per diem it took a date of interchange as of some time other than actual interchange. Are you familiar with that practice?

A. I am not familiar with what was done on the South Buffalo Railway.

Q. Do you have any practice on your railroad of that kind?

1215 A. Yes, it is known as the Buffalo car pool plan for the Buffalo Creek Railroad.

Q. What is it? Will you please explain?

A. It is a matter of efficiency all the way through for one thing, and, secondly, it is set up entirely for the purpose of assuring shippers an adequate supply of empty cars for loading. That operates in this manner: Any one of the line-haul carriers of the City of Buffalo is privileged to deliver the empty cars required for loading out-bound by way of their line to the Buffalo Creek at any time during the 24-hour period which is convenient to their operations, limited only by our ability to take the cars in; that is have we sufficient track room.

1216 The efficiency of the operation is very apparent, because in all railroad operations there are peaks and valleys of business. When you have a large volume of business to handle, as is the case with every railroad in the Buffalo area, in the night hours, all of their locomotive switching power, or whatever you want to call it, is engaged in getting out their night trains to correspond to the releases from the plants. As soon as that work is completed they can go about handling the less important operation of switching up and delivering empties for prospective loading or for the necessary loading at outlying points. That is the manner in which the empties are delivered to the Buffalo Creek Railroad. We get the greatest volume of our empties after midnight.

Q. What does postdating mean?

A. Well, here is the rest of the story: We do not know how many empties they are going to come with. We also do not know how many we are going to require. And in some instances they will come with as many as they can give us, they happen to have them, whereas they might not have them the succeeding day. The result is that lots of times, particularly on a Monday morning, we will have a couple of hundred empties on hand. And we, natu-

1217 rally, are not going to take those empties into our accounts until we need them, because this is being done for the operating convenience of the line haul carriers. If we were to stand upon our rights, we would call the New York Central Railroad and say, "We just got an order for fifty cars of grain to be loaded this afternoon. Get your empties over here." Obviously, the New York Central could not get the cars there that quickly. The result is that we maintain a supply of cars and when we require them we take them into our accounts.

Q. When you say you "take them into your accounts," you mean you set that as the time, beginning at which you are liable for a per diem charge with the connecting carrier?

A. That is true. And the time is determined by the time when we take the cars out of the hold yard and move them to the particular industry which is to do the loading.

The COURT. That all depends on your line?

The WITNESS. That is immaterial, because if anyone—and this has happened—if any one of the line haul carriers has a supply of cars on our line, when they are short they are welcome to come and get them. They are their cars, not ours.

Q. Now will you turn your attention to this situation: When your line receives traffic consigned to a particular
1218 consignee, which is in excess of that consignee's ability to take it, what do you do with them?

A. Well, we hold it. We place it on demurrage, too, as the succeeding 7 a. m. We notify the customer that we are holding the cars, subject to his orders for placement.

The COURT. That is ordered by a definite number which you have received? That is where you have received a definite number that he has ordered?

The WITNESS. Well, it is in this manner: We receive whatever is in-bound from the line haul carriers. Frequently the industry doesn't know just what is coming in at this time. He has many types of commodity coming in——

Mr. BROMLEY. These are loaded cars, your Honor.

The WITNESS (continuing). These are loaded cars, in-bound, your Honor.

Mr. BROMLEY. Not empty cars, but are loaded cars.

The WITNESS (continuing). And having many and various commodities which go into his manufacturing process, it is decidedly to his advantage that we give him knowledge of what we have, which we do as of 3 p. m. Then he knows that those are available for his placing at the succeeding 7 a. m., and he gives us a written order detailing the numbers of the cars wanted and where

1219 he wants them placed. That order may include every car we have for him or it may leave a large number of cars still subject to order.

In fact, there is one shipper down there, or one receiver, who has as high as a hundred in-bound loads on hand at practically all times.

Q. On your lines?

A. On our line, received from all of the various railroads in Buffalo.

Q. And you will hold them there just as long as he wants you to, will you?

A. We do.

Q. Then you will deliver them to him whenever he wants them, without any further charge, other than demurrage; isn't that right?

A. That is right.

The COURT. You charge demurrage after the regular time, according to the regulations?

The WITNESS. Whatever the regulations are, as received and directed by the Washington authorities.

Q. Therefore, it is a normal thing for your Road to have cars consigned to an industry and to hold them on your tracks awaiting placement?

A. Yes, sir.

Q. And is it normal for the lapse of time between the time
1220 that you get them and the time you deliver them to be all the way from a couple of hours to two or three days or more?

A. Yes.

Q. Do industries on your line, sir, ask you, and do you comply with the request, to spot their inbound cars in a certain particular order or manner?

A. Some of them do, yes.

Q. And do you do it?

A. Yes.

Q. Do you put them at the exact spots, for instance, under loading or unloading chutes, that you are requested to do so by the consignee?

A. Yes.

Q. And do you, if requested by an industry on your line, spot cars at certain designated times? That is, say, a certain part of the number of cars you have on hand for a consignee on one day and a certain other number on another day? Do you render that kind of a service?

A. That comes in with their orders, and it is subject to our operating convenience. But, of course, we regard operating con-

venience the manner in which we can make the most money for ourselves, so the better service we give the customer the more chance we have of getting in greater revenue.

Q. On your line is it unusual for one of your customers to
1221 have as many as fifty or a hundred different spots in and about his plant?

A. Well, that varies. There are plants that have as high as 70 spots. There are others that will have about 14 or 15.

Q. And is it normal for those customers to make up a program or list of spots where he wants the cars placed and deliver the program to you and for you to carry out the program as he has set it up?

A. Well, we make that requirement ourselves, that they give us a precise program to enable us to properly perform the work.

The COURT. As to the point of delivery on a certain track, you mean?

The WITNESS. Yes, sir.

Q. And, having received that program, do you perform the spotting service promptly or not?

A. Just—well, possibly I should answer this a little differently: We have, through consultation with our industries generally, set up a schedule of operation whereby we finish the work in one plant and then go to the next one; and except for a point where we are going to use the entire 8-hour services of a crew, we do have such an operating schedule. It is a co-ordinated service between our various customers.

1222 Q. What do you mean in instances where you are going to use the entire 8-hour services of a crew?

A. Well, there are locations, particularly in the chemical area, which we serve, Elk Street, where a crew will move back and forth between a single industry and the yard in the course of their performing the switching operations required by us to line up the business we have and required by the industry. In order to get their cars placed and their cars pulled as we require between the two operations it is possible that that engine, so far as its industrial service is concerned, will serve but the one industry. But it is also performing necessary switching operations contributing to our own functioning.

Q. Does it ever happen that it does not have any necessary switching operations in your own function and it may hang around the industry for a while?

A. Well, we have such a situation which does occur and it is not that the industry wishes it that way. It is merely that the length of time between jobs—and we are kept very well informed as to when the next move is wanted—the length of time is not

sufficient to take that crew from that location to have him to perform another operation and get back in time to take care of the necessary operation for the industry.

1223. Q. So you let him wait?

A. We let him wait because, if we did not, the capacity of that industry to function has been restricted. And just as soon as we cut down the out-turn of our industries we begin losing money, because we are paid on a unit basis, and the more units we can handle the greater efficiency we can gain from our locomotives, the better our revenue.

Q. Do you serve some plant of the Ford Motor Company in this area?

A. We have one assembly plant, the Buffalo assembly plant.

Q. So far as that customer is concerned, at their request, do you deliver cars to them in an exact order as predetermined by them?

A. Yes.

Q. What is the purpose of that, from their standpoint? Do they have an assembly line or some——

A. Well, the purpose is economical operation for them; and the same as I answered previously, by giving them an economical operation they are going to get a greater out-turn and we are going to handle more cars, and we are going to get more money.

Q. They have an assembly line, don't they, in that plant?

A. They do.

Q. And if a car comes in which is loaded with a certain
1224 kind of a part, they want that car placed right near the line so they can take the material out and put in on the hooks that deliver that kind of material to the assembly line; isn't that true?

A. That is true.

Q. So they want to integrate your placement of their incoming cars with their assembly line operation?

A. That is true. We do that for all of our industries.

Q. Is it normal and is it a requirement on your Road that when you move cars into an industry track or take them away, your crews go along and see that all men are out of the cars and the platforms are up?

A. Well, generally speaking, that is a requirement of our operating rules.

Q. And your engine stands by and waits until your crew gets any employee of the industry out of the cars, is that right?

A. That is true. That is a safety requirement.

Q. Do you have situations on your line where there are fences across the tracks which lead into industries?

A. Yes.

Q. Do you have situations where there are switches on those tracks, which are operated by the industry itself, some kind of an electric lock operation?

A. Yes. That is a safety feature.

1225 Q. And your power cannot come into such stations until either the industry opens the gate or there is an electrically locked switch operated, is that right?

A. That is true.

Q. What can you say as to whether your railroad makes a practice of spotting cars inside of buildings, Mr. Sporleder?

A. Well, that is controlled entirely by the safety feature again. We spot cars inside of buildings, certainly.

Q. Do you spot cars underneath cranes and crane-runways?

A. Yes.

Q. And when I say "cranes and crane-runways" I mean such as are owned and operated by the industry and not by you?

A. That is right.

Q. Do you get any extra compensation for this spotting of cars at exact spots from any of your industries?

A. No. That is the first placement.

Q. Do you perform what has been referred to here as intraplant switching for a company?

A. Yes, sir.

Q. That is normal on your line?

A. It is. We have a tariff rate to cover.

Q. And do you do that kind of intraplant switching for an industry by as many separate switches as they desire and the volume of the traffic justified?

1226 A. Dependent entirely on the volume of traffic. We are not going in to make one movement. We generally make those movements in conjunction with our regular switching schedule.

Q. Then you move cars around inside the plant on plant tracks as requested by the industry?

A. Yes, sir.

Q. Is it anything unusual to have private automobile roads crossing railroad tracks inside of industrial plants?

A. I would not call them private automobile roads. They are industry—they are highways, or roadways, rather, necessary for industrial operation.

Q. And are crossing accidents avoided by precautions taken by your train crew?

A. Yes; and by the industry as well.

Q. Is it anything unusual on your line, your being requested, and performing service, such as switching in later-arrived cars ahead of earlier-arrived cars, Mr. Sporleder?

A. Why, that is regular, because the earlier-arrived cars are not always necessarily the cars the industry want.

Q. Do you ever permit shippers to use your railroad-owned tracks for the purpose of loading or unloading cars? I mean, other than team tracks now.

A. Oh, it has been done, although it is rare.

Q. What are the situations in which it is done, where
1227 some shipper asks that as a favor and you grant it to him, is that right?

A. Well, when the shipper will ask it as a favor we do it with a letter agreement, the understanding being that they are going to be responsible entirely for anything which may occur resulting in an accident of any nature whatever, that they will not be relieved of any tariff charges, and—well, that about covers it. Now, we do do it on other occasions, for our own convenience.

For instance, cars are sometimes ordered back to an industry. Those cars may be in a train lined up to go, whereas all that the industry wishes to do is possibly check over the—there may be some question as to the number of sacks, or something of that nature, in the car, or there may be one of the sacks missing. We have a special service charge of $6.93. That is rather an old tariff charge. If we were to give him what he asks there is not sufficient revenue in the movement to justify the expense of taking that car back to the industry. We will then, rather than lose money on the operation, let him come on up and make the adjustment right in the yard, and we will give him a man to protect him while he is doing it.

Now, it is done for our operating convenience. It is also done to save claims.

1228 Q. Is it normal on your Railroad for the destination of loaded cars to be changed en route, pursuant to instructions received from consignor and consignee, and for the Railroad to change the destination without charge?

A. We do not do that, although that is common to great many railroads. We do not do it because we have a local tariff which applies, and if there is a change made in that billing after the car leaves the industry it is done on the basis of a local movement.

Q. Do you always move cars to destination immediately after they are loaded, removed from the loading track by your Railroad, or do you sometimes set them up and wait?

A. Well, they are set up and held. I wish we could deliver them as fast as they are made. It would be good business. But you cannot do that and do a volume of traffic at the same time.

Q. So, what do you do with them, set them up and wait until you get enough to fill out?

A. They are set out from the industry and, as soon as we have a big enough drag to go up to the classification yard, they are taken up there and classified.

Q. What do you do about industries with heavy loading schedules, which make a number of foreign-line cars
1229 empty during a day? What do you do with respect to returning those cars to their home roads as they are unloaded?

A. At the present time we are not returning them, because there is a car shortage, and we have had a car shortage for several years. And as these cars are made empty we are resetting them for an out-bound load.

Q. That is, you are holding them?

A. We are holding them for out-bound loading.

Q. Because you find it reasonable to anticipate that you will some time get an order for empty cars, then you will have them available to fill the order; is that right?

A. We get orders ahead all the time.

Q. Do you ever permit industry-owned locomotives to use your railroad tracks?

A. Well, we have industry-owned locomotives, yes, they are out on our tracks.

Q. And you permit them to do that sometimes without any charge to them, do you not?

A. Why, yes, because they are performing work which, if they did not do it, we would have to. In other words, they are merely moving cars from their own switches out onto our tracks, making them available for us to further progress their movement.
1230 And I do not see how they could do it without getting out on our tracks, because, in this one instance I have in mind, their curvatures are so great we could not get in on their tracks to get it. They must necessarily bring the stuff out to us.

Q. Do you have markers on your railroad that show where your tracks, the exact point, which your tracks merge into the tracks of the industry?

A. Well, I would not say they are markers, although in each instance it is definitely established by survey and is recorded in the various agreements pertaining to side track operation.

Q. Well, you have all that information on maps carefully prepared in your office, have you not?

A. Yes, sir.

Q. So that your clerks, and other employees, can determine from the maps where the dividing lines are?

A. That is correct.

Q. By the way, in an out-bound load shipment over a switching terminal carrier, is it the shipper that routes the shipment or the terminal carrier?

A. The shipper routes the shipment. We have nothing whatever to do with that. We merely act as the agent for the line haul carrier.

Q. And the shipper determines what line haul carriers
1231 you shall deliver his loaded cars to?

A. The shipper merely gives us an order bill to deliver the car to such-and-such line haul carrier; and he does not in any way give us any bill of lading or anything of that nature. That bill of lading goes direct to the line haul carrier.

Mr. BROMLEY. That is all.

The COURT. What is your location?

The WITNESS. Well, if you are familiar with Buffalo, it is Howard Street and the New York Central near Fillmore Avenue, although it is about half a mile from the Central passenger station; and the other extreme is right down at the foot of Main Street, directly opposite the D. L. & W. passenger station.

The COURT. I thought you said you crossed Main Street?

The WITNESS. No. Main Street is considerably farther north than the Central Terminal.

The COURT. I know that, but I thought you and the Buffalo Creek Road ran north, crossed Main Street.

The WITNESS. No.

The COURT. By the Ford?

The WITNESS. Well, Ford has been—earlier, you have in mind, the location of the Ford plant there out at Main Street, about a quarter of a mile down this way from Fillmore Avenue.
1232 They are no longer located there. That was the first——

The COURT. No. Beyond Fillmore, farther out, the old Ford building, recently sold to the Trico.

The WITNESS. Well, the assembly plant was originally located out there. It is now—well, I would say about ten years ago was relocated to this water-front location on Fuhrmann Boulevard.

The COURT. Your terminus is half a mile from the Central Railroad station?

The WITNESS. Yes. That is where we connect with the New York Central Railroad.

The COURT. That is the east terminus?

The WITNESS. That is the east; and the west is down opposite the D. L. & W. Railroad.

The COURT. How many plants do you serve?

The WITNESS. 25 or 30.

The COURT. What are the large ones?

The WITNESS. The large ones are General Mills, Cooperative G. L. F., Pillsbury Flour Mills, Ford Motor Company, National Aniline & Chemical, General Chemical, Standard Oil Company, and the Superior Elevator of the Cargo Grain, also the Eastern Elevator of Cargo Grain, Spencer Kellogg Company. I guess I have named the large ones.

1233 By Mr. BROMLEY:

Q. Do you connect with all the trunk line carriers coming into this Buffalo switching district?

A. Yes, sir.

Mr. CRAIG. For reasons heretofore stated, the plaintiff moves to have stricken from the record the testimony of the witness Sporleder relative to services rendered by Buffalo Creek Railroad to its shippers and customers.

The COURT. Denied.

Cross-examination by Mr. CRAIG:

Q. Mr. Sporleder, do any of your customers or shippers own all of the capital stock of your Company?

A. No, sir.

Q. Do any of your shippers own any of the capital stock of your company?

A. No, sir.

Q. Do any of the holding corporations which own all the capital stock of any of the shippers you serve——

A. I don't know.

Q. (Continuing.) Own any of the capital stock of your Company? What is your answer?

A. I would rather you repeat that. I interrupted and I became a little bit involved too much.

1234 Mr. CRAIG. Will you read the question?

Q. (Question read by reporter as follows: "Do any of the holding corporations which own all the capital stock of any of the shippers you serve own any of the capital stock of your Company? What is your answer?")

A. None that I know of.

Q. You spoke of your having, I think, about four and one-half miles of track, is that right?

A. No. That is the distance between the extremeties. About 35 miles of tracks.

Q. 25 miles of track?

A. 35 miles of track.

1235 Q. How much of that is so-called main line track?

A. About 13 miles.

Q. And the rest of it is switching track?

A. The rest of it is yard track; yes.

Q. Now, can you tell me anything about the situation which exists at the point of junction between your tracks and the tracks of any given shipper as to whether or not that junction is the property line of the shipper?

A. Normally speaking it is the property line of the shipper, but there is a peculiarity in the case of the Buffalo Creek. We occupy public streets and the shipper is responsible for all tracks in the street necessary to serve its industry, so that our property line generally controls.

Q. But that is due to the peculiar situation which you describe?

A. Yes; it comes within the special-franchise provisions which we have with the City of Buffalo.

Q. Do you lease any ground from any of your shippers on which your tracks are located?

A. None that I recall at the moment.

Q. Some reference has been made to a situation where after a locomotive and crew has completed a particular job it does not leave that job. Do you recall the testimony on that?

1236 A. It does not leave the plant or that area.

Q. Isn't that because at the particular time you do not have a specific further task for the locomotive and crew to perform?

A. We have a further task, all right, but it might not be in that particular area, and knowing through our close cooperation with the industry what they are going to need shortly, we know full well that we cannot start an engine off on another job a mile away and get him back, or that we can provide another engine to do the same thing.

Q. Isn't it true that while the crew and the locomotive are waiting there they are awaiting instructions from your railway company?

A. From our railway company, yes; not from the shipper.

Q. Now, relative to the postdating arrangement which you have described is that arrangement in effect with all of your line-haul connections?

A. Yes; it is a pool arrangement.

Q. You don't have it with some and not with some others, do you?

A. No. Well, it is required of all. As a bit of information to you, if you like, it results in a very efficient operation. Instead of holding cars for a considerable length of time we hold them for but one-half of a day.

1237 Q. What I am interested in is the fact that you have an arrangement with all of your line-haul carriers?

A. Yes; all.

Mr. CRAIG. That is all.
Mr. BROMLEY. That is all.

EARL B. MOFFATT, a witness called by and on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, please, Mr. Moffatt?
A. I live in Montclair, New Jersey.
Q. And your business is what?
A. I am assistant to the President of the Delaware, Lackawanna & Western Railroad Company.
Q. For how long a time have you been connected with that railway?
A. Since 1906.
Q. Have you ever been in any business other than the railroad business?
A. I was a painter when I first started out. That was for just a few months.
Q. The Delaware, Lackawanna & Western is a trunk-line carrier, isn't it?
1238 A. Yes; operating between New York and Buffalo.
Q. Are there situations where that road performs for itself its terminal switching service?
A. Yes; in most places we perform our own terminal switching.
Q. What about Buffalo?
A. We perform most of the switching in the Buffalo area ourselves for industries located on or adjacent to our tracks. We have other arrangements with other railroads for the interchange of cars, such as the Buffalo Creek and the South Buffalo Railway, where we deliver cars to them and receive cars from them.
Q. You are familiar with both the trunk line and the switching operations of your railroad, Mr. Moffatt?
A. Yes, sir.
Q. Can you tell me whether there are situations on your railroad in which switching engines have been assigned to spend all of their time serving one industry, even if by doing so there are certain periods of nonproductivity?
Mr. CRAIG. An objection to the question, your Honor. We are now getting into the practice of line-haul carriers which do their own terminal switching. For reasons heretofore stated in connection with other testimony an objection is made.
1239 The COURT. Overruled.
Mr. CRAIG. I failed last time, although I made a motion to strike at the end. As heretofore may we agree that the one objection will apply to all questions concerning the operations?

Mr. BROMLEY. Yes.

The WITNESS. Will you repeat the question, please.

(Question read.)

The WITNESS. Yes, we have such cases.

Q. And can you give me any estimate as to how long nonproductive period would run?

A. It varies. In most cases it does not cover any extended period. What I have particularly in mind is the serving of the anthracite coal mines.

Q. And there how long does the nonproductive period run up to as a maximum?

A. I wouldn't want to specify just how long it might be, but there are occasions where an engine is waiting for additional cars to come down from under the breaker or for other reasons where there is no work for him to do in and around that particular spot, and the time when he is needed again will be such that you cannot send him anywhere else to do any other work.

Q. So that he will wait there?

A. Necessarily.

1240 Q. That might be as long as 30 or 50 minutes, might it not?

A. It is possible it might be that long, although I have no actual information about it.

Q. When your line receives traffic consigned to one of its customers in excess of that customer's ability to take it, what do you do with it?

A. We notify the consignee that the cars are available and we put them under so-called constructive placement, placing them under demurrage.

Q. And then do you hold them?

A. Necessarily so; yes.

Q. And later on when requested by the industry do you move them to the industry without further charge other than demurrage?

A. That is correct.

Q. Is it normal for your road to have cars consigned to an industry to hold those cars on your tracks awaiting placement at the industry?

A. Yes; that is not unusual.

Q. Is it unusual for you to hold cars in such situations as long as two or three days?

A. It might be unusual, but it probably is not rare.

Q. And such cars you hold in your own railroad yards, do you not?

A. Yes, sir.

1241 Q. Is it normal for customers on your line of railroad to request you to spot cars in a particular order or in a particular manner?

A. Yes; it is.

Q. And do you do that?

A. Yes; we do.

Q. If a customer asks you to place a car over a material bin or over or under an unloading chute do you do that for them?

A. Yes; we have a great many cases where we place cars in certain spots on coal docks for the particular sizes of coal that are needed in the bins.

Q. That is the reason why they have to be so particularly spotted, is it?

A. Yes. And there are other concerns where they have to set up the so-called round-robin arrangements where they want cars closely spotted where their facilities are and put the material on revolving wheels, and so forth, to get it to where they want it quickly. It facilitates their handling.

Q. Do you have other instances where customers want cars delivered at certain particular time to coordinate with their manufacturing operations?

A. Yes; we have those cases.

Q. And do you perform that service?

1242 A. We do as near as we can. We don't guarantee it.

Q. Is it normal for your customers to make up programs for lists of the tracks and spots where they desire to have the car placed, and is it normal for the railroad to deliver cars in the order specified and place them pursuant to those advance instructions?

A. Yes; that is not unusual.

Q. It is unusual for an industry served by your road to have as many as fifty and a hundred different spots in and about its plant?

A. I don't know of any industry where we have that many, but we have a number of industries who have from 15 to 35 or more.

Q. Is there anything unusual about an industry having a fence or a gate across the tracks which serve the industry?

A. Where you mean they unlock the gate before we can get in?

Q. Yes.

A. There are a number of places where that is so.

Q. Can you give me an example of one for a shipper on your line in the manufacturing business that you have to spot the cars which are delivered to the shipper in an exact spot and in an exact order, Mr. Moffatt?

A. There are two locations. One is the Easy Washer at

1243 Syracuse and the other is the Carrier Corporation at Syracuse.

Q. Do those concerns have unloading machines which pick up the material at designated spots?

A. I wouldn't quite term them unloading machines, but the Carrier Corporation has a continuous rack where they take the material out of the car and put it on and it is carried from there to the point where they want to use it in the plant.

The COURT. You are speaking now——

The WITNESS. I am speaking of the Easy Washer rather than the Carrier Corporation.

The COURT. Are you speaking of operations here or at Syracuse?

The WITNESS. At Syracuse.

By Mr. BROMLEY:

Q. In moving cars into an industry track is it normal for your crew to go along with the empty cars or the cars that are being loaded and see that employees get out of the car before you make a move?

A. It is an absolute requirement under operating practice.

Q. Do you normall' spot cars inside buildings of your customers?

A. We spot cars in a number of places inside buildings. I mentioned the cars spotted inside of coal trestles and
1244 we have certain other industries where we place cars inside of buildings.

Q. Is it normal for you to spot cars on trestles in industries that run up in the air over unloading bins?

A. That is right.

Q. Is it normal for you to spot cars underneath cranes and in crane runways that are owned by industries?

A. It is. We have cases like that.

Q. Does your road ever handle over its lines private cars that are owned by industries?

A. So-called private line cars?

Q. Yes.

A. Yes, a great many.

Q. Is that normal and usual for railroads to handle private owned cars?

A. It is not unusual at all. We pay mileage for hauling.

Q. You don't get any additional compensation, do you, for spotting cars in exact spots or arranging cars and placing them in exact order?

A. Not for the first placement, but we do have the so-called intra-plant switching, and if they ask us to make further movements of

it before the original load is out, then the intraplant switching tariff applies and there is a charge made.

Q. But so far as placing in exact spots or exact order, 1245 that is covered by the one through rate charged; is that right?

A. We place the cars wherever the consignee asks to have them placed for unloading or for loading.

Q. And does your road perform intraplant switching for industry movement around the industry tracks?

A. I just mentioned that. It is not very extensive in our railroad. There are cases where it is done.

Q. And will you perform that service as often as it is requested by the industry?

A. I think we would be obliged to, with a proper charge for it.

Q. Is there anything abnormal about your switching into your customers later arrived cars ahead of earlier arrived cars if the industry so desires them?

A. No; that is not unusual at all.

Q. What about this situation: Do you ever have cars which move on bills directing them to be taken to a general destination which may encompass any one of several points and then on the way receive oral instructions as to the precise point of delivery?

A. We have a great many cars that are loaded at mines where the way bill does not specify final destination, but where they are moved to the classification yard, and at that point 1246 we get the orders for the final destination of the car.

Q. Are there occasions when your railroad will permit its shippers to use your tracks for loading or unloading other than team track?

A. Yes; that is not unusual. We have a number of cases in the mining territory where other than team tracks are used for loading unprepared coal, and we have cases where a track or even a passing siding has been temporarily taken out of service to accommodate an abnormal amount of business for a road contractor or some other reason of that kind.

Q. And that use of your tracks applies to loading as well as unloading, does it not?

A. Yes, sir.

Q. Is it the practice of your railroad to permit a change in the destination of cars pursuant to orders received from the consignor or the consignee without charge for such change?

A. I don't know. I am not fully familiar with the diversion tariff, but I think there are certain instances where orders can be given for diversion, but whether always it is under a charge or not, I don't know.

Q. At least the practice of diversion is a common, ordinary one on a railroad?

A. Oh, not unusual at all.

1247 Q. Are there instances here in Buffalo where your railroad will remove loaded cars from loading tracks of shippers and then set them off on your own tracks and hold them until you get ready to move them on to destination?

A. Loaded cars?

Q. Or empties?

A. Yes.

Q. You refer to loaded cars now?

A. Well, the same is true of empty cars we take off the tracks. We may not move them into the main yard for a considerable time thereafter.

Q. And you hold those cars on your railroad tracks?

A. Yes, sir.

Q. There is nothing unusual about that practice, is there?

A. Oh, no; not at all.

Q. What do you do, if anything, about holding a supply of empty cars near your customers whom you anticipate will have use for empty cars?

A. We usually try to have sufficient cars at all convenient points, so that we can take care of any business that is offered to the Lackawanna Railway.

Q. And you try to anticipate the demands for empties, don't you, and hope you will get your anticipated business?

A. That is our hope; yes, sir.

Q. Those cars, of course, are not on demurrage to any-

1248 body, are they?

A. Oh, no.

Q. And you will hold, say a certain number of cars which have been made empty by an industry and turned back to you; you will hold them on your tracks in anticipation of use for as long as two or three days more, won't you?

A. I would say that could occur and has occurred.

Q. What about the coal car, the empty coal car situation; do you know what the situation here in Buffalo is with respect to coal car empties?

A. I just don't get the question, sir.

Q. I thought I remembered discussing with you the fact that there was a coalyard capacity here of 100 cars, and some industries need 125; you held the extra 25 on your own tracks, for the coal company to take if they needed them?

A. Well, that occurs during the summertime in connection with our operations at the lake trestle.

Q. Will you explain that to me?

A. We may have when navigation opens as high as several hundred cars which are held at East Buffalo. The capacity of the yard at the coal dumper is limited, and, therefore, we are governed by two features, the order of the consignee on sizes of coal, and the availability of boats for such coal. In other words, we
1249 switch in and bring out the coal as and when it is ordered for a specific boat. The balance of it is held at East Buffalo.

Q. The balance of what?

A. The balance of the cars, which may be shipped eventually in another boat.

Q. Is it normal for your railroad to remove loaded cars from loaded tracks and take them off demurrage and thereafter hold them sometimes for a considerable length of time before starting them towards their destination?

A. Yes; that is the usual practice. You cannot have an engine ready to take every car every time it is ready to move.

Q. And do you have situations where you only do alternate day's switching and therefore hold the cars for a period of 24 hours or more?

A. I don't know of any at the moment, but during the depression we did have cases where we operated certain local trains every other day and only provided every other day service.

Q. Then you would have to hold your loaded cars without demurrage until you got ready to move them?

A. Oh, yes.

Q. Do you ever have situations where you permit industry-owned locomotives to use your tracks with or without
1250 compensation?

A. Yes; we have two such cases that I know of.

Q. In this district?

A. One at Buffalo with the Republic Steel and one at Berwick, Pennsylvania, with the American Car & Foundry Company.

Mr. BROMLEY. That is all.

Mr. CRAIG. As heretofore stated, the plaintiff moves that the testimony of the witness Moffatt relative to service rendered by the D. L. & W. railroad to its shippers and customers be stricken from the record.

The COURT. Motion denied.

Cross-examination by Mr. CRAIG:

Q. Mr. Moffatt, I understand that your railroad does some of its own terminal switchings in the Buffalo district?

A. Yes; we work about 50 to 70 engines in yard service around Buffalo.

Q. What is the fact about the point of junction between your tracks and the tracks of your customers and shippers; do your tracks generally meet at the property line of the shipper?

A. They may or may not, but in each case it is usually covered by a side track agreement which specifies the point where their track begins and ours ends.

1251 Q. Do you lease ground from any of your shippers on which your tracks are?

A. Not to my knowledge.

Q. Do I understand that in some instances by lease or otherwise that your track is within the property of a shipper?

A. I don't know.

Q. You don't know that it is?

A. I don't know that it is, nor do I know that it isn't, but I have one particular point in mind in that connection where the shipper owns the ground and the railroad owns the tracks, and that is at the anthracite coal mines.

Q. Not here in Buffalo?

A. I didn't say in Buffalo.

Q. I am asking you.

A. Not to my knowledge.

Q. Don't you know that there is going on presently and for years past there has gone on an investigation by the Interstate Commerce Commission relative to the legality of spotting service rendered by railroads to shippers?

A. Yes; I testified in it. You mean 104, don't you?

Q. I mean Ex Parte 104.

A. I testified in that case, sir.

1252 Q. And you know, don't you, that in some instances, specific instances, that the I. C. C. has condemned car spotting practices of railroad carriers subject to the Interstate Commerce Act?

A. I understand that in certain instances they have, and I believe that under some order or agreement, or whatever you may term it, there is a new tariff arrangement applicable to the placing of cars.

Q. That is that tariff is in the nature of a reformation of the practice previously existing?

A. I wouldn't know, sir, because it has been quite a while since I had very much to do with those tariffs.

Q. At any rate you know that this investigation is going on and has been going on for some years, don't you?

A. I know it is several years since I testified in the case.

Q. You know, don't you, that the Supreme Court of the United States has upheld the Interstate Commerce Commission in some

instances in its condemnation of spotting practices indulged in by the carriers?

A. No; I don't know that.

Q. You don't know that?

A. No, sir.

Q. You spoke about holding empty cars in anticipation of the needs of your shippers, I believe?

1253 A. Yes, sir.

Q. You testified, as I recall it that you hold those cars for two or three days or more, don't you?

A. I say we build up a supply of cars in anticipation of loading, and if we are lucky enough to get them all loaded on the first day they all move. On the other hand, it might be two or three days before they all move, and one or two cars or more might be delayed three or four days depending on which end of the track you took cars from.

Q. And you hold some of your cars for a week or more, don't you?

A. It could possibly happen.

Q. It does happen, doesn't it?

A. I don't know. I wouldn't say it is the usual practice by any means, because the car supply has been too stringent to permit anything like that to go on. For the last few years we have usually been short of cars instead of long.

Q. In holding these cars you hold not only cars of your own railroad, but the cars of other railroads, don't you?

A. Again going back to a territory such as the mines——

Q. Let us talk about Buffalo.

A. Let us take it at the mines.

1254 The Court. Confine it to Buffalo.

Q. You hold these cars in the Buffalo district for your local shippers, don't you?

A. We try to hold a supply of cars at East Buffalo for our Buffalo shippers; yes, sir.

Q. And not only your own cars, but cars of other carriers, don't you?

A. That is not unusual. We do hold cars and we pay the owners of those cars for holding them.

Q. And you will hold those cars of other owners as long as it is necessary to insure your shippers a supply of cars, won't you?

A. The same as they do with our cars for their shippers.

Q. I am not asking about their cars; I am asking about your cars. Is that right?

A. That is correct.

Q. Don't you know that the Interstate Commerce Commission has been trying to get empty cars back into service as promptly as possible?

A. I do, and I know that the Lackawanna Railroad has been following the Commission's orders to the fullest extent it can.

Q. Nonetheless you hold these cars as long as necessary to supply your own shippers, don't you?

A. I didn't say that. I qualified my answer on that. I
1255 told you that the supply of cars at the moment and for some time past has been such that no one could justify the undue holding of cars. The condition about which you refer may happen when you are long of cars, when there is no shortage, but the Commission, as you say, has issued orders, and it is the policy of our railroad to try to follow those orders to the best of our ability.

Q. Are you qualifying your previous answer?

A. I don't know that there is any qualification necessary of my previous answer.

Mr. CRAIG. That is all.

Redirect examination by Mr. BROMLEY:

Q. The tariff to which you referred, this new recent tariff is the so-called Curlett tariff, isn't it?

A. I don't know it by name, sir. I have only been told that it has been issued. I don't know any of the details of it.

Q. What did you want to tell counsel about the situation at the mines, Mr. Moffatt?

Mr. CRAIG. I object to the situation at the mines.

The COURT. Sustained.

Mr. BROMLEY. That is all.

1256 FRANCIS X. GARLAND, a witness called by and on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Garland?

A. Youngstown, Ohio.

Q. And your business is what?

A. Transportation, railroad transportation.

Q. You are connected with what railroad?

A. The Erie Railroad.

Q. In what capacity?

A. Assistant Superintendent of the Mahoning Division.

Q. How long have you worked for the Erie Railroad?

A. 30 years.

Q. Any railroad experience prior to that?

A. No, sir.

Q. The Erie Railroad comes into Buffalo?

A. Yes, sir.

Q. What can you tell us as to whether it does its own terminal switching service here in Buffalo?

A. Well, it does its own terminal switching in Buffalo.

Q. Does it also utilize the services of the Buffalo Creek and the South Buffalo Railway Company?

A. Yes, sir.

1257 Q. And where those railways operate the Erie does not perform its own terminal switching, does it?

A. That is correct.

Q. Are you familiar with the character of the Erie's switching terminal service rendered over its lines?

A. Yes, sir.

Q. Let me ask you this question, is it the practice of your railroad to take traffic received at a point in this district, say, in excess of the particular consignee, to take it and the other railroad to hold it without any charge except demurrage?

A. Yes, sir.

Mr. CRAIG. For the reasons stated in the case of the other witnesses the plaintiff objects to the question and other questions which may be asked along the same line.

The COURT. Overruled.

By Mr. BROMLEY:

Q. Is it normal for the Erie Railway to have cars consigned to industry and to hold those cars on railroad tracks awaiting placement?

A. Yes, sir.

Q. Would you say that is a frequent or infrequent occurrence, Mr. Garland?

A. Well, it fluctuates, depending on the volume of traffic

1258 and the capacity of the industry.

Q. But it certainly is almost a daily occurrence over the years, isn't it?

A. Yes; with many industries.

Q. And those cars that those industries are thus unable to take are held by the Erie in its railroad yards, aren't they?

A. That is right.

Q. Would you say that the experience of your line is that such cars are held for periods of times that vary from a few days to several days?

A. Yes, sir.

Q. What is the situation on your railroad with regard to the spotting of cars for industries?

A. The line-haul obligation provides for the spotting of a car at the designated points at the request of the industry.

Q. And does your road do that?

A. Yes, sir.

Q. And does that answer mean that you will put a car in an exact spot over a loading bin or under a loading chute, for instance?

A. Yes.

Q. In an exact spot ordered by the industry?

A. Yes, sir.

1259 Q. You customarily do that?

A. Yes, sir.

Q. And does that answer also include this proposition, that you will classify and assembly cars so as to arrange them in order in a cut, the order being designated by the consignee?

A. Yes, sir.

Q. And does that happen on your line where you serve industries which use raw material and want those raw materials to come to their unloading places in a certain sequence?

A. Yes.

Q. There is nothing unusual about that, is there?

A. No, sir.

Q. Is there anything unusual about an industry for which you are holding, say, 20 cars to ask you to ship in and spot 10 of them and hold 10 of them until the next day?

A. No; that is not unusual.

Q. You do that, don't you?

A. Yes, sir.

Q. Is there anything unusual about a request and compliance with the request that you deliver cars which you have received earlier than certain other cars, you deliver them first?

1260 A. Yes.

Q. Is that normal; that is, to reverse the delivery to the customer with regard to the order in which you have received it?

A. We are governed entirely by the request of the customer.

Q. Do you have customers that make up in advance lists or programs of the day's work or the trick's work and designate the place where they want the cars placed?

A. That is the general practice.

Q. Is it normal for the industries served by you to have a large number of spots in which they may request the spotting of cars?

A. Yes, sir.

Q. Is there anything unusual in your serving an industry which has an assembly belt and therefore wants a particular placement of particular materials at particular spots; that is usual, is it?

A. Yes, sir.

1261 Q. Do you know anything about whether it is abnormal for a switch engine to stand by and wait as long as five minutes for a crew to go along and see that the cars which the engine is about to pull out from a loading platform are clear of loading employees?

A. That is a standard operating rule of all railroads of the United States and Canada.

Q. Is there anything unusual for an engine to wait as long as five minutes for a man to get out of a car before it is moved?

A. Oh, yes.

Q. I say, is there anything unusual about it?

A. Oh, no, no, sir; quite usual. It is necessary.

Q. Will you spot loaded cars under cranes or crane-runways owned by industries?

A. Many places.

Q. Well, do you do the same for empty cars?

A. Yes, sir.

Q. Does your Road regularly handle and move so-called industry-owned or private cars?

A. Yes, sir.

Q. You do not get any additional compensation for this precise spotting in designated points or places or in designated order, do you?

A. Not any initial placing.

1262 Q. You mean by that if you make a second movement of a car once spotted then that is covered by a tariff and you get a new payment for that service?

A. That is right.

Q. Is it normal for your Road to perform intraplant switching for industries?

A. Yes, sir.

Q. That is, switching on tracks owned by industries within a single plant?

A. Yes, sir.

Q. And is it normal for your Railroad to perform as much of that with as great frequency as the industry requests you to?

A. Yes, sir. The tariff provides for it.

Q. Have you any situations that you know of, sir, where commodities, such as grain, let us say, come in in freight cars and are inspected while standing on your tracks for the purpose of determining the precise destination?

A. Well, there is not any territory in which I am located now, but having been previously located at Buffalo; yes, that did exist.

Q. In other words, the Railroad, in such a situation, would not know the exact destination of the car until after inspection

1263 had determined the quality or character of the grain, let us say, contained in it; is that right?

A. That is right. We have that with other commodities, too.

Q. Do you ever permit your shippers to use your railroad-owned tracks, other that team tracks, for loading or unloading their cars?

A. Yes, sir.

Q. Is there anything unusual about that?

A. No. We coordinate our efforts with the shipper and expedite the release of equipment at all times.

Q. What do you do with respect to maintaining a supply of empty cars on hand to serve your customers, Mr. Garland?

A. Well, those are distributed as nearly as possible with the anticipated requirements of the industry; and in many cases the industry tells us their daily loading, what they anticipate; then it is up to us to provide that equipment there in sufficient time to make preparations, cleaning and whatever may be necessary, prior to loading.

Q. And in order to do that, if the industry, which has made the request of you, has unloaded a number of cars during the day, you will haul those empties out and put them on your tracks and hold them, hoping you may have use for them by that same industry the next day, won't you?

A. In some cases we distribute them at other places that
1264 they may be needed.

Q. That is to say, you do not always return to the owner-line a car made empty?

A. Not when there is a demand for them, such as there has been for several years now.

Q. And, so far as the movement of loaded cars is concerned, when you take loaded cars off a shipper's loading track, is it unusual for your Railroad to hold them on its tracks and move them at a later time, together with other cars which may have been subsequently loaded?

A. No; it is not unusual.

Q. That is, there is no additional charge for this set-off or holding by your railroad of these loaded cars?

A. No. It is just good operation for your economy and to meet the schedules, that is all.

Mr. BROMLEY. That is all.

Mr. CRAIG. For the purpose of the record, the plaintiff moves that the testimony of the witness Garland relative to service rendered by the Erie Railroad to its customers and shippers be stricken from the record.

The COURT. Denied.

Cross-examination by Mr. CRAIG:

Q. Mr. Garland, do I understand that in the Buffalo dis-

1265 trict the Erie does some of its own terminal switching?

A. They did when I was here. What they are doing now I cannot say. I am located here. But we do in Youngstown.

Q. When were you here in Buffalo?

A. 1937 to 1940.

Q. When you were here, will you state what was the fact as to your tracks; that is, the Erie tracks, joining the industries' tracks at the industry property line?

A. I would have to look at the side track agreement for every individual industry to make the answer.

Q. What is your recollection, generally?

A. Well, then, they are—I would have to see the agreement to make a proper answer to that question. Some is at the clearance points, some on the property line; some cases we get easements, sometimes we lease land. All depends on the physical lay-out and what is necessary for the convenience of the Railroad and the industry.

Q. In this case, if it existed, if you recall, where you have track beyond the property line of the industry, what is the extent of that trackage?

A. I don't just understand your question.

Mr. CRAIG. Read the question.

Q. (Question read by reporter as follows: "In this case,
1266 if it existed, if you recall, where you have track beyond the property line of the industry, what is the extent of that trackage?")

A. Whatever the agreement provides for, side track agreement.

Q. Do you recall what the situation was generally, if you have a situation where there would be more than a mile of your track in the industry?

A. Well, at this time I do not recall any specific instances of that distance.

Q. Do you recall of any instance where there was more than that?

A. Oh, on different parts of the Railroad there has been cases where we have been on other people's property for over a mile.

Q. Here in Buffalo?

A. No, sir; not that I can recall right out specifically.

Q. I think you referred to situations where cars are put on constructive placement, is that right? Where the shipper, consignee, is unable to receive the cars?

A. Well, I did not use the term "constructive placement," but that is proper, because that is what is done.

Q. That is the situation where the consignee is unable to receive delivery and you hold the car until the consignee can receive it?

A. That is correct.

1267 Q. And that car goes on demurrage, does it not?

A. Yes, sir.

Q. And isn't it the fact that when the car goes on demurrage under that constructive placement that you give written notice to the consignee?

A. Yes, sir.

Mr. CRAIG. That is all.

Redirect examination by Mr. BROMLEY:

Q. Did you hear Mr. Moffat testify, Mr. Garland?

A. Yes, sir.

Q. Do you know whether or not the tariff that he referred to was sometimes called the Curlett tariff?

A. I am thoroughly familiar with it. That is it. It is I. C. C. 833, I believe.

Q. That is the new Curlett tariff?

A. Effective January 1st.

Q. 1946?

A. Yes, sir.

Mr. BROMLEY. That is all.

Redirect examination by Mr. STRANGE:

Q. What is the number of that, again?

A. I think it is I. C. C. 833. I think that is the number.

Mr. BROMLEY. You put it in evidence.

1268 Mr. STRANGE. No, you did. I do not understand there is a Curlett tariff in evidence.

Mr. BROMLEY. I am not at all certain it is I. C. C. 833. It might be. It is W. S. Curlett I. C. C. No. A–833.

The WITNESS. A–833.

Mr. BROMLEY. That is the one you referred to?

The WITNESS. Yes, sir.

Mr. BROMLEY. That is all. I thank you.

RAYMOND J. CANNON, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Cannon, please?

A. Buffalo, New York.

Q. And your business is what, sir?

A. Superintendent of Baltimore & Ohio Railroad.

Q. You are Superintendent of what part of the Baltimore & Ohio Railroad?

A. The terminals of Buffalo and Rochester, with headquarters at Buffalo.

Q. And so far as the terminal at Buffalo is concerned, what does that comprehend?

A. We have a yard called our Buffalo Creek Yard, in the vicinity of Tifft Street, and it consists of 21 tracks,
1269 capacity of about 1,200 cars. There is a new yard off to the right of the main track, has a capacity of 170 cars. Then there is a freight house to which we operate over the Buffalo Creek, at Ganson Street, with a capacity of 100 cars.

Q. Do you perform your own terminal switching in this district?

A. We do.

Q. Does the South Buffalo Railway perform any part of it for you?

A. No.

Q. Hasn't the South Buffalo a connection with your Road?

A. Yes. We interchange cars with them. We deliver to them and they deliver to us.

Q. And you pay them some part of the freight rate, do you not?

A. Yes.

Q. Well, then, they do perform part of your terminal switching service for you, don't they?

A. Yes.

Q. Is that likewise true of Buffalo Creek?

A. We deliver cars to Buffalo Creek and they deliver to us. There is a switching arrangement between us.

Q. Can you give me an idea of the number of customers
1270 that your Railroad serves directly in this terminal switching which it performs itself in this district?

A. We have three coal companies and Horwitz scrap yard, and the other customers are team-track customers.

Q. So that you serve about four industries and the rest are team-track deliveries or loads?

A. That is right.

Q. How long have you been in the railroad business?

A. 26 years.

Q. How long have you been here at Buffalo?

A. 20 months.

Q. Where were you prior to that?

A. Garrett, Indiana.

Q. Have you ever had any other railroad experience except with the B. & O.?

A. No.

Q. Now I direct your attention to the situation where your line receives loaded traffic consigned to a consignee in excess of the

ability of that consignee to take it. Do you have that kind of situation here?

A. Yes.

Q. And where that happens you hold those loaded cars until the consignee gets ready to take them, do you not?

Mr. CRAIG. If the Court please, the plaintiff objects to the question on the ground it is immaterial and irrelevant.

1271 The COURT. Overruled.

Mr. CRAIG. May we have the usual stipulation, that this objection applies to all questions concerning the operation?

Mr. BROMLEY. Yes, sir.

Will you read the question, please?

Q. (Question read by reporter as follows: "And where that happens you hold those loaded cars until the consignee gets ready to take them, do you not?")

A. Yes.

Q. You put them on demurrage?

A. Yes.

Q. You do not get any written notice of constructive placement in such a situation, do you?

A. We do in the case of cargo coal.

Q. But other commodities where we place the cars, our customers will be right in that immediate territory and we show him his placed, the same as if they were put on a side track, as if they were up on the coal trestle.

Q. But what I am interested in is whether or not you give those people written notice of constructive placement?

A. No.

Q. Do you put all the cars in the same demurrage account?

A. Yes.

1272 Q. Is it usual for the B. & O. to have cars consigned to an industry and to hold those cars on your tracks awaiting placement?

A. Yes.

Q. Is there anything unusual about holding those cars for several days?

A. Well, it is seldom necessary to hold any cars several days.

Q. But have you done it?

A. We have done it.

Q. And have you held them up for as long as four days, Mr. Cannon?

A. Yes.

Q. What happens when a boat cargo of coal comes in here, as to whether or not you hold the cars loaded out of that boat until the industry gets ready to take the cars?

A. We hold the cars and deliver them as they want them. We do not have a coal unloading machine. We deliver our cars to D. L. & W. Railroad and they take them pending the arrival of the boat.

The COURT. You get coal by the boats, do you?

The WITNESS. No, we get coal in cars to be shipped out on boats.

Q. That is what I did not understand. You are now talking about loading a boat here for shipment?

1273 A. Yes.

Q. And you have no car dumper yourself?

A. No.

Q. Cars are shipped in here to build up a supply to be loaded on the boat, is that right?

A. That is right.

Q. And you accumulate those loaded cars and hold them until the boat comes in?

A. Yes.

Q. Is that what you mean?

A. That is right?

Q. How many cars will an average size coal cargo boat accommodate or take?

A. About 150.

Q. I would have have said many more myself.

The COURT. 150 what?

The WITNESS. Cars.

Q. To load a boat, sir, how many cars of coal?

A. Averages about 60 ton to the car, 56 to 60 ton to the car.

The COURT. 150 cars?

The WITNESS. Yes.

The COURT. One boatload?

The WITNESS. Run around 9,000 ton.

The COURT. You thought it was more than that?

1274 Mr. BROMLEY. I thought more than that, but I guess I am wrong.

Q. Sixty times 150 is 9,000, and that is 9,000 tons, and that is what you think an average boat will carry, is that right?

A. That is a good-sized freighter, that is the usual type that we load.

The COURT. You get coal from Pennsylvania?

The WITNESS. Yes, some West Virginia.

By Mr. BROMLEY.

Q. Do you spot cars for industries as, when and where requested?

A. Yes, sir.

Q. Do you arrange cars for delivery in a certain order specified by a consignee?

A. Yes.

Q. And have you always done that since you have been here?

A. Yes.

Q. Is it normal for your industries to ask that you spot cars at certain precisely designated locations?

A. Yes.

Q. And it is normal for them and usual for them to give you the order in which they want their cars delivered by car number?

A. Yes.

1275 Q. And do you do both of those things?

A. Yes.

Q. Is it normal for industries served by your Railroad, sir, to have a large number of these different so-called spots in and about their plants?

Mr. CRAIG. What do you mean by "a large number"?

Mr. BROMLEY. Well, let him say.

Mr. CRAIG. Well, what is a large number?

The COURT. Let him tell how many there are.

A. Well, we do not have any large industries on our line here in Buffalo, but we will place the cars according to the spots we do have.

Q. Are there other places, for instance at Youngstown, where you do have customers with numbers of spots?

A. Yes.

Mr. CRAIG. I object to that, your Honor.

Q. Can you give me the number of spots?

Mr. CRAIG. Over in Youngstown now.

The COURT. I will sustain that.

Q. You heard the witnesses testify about the practice of having railroad crews go along with the cars that are about to be pulled away from a loading platform, to get the men out of the cars. Is that normal on your Road?

A. Yes.

1276 Q. Do you spot cars inside of buildings?

A. Yes.

Q. Under cranes and crane-runways?

A. Yes.

Q. On trestles?

A. Yes.

Q. In precise spots over loading or unloading bins?

A. Yes.

Q. Do you do intraplant switching?

A. No, we do not have any occasion to do it here.

Q. Would you do it if you were asked to?

A. Yes.

Mr. CRAIG. I object to that.

The COURT. Sustained. Strike out the answer.

Q. Is it normal for you, if requested by a shipper, to switch in the later-arrived cars ahead of earlier-arrived cars?

A. Yes.

Q. Do you keep on hand, or do you try to, a supply of empty cars in anticipation of the demands of your customers?

A. Yes.

Q. Do you have any situation where loaded cars consigned in to customers are inspected on your tracks?

A. Yes.

Q. Prior to delivery?

1277 A. Yes.

Q. What kind of commodities?

A. Well, it is usually grain or grain products, they will come down and examine the car.

Q. And thereafter is the destination determined or changed by reason of the inspection?

A. It seldom is, but might be. It is usually on in-bound loads that they do that, they come down to inspect the car and see that it is all right. I am referring to the Corn Exchange.

Q. To the Corn Exchange?

A. Yes.

Q. Is not the precise spot or location of such cars determined by the quality of the content of the car?

A. Yes.

Q. As disclosed by the inspection?

A. Yes.

Q. And, therefore, after the inspection, you are told where to move it and spot it?

A. Yes.

Q. Those inspections take place on your tracks generally?

A. Yes.

Q. Do you ever have situations where you permit your shippers, or the consignees, to load or unload cars from your tracks

1278 A. Yes.

Mr. BROMLEY. That is all.

The COURT. The large bulk of your business is coal?

The WITNESS. Yes.

The COURT. On the B. & O. Your empties, do they go back empty, usually?

The WITNESS. They go back empty, yes.

The COURT. All right, that is all.

Cross-examination by Mr. STRANGE:

Q. Mr. Cannon, with regard to cars held on demurrage after constructive placement or delivery is concerned, do I understand you to say that when a car is so held that you do not give notice in writing to consignee of that situation?

A. Well, I said that. We do this: We make out a placement card and turn it over to the agent's office, and he handles it from there with the consignee.

Q. Now, you do not know, then, whether the agent extends notice in writing to the consignee or not, do you?

A. No. I will answer that; no.

Q. Now, then, with regard to the spotting of cars, I think you testified that you spotted, that there was a practice of Baltimore & Ohio Railroad Company to spot cars in a plant wherever
1279 the consignee requested or required them to be spotted?

A. Yes.

Q. Is there any limitation on that practice?

A. They would spot them in the usual course of their switching operation.

Q. Suppose that the consignee itself maintained a switching railroad, performed its own switching, would you spot a car for that industry or that consignee within the part of the plant where it did its own switching?

Mr. BROMLEY. I object to that question as conclusional, because I think the phrase "maintain"——

The COURT. I do not know whether he has a situation like that. Do you have any situation like that?

The WITNESS. No, we do not have any situation like that.

Q. On the B. & O. you have no connection in any of your yards with a plant that maintains its own switching?

Mr. BROMLEY. He is only talking about Buffalo, as I understand it.

Mr. STRANGE. But I am on cross-examination now, may it please the Court.

The COURT. He may answer this question. Are there other locations where the plant to which you make delivery has a system of switching within its own boundaries? There may be some. Do you recall?

The WITNESS. Yes.

1280 Q. Well, now, what with regard to the extent to which the B. & O. would spot at plants such as that?

Mr. BROMLEY. I object to it because it is conclusional.

The COURT. If you will confine the inquiry to Buffalo.

Mr. STRANGE. Well, we won't press that, may it please the Court, then, if you have no such plant here.

The COURT. You might ask him that. I don't know.

By Mr. STRANGE:

Q. Have you any such plant here?

A. No, we do not have.

Q. You have spoken with regard to the spotting of cars under cranes for loading and unloading purposes, is that right?

A. Yes.

Q. Are any of those cranes in the Buffalo area located on the tracks of the B. & O.?

A. Yes; we have one at the freight house at Ganson Street.

Q. Beg pardon?

A. We have a crane at the freight house at Ganson Street.

Q. Are cars loaded and unloaded for consignees on your track?

A. Yes.

Q. You spoke of cars being loaded and unloaded on your tracks. Is that a general practice?

A. No. It is just something to expedite the movement of the car or to help the shipper out.

1281 Q. Day in and day out that is not the practice?

A. No.

Mr. STRANGE. That is all.

Mr. BROMLEY. That is all.

The COURT. Do you have other witnesses along this line, Mr. Bromley?

Mr. BROMLEY. I have three others along this line, which I will be glad to stipulate into the record. And I have a total of four witnesses. I think we can get through today.

The COURT. Four all together, you mean?

Mr. BROMLEY. Yes, sir.

The COURT. Including the three?

Mr. BROMLEY. Yes, sir.

The COURT. Perhaps you can arrange some situation with Counsel to get through, if you can, this afternoon.

Mr. BROMLEY. I should like Counsel to stipulate that the three following witnesses, whose names I will give them, will testify in substance to the same effect as given by the preceding witnesses. Would you like to do that, Judge Craig?

Mr. CRAIG. Well, maybe we would want some stipulations, too, whether or not the tracks of the Railroad Company go into the industry property, and that sort of thing. Trying to dis-

1282 tinguish between a situation which has been testified to and the situation we have.

The COURT. Well, I think perhaps the easiest way is to take the testimony.

Adjourn until 2 o'clock.

(Whereupon a recess was taken until 2 o'clock p. m.)

1283 After Recess, 2 o'Clock P. M.

Appearances: Same as before noted.

JAMES J. SWIFT, a witness called by and on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Swift?
A. Buffalo.
Q. What is your business?
A. Transportation.
Q. With what railroad are you connected?
A. The Lehigh Valley.
Q. What is your office?
A. Assistant General Manager.
Q. How long have you been connected with the railway?
A. With the Lehigh?
Q. Yes.
A. 29 years.
Q. Did you have any prior railway experience or connection?
A. Ten years with the Lackawanna.
Q. How long have you been in Buffalo?
A. One year.
Q. Where were you prior to Buffalo?

1284 A. I was General Superintendent with offices at Bethlehem for one year, and prior to that superintendent at Jersey City for four years. Prior to that I was assistant superintendent and trainmaster and various other occupations.

Q. Does the Lehigh Valley perform any terminal switching here in the Buffalo district?
A. They do.
Q. To what extent?
A. About 28 industries I would say independently.
Q. And they have connections with the Buffalo Creek and the South Buffalo Railway Company switching roads, do they?
A. They do.
Q. And those two roads perform a part of their terminal switching service?
A. That is correct.
Q. A part of the main line of the Lehigh Valley comes into Buffalo?
A. The main line itself comes into Buffalo.
Q. Can you give me any idea of your switching and terminal track mileage in this area?

A. Not in track mileage, but the switching limits extend about 12 miles out.

Q. To the eastward?

1285 A. To the eastward.

Q. When traffic consigned to any one of your industrial customers is received by you in excess of their ability to take it, what do you do with it?

Mr. CRAIG. I object to that, if your Honor please, for the record. What is done by the Lehigh Valley in connection with any of its customers I object to on the ground that such service is irrelevant and immaterial.

The COURT. Overruled.

Mr. CRAIG. May we have the same stipulation, that one objection will suffice?

Mr. BROMLEY. Yes.

A. Why, the consignee is notified and if in position to accept we place the car. If they are not in position to accept, it is constructively placed, demurrage charges set up, and we hold the car until the customer is ready for it.

Q. You hold it on your own tracks, do you not?

A. That is correct, sir.

Q. Do you make any charge other than a demurrage charge when it is later delivered, when the customer is ready to take it?

A. Nothing except the demurrage charge.

Q. Is it an everyday occurrence on your line to have

1286 cars consigned to an industry and held by you on your tracks awaiting placement upon orders from the industry?

A. It is quite general; yes, sir.

Q. Can you give us any idea of the varying length of time that you so hold cars on your lines awaiting the customer's convenience to place?

A. Well, that varies with conditions. Sometimes weather conditions have an effect; other times plant conditions, you have a plant condition where they are not turning out the product as fast as they thought they would, and then you have cars that they cannot take right away. I have seen it from half a day to three and four days.

Q. What is your experience on your Railroad in this district with the matter of spotting cars for your industrial customers? First, do you do it or do you not?

A. We spot in accordance with the orders of the customer.

Q. And when you say that you mean you place cars in exact spots where designated by the customer?

A. That is right.

Q. Even though that involves uncoupling the cars and moving each separate car some distance apart from its neighbor?

A. Yes. We may go in with five cars in a plant similar to that and they may want sand on one track at their sand bin, pig
1287 iron at another, and they may want a car spotted at the platform at the house. So we have to uncouple and place the respective car—or the cars at the respective points.

Q. All of that service is rendered under the one transportation charge, either through rate or local rate, is it not?

A. That is correct.

Q. There is no additional charge for that service?

A. Not for that service.

Q. Is it a normal practice for your Railroad to receive instructions from consignees as to the order in which they want you to assemble a cut of cars?

A. Those that have any sizeable number of cars, yes. Those that only have a few, why, they notify the conductor or the agent just to place the cars. But where you have a plant that has any number, 15 or 20 cars, why, of necessity they would have to be placed, and they do.

Q. Do they tell you that by giving you a list of car numbers, which indicates that you must arrange the cars in the order in which the numbers are arranged on the notice?

A. That is right, and properly so, because if that were not done we would have confusion in their plant in placing the cars.

1288 In other words, we set them up in sequence of placing, rather than go in with a blind cut of cars and have to switch them inside.

Q. If you are holding, say, 20 cars on your tracks for an industry and he orders you to deliver six or eight of them tomorrow, will you deliver that six or eight and hold the others?

A. Yes, sir.

Q. The arrangement of a cut of cars which you take into an industry is accomplished where, on your Railroad?

A. On our tracks, in our yard tracks.

Q. And do you sometimes call a yard used for such a purpose as that a classification yard?

A. Well, we have classification yards and we have local yards. We have yards supporting a freight station and/or team track. We would not call that a classification yard. But our larger terminal, such as Tifft Terminal; yes.

Q. Do you arrange these cars in the order in which the customer wants them in one of these yards wherever you happen to work?

A. That is right.

Q. That means the engine has to run in and pull out certain cars and put them on certain tracks and put other cars back and fix it so they appear in the cut in the predetermined order as directed by the customer, doesn't it?

1289 A. Whatever the customer wants we place in line with his instructions. Otherwise he could not work his plant in some respects.

Q. I am trying to get at the work that is involved on your part in your yard to accomplish that result.

A. Well, it depends entirely—we may not have all of the customer's cars on a track, we may have them on two or three tracks, not in our yard. He may want one out of this track and three out of the next one and four out of another one. We do not have all cars assembled on one track for one consignee.

Q. When that situation exists then your switch engine has to get them and assemble them on a track, does it not?

A. Yes, sir.

Q. And couple them together?

A. Yes, sir.

Q. In the order the consignee wants them?

A. Yes.

Q. And then haul them down to the plant and place them?

A. That is right.

Q. That is all a part of switching, is it not?

A. That is correct, sir.

Q. That is all a part of terminal switching?

A. That is right.

1290 Q. Is it normal for industries to have fences and gates across tracks in your experience here?

A. Do you mean in order to get into their plant?

Q. Yes.

A. Yes, sir; it is.

Q. And do you serve industries like the Maritime Milling Company that has loading doors and conveyor belts or loading and unloading chutes which require that cars be placed exactly under or closely in relation to such devices?

A. No; we don't have any of that.

Q. Do you have any places where the shipper has a trestle and you have to take the cars up on the trestle and spot them?

A. Not in the Buffalo area.

Q. Do you have any places where you have depressed tracks which run under cranes owned and operated by industries?

A. Yes, sir.

Q. Do you spot cars there for loading and unloading?

A. Yes, sir.

Q. You heard the testimony of these various other gentlemen this morning, didn't you?

A. Yes, sir.

Q. And is it the practice of your road to see to it that your
1291 crews go along a string of cars before they pull them out and make sure the industry employees are all clear of the cars?

A. Yes, sir; that is a standard rule.

Q. Is there any time limitation on that within which it must be done?

A. Well, it depends on circumstances again, or the location or conditions. You have close clearance sometimes that it takes a man longer to get around and look to see that everything is quite clear. On one track it might take five minutes and another track 35 or 40 minutes, depending on where they have to go.

Q. And during that inspection your engine stands idle coupled to the string of cars, doesn't it?

A. We don't always couple. We don't couple to the track until we are sure that everybody is out from under, so that we might not catch anybody that might be in there.

Q. The engine stands idle on the track very close to coupling, doesn't it?

A. Immediately adjacent.

Q. Just a distance of a couple of feet from the end car?

A. That is correct.

Q. That is where the engine stands?

A. Yes.

Q. Do you spot cars inside of industry buildings, Mr. Swift?

A. We do.

1292 Q. Do you accomplish that by having the locomotive enter the building or by using a reach of cars so-called?

A. Where we have a Diesel engine where there are no restrictions from a fire standpoint the Diesel may go in, but where we have a steam engine there are some restrictions at some points, and we use what we call a buffer, an extra car or two, to keep the engine outside of the building.

Q. That extra car or two cars are merely designed to be a connecting link between the cars inside the building and the engine outside the building?

A. That is right.

Q. Do you do intraplant switching in this area, Mr. Swift?

A. We do.

Q. That is a movement around a plant on plant owned tracks?

A. That is right; from a point within the plant to another point within.

Q. And do you do that as directed or ordered by the industry operating the particular plant?

A. Yes, sir.

Q. Will you do that as frequently as an industry desires it, Mr. Swift?

A. Why, consistent with conditions. I wouldn't say that we guarantee that we will be there immediately, but within a reasonable time after the order is received.

1293 Q. Do you have situations here where there are roads or plant highway crossing tracks inside of plant areas?

A. We have places where there are roads that are traveled by plant people, men who work within the plants and others going to and from buildings; automobile traffic.

Q. Is it a part of the duty of your crews to afford protection at those crossings?

A. Yes, it is.

Q. You have heard the testimony here about the practice of some railroads—I guess all railroads, to accede to demands of industries that you switch in earlier arrived cars ahead of later arrived cars. Is that likewise your practice?

A. That happens again by plants that may have a surplus of one material and a shortage of others, and when the cars arrive on which they have the shortage, they want preference on the placing.

Q. They want those first?

A. Yes, sir.

Q. And do you give them those cars first and hold the others?

A. Yes, sir.

Q. Do you have any situation where the contents of cars are inspected on your tracks prior to delivery?

A. No, sir.

1294 Q. Do you handle any grain?

A. Out-bound grain; not in-bound.

Q. And where does the out-bound grain move from?

A. Elevators on the Buffalo Creek, the Pennsylvania Railroad, and one elevator on the Lehigh Valley; also off the New York Central and the Erie.

Q. When those cars of out-bound grain are loaded do they have to be spotted under loading chutes?

A. At an elevator?

Q. Yes.

A. Yes, sir. Of course, that is not my operation. I said "Yes, sir." I have observed that, but on the Lehigh Valley they have to be loaded at the one elevator I have there, but the others I can't testify to that.

Q. I want to talk about the elevator on your line. Is it necessary there to spot the cars under loading chutes?

A. We set the cars on a track above the chutes and the industry drops the cars down and brakes them at the point where they are needed. In other words they feed the chute from a string of cars that is on a slightly descending grade.

Q. By gravity?

A. They have a block and tackle. They start them up ahead to get them on the brake.

Q. They get them started by a car puller and let them
1295 drift down by gravity subject to the car brake?

A. That is right.

Q. Does it ever occur in this district that you permit shippers to use your tracks for loading and unloading purposes?

A. On special occasions, yes.

Q. Do you move loaded cars away from the loading point and haul them to their destination promptly or do you wait until you accumulate a number of loaded cars?

A. Why, we take them out of the industry and assemble them in whatever yard it might be and classify them into whatever train they are to go out in on the road.

Q. And until you are ready to give them a road-haul pull, you leave them on your tracks in your yard, do you?

A. Yes, sir.

Q. What do you do about assuring your customers of a supply of empty cars, if anything, Mr. Swift?

A. Well, in the Buffalo area there is a lot of commodities such as grain and feed, and flour, and products off the lakes at the mills that require what is known as a Class A boxcar. We must assemble such cars and prepare them. Sometimes we have a half day's supply; other times a day's supply, and we get up to more than a day and up to two and three days, and on occasion because of a change in conditions, we have had cars
1296 here assembled and waiting for boats to come in with a cargo of grain which we understood was very rush, and something would happen to the boat, it was delayed or otherwise, navigation in some way affected, so that we had the cars on our hands and we held them here. That didn't happen once, it happened several times.

Q. Where you hold cars in that situation empty for loading, you don't charge for demurrage, of course?

A. No, the cars are in our own yard.

Q. You don't charge the consignee or the shipper or anybody else anything for that service?

A. No, sir.

Q. And would that amount to as many as 150 cars?

A. Well, I would say a cargo—the one I have particularly in mind was 100 cars.

Q. You don't assemble those in advance and hold them until the boat got here and then unload the boat into them?

A. That is right. We assemble them on the theory that the boat would be in earlier, but it didn't come in so that we still held them.

Mr. BROMLEY. That is all.

Mr. CRAIG. The Plaintiff moves that the testimony of the Witness Swift relative to service rendered by the Lehigh Valley Railway Company to its shippers and customers be stricken from the record.

1297 The COURT: Denied.

Cross-examination by Mr. CRAIG:

Q. Mr. Swift, in your terminal switching and your plant switching do you serve any steel manufacturing plants?

A. I had better look at my list to answer that question [referring to paper]. Nothing like the Bethlehem Steel, not as large. We have one out here at East Buffalo, but I wouldn't call that a steel plant in the true sense. The Hanna Furnace, we deliver cars when assigned for the Hanna Furnace.

Q. Does the Hanna Furnace operate blast furnaces?

A. Yes, sir.

Q. Open hearths?

A. Yes, sir.

Q. Do you do any plant switching for the Hanna Furnace Company?

A. No; we just place cars on a designated track and they take them away from there, and we take them on the out-bound.

Q. You don't transmit any molten metal from the blast furnaces to the open hearths?

A. No.

Q. In connection with the Hanna Furnace Company do your tracks enter or pass the line of the Hanna Furnace

1298 Company?

A. We don't have any tracks. We travel over the Pennsylvania on the leased track arrangement.

Q. By virtue of that lease does that leased track enter the Hanna Furnace Company property?

A. I wouldn't be able to testify to that.

Q. You don't know one way or the other?

A. No, sir.

Q. You spoke about holding empty cars and you spoke of a maximum length of time that you hold them. Isn't it true that

that is connection with the arrival or the prospective arrival of a cargo of grain by water?

A. The particular one cited that we have held cars for storage grain out of the elevators on the various railroads was in this way: We would have orders that an elevator on the Erie—it looked like we were going to get the grain tomorrow. In fact, we were told that. But then the elevator decided they were going to change that and they loaded somebody else's grain in preference somewhere over on the Pennsylvania. We would have an order there to reassemble the car, and the elevator didn't load our lot, they loaded somebody else's, and the result would be we would have cars in possession for two or three days. It was not cargo grain; it was storage grain.

1299 Q. When you first held the cars, you expected to have them ready the following day?

A. Yes, we hoped so.

Q. And it was a result of the change of mind or the plan of the shipper?

A. Somebody, but we didn't get the cars that we anticipated.

Q. You expected to use the cars the following day; is that right?

A. Yes, sir.

Q. You say you do some intraplant switching?

A. That is right.

Q. For your customers?

A. That is right.

Q. Do you perform that switching when called on for specific moves?

A. Yes, we are told where they want the car moved from and to.

Q. The shipper does not supply you with a schedule of operations, does he?

A. Not in respect to intraplant; no sir.

Mr. CRAIG. That is all.

Mr. BROMLEY. That is all.

1300 MILES R. DWYER a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Dwyer?

A. Buffalo.

Q. How long have you lived here?

A. 25 years.

Q. Your business is what?

A. Transportation.

Q. Connected with what Road?
A. New York Central.
Q. What position do you hold?
A. Superintendent.
Q. Over the 25 years that you spoke of have you been connected with that Railroad here in Buffalo?
A. Yes, sir.
Q. What various positions have you held, in brief?
A. Superintendent, Assistant Superintendent and Trainmaster.
Q. Have you had any other railroad experience?
A. Been on the Railroad forty years.
Q. Various parts of the country?
A. Yes, sir.
Q. Always with the New York Central?
1301 A. Yes, sir.
Q. Does the New York Central do any terminal switching here in the Buffalo district?
A. Yes, sir.
Q. How many customers do you serve, do you know?
A. I would say 324 industries, team track.
Q. Does your Road have connection with the South Buffalo?
A. Yes, sir.
Q. And with the Buffalo Creek?
A. Yes, sir.
Q. And is your terminal switching in those areas performed by those two railroads?
A. Yes, sir.
Q. How many separate switching crews are you now using in this district?
A. About 212.
Q. Does that mean you use 212 engines and 212——
A. No, no. Crews, tricks.
Q. Tricks?
A. That is right.
Q. There are three or four men in a crew?
A. Five.
Q. Five men in a crew?
A. Yes, sir.
Q. How many switching engines do you employ in that service?
1302 A. Well, that would be probably around 62 or 65.
Q. Can you give us any idea of the mileage extent of your terminal switching tracks in this area?
A. I would say approximately 250 miles.
Q. We are talking now about the Buffalo switching district?
A. That is right.

Q. Those 250 miles are used to serve your 340 customers?

A. I was taking in the whole Buffalo Division or 324 industries. That is including Niagara Falls, Suspension Bridge, in my territory.

Q. I wanted to limit it, if you can, sir, to the Buffalo switching district, so far as number of customers is concerned.

A. Well, I could not do that unless I got my records.

Q. Well, it is something less than 324?

A. That is right, it is less; yes.

Q. Substantially less?

A. Yes, sir. I would say there was around 75 around Niagara Falls and the Bridge, perhaps, roughly.

Q. So it is 324, less 75?

A. Approximately.

Q. Or about 250?

A. Yes, sir. Also that mileage is cut down from 250 around Buffalo to around 190, I would say, or something like that.

1303 Q. You have about 190 miles of track to serve 250 customers in the Buffalo switching district; is that a fair way to put it?

A. Yes, sir.

Q. Have you instances in this district on your Railroad where you hold loaded cars consigned to customers who are not in position to take them?

A. Yes, sir.

Mr. CRAIG. Just a moment: If the Court please, the plaintiff objects to this question which relates to service by New York Central to its customers, on the ground it is irrelevant and immaterial.

The COURT. Overruled.

Mr. CRAIG. May we have the same stipulation, one objection will suffice?

Mr. BROMLEY. Yes, sir.

Q. Your answer was yes?

A. Yes, sir.

Q. Can you give me an illustration of that, Mr. Dwyer?

A. Why, we have cars for all industries, that they cannot take, that we hold outside until they order them in.

Q. Have you got a shipper called Eastern States Milling Company?

A. Yes, sir.

Q. What is the situation about whether or not you hold

1304 an advance supply of raw materials on your tracks for that Company?

A. We do hold sometimes up to a hundred cars for them.

Q. And in terms of consumption, how many days' supplies of raw materials would that constitute for that mill, can you tell me?

A. It varies; sometimes unloads 50 to 60 cars a day. Perhaps two or three.

Q. You mean two or three days?

A. Supply; yes.

Q. A supply ahead that you hold for them?

A. That is right; due to bunching on account of weather conditions, and what not.

Q. Is it due to their desire to be protected?

A. Yes.

Q. In the supply of their materials?

A. That is right.

Q. And does that same situation exist with relation to a company like Semet-Solvay?

A. Well, not so much with the Solvay, because they take their cars in as fast as they are delivered.

Q. What about the Wickwire Company?

A. Sometimes.

Q. What is the business of Wickwire Company? What is its correct name?

1305 A. They changed that now and I can't tell you.

Q. What was it?

A. Wickwire, Spencer-Wickwire.

Q. What was its business?

A. Steel wire, manufacturing wire.

Q. Manufacturing steel wire?

A. Mesh, for road-building, and wire materials, and what not.

Q. What do you do as a regular matter with regard to spotting cars for your industry customers when requested?

A. We spot them where they are ordered by the industry, as to location.

Q. And those spotting locations are at various points around the manufacturing plant, are they?

A. Yes, sir.

Q. Served by industry-owned tracks?

A. Yes, sir.

Q. And do you place them in exact locations, such as overloading, unloading bins, and under chutes?

A. Yes, sir.

Q. Do you have occasions to spot them on trestles?

A. Yes, sir.

Q. Under industry-operated cranes?

A. Yes, sir.

Q. On depressed tracks under cranes?

A. Yes, sir.

1306 Q. Under chutes?

A. Yes, sir.

Q. Do you have occasion to line up two or three or four rows of cars on parallel tracks, so that their doors are exactly in line, so that gangways can be placed between them and the whole series of two or three or four strings loaded at once?

A. Yes, sir.

Q. Does that involve uncoupling each car from its predecessor?

A. Yes, sir.

Q. In situations like that is it necessary for your switching engine and crew to be engaged in or about one particular industrial plant for two or three or four or five hours?

A. Yes, sir.

Q. Longer than that?

A. Sometimes.

Q. Whole tricks, eight hours?

A. Well, we do not have eight hours very often, but we do run four and five and six.

Q. Where the business requires eight hours would you leave your crew there and your engine?

A. Yes, sir.

Q. Glad to do it, would you not?

A. I will say we would.

1307 Q. Do you serve any automobile plants here?

A. Yes! the Chevrolet.

Q. And do their requirements result in your being ordered to place cars in exact locations for unloading?

A. Yes, sir.

Q. And for loading?

A. Yes, sir.

Q. Are there situations where, with respect to tank cars, for instance, the spotting requires that they be placed exactly under pipes to be connected with the dome for purposes of loading or unloading?

A. Yes, sir.

Q. That requires an exact spotting, does it not?

A. That is right.

The COURT. What did you say your mileage is in the switching district, in your district here?

The WITNESS. Approximately around 190 miles in our territory here.

The COURT. That is Buffalo territory?

The WITNESS. Yes. That takes in Gardenville, of course, and Depew, Seneca, East Buffalo, Ohio Street, Louisiana Street, Carlton Street ore dock.

Q. How many yards do you have in that area, about?

A. We have six yards in the whole division; in that area we have four, divided up into pocket yards; East Buffalo
1308 has some seven or eight, Gardenville has six. It is all divided into small pocket yards. I have to stop and count them if you want the exact number.

Q. Well, it would be 25 to 30 yards?

A. Pocket yards; yes.

Q. In those yards you store cars and switch cars and classify cars and make up cuts?

A. Yes, sir.

Q. And trains?

A. Yes, sir.

Q. Do you do any intraplant switching for any of your customers?

A. Yes, sir.

Q. By the way, you do not get any extra compensation, outside of the freight rate, for doing this exact spotting for industries, do you?

A. No, sir. Entitled to initial spot.

Q. You have heard the testimony about delivering earlier-arrived cars to industries if it desires them?

A. Yes, sir.

Q. Is that your practice too?

A. Yes, sir.

Q. Is that normal on your Railroad?

A. Yes, sir.

Q. What do you do about holding empty cars for antici-
1309 pated customer use?

We hold them. We have a pretty good line on what our industries are going to do from day to day and we assemble our cars and protect our loading.

Q. Suppose you are disappointed——

A. We do—we are disappointed at times. We still hold.

Q. You still hold them?

A. That is right.

Q. Of course, you do not charge the customer for that service?

A. No, sir.

Q. Do you have any situations, Mr. Dwyer, where commodities are inspected in loaded cars on your lines?

A. Yes, sir.

Q. Give me an illustration.

A. We have grain coming in here billed to the brokers, that is inspected by the Corn Exchange, who take their samples up to the Corn Exchange and after distributed and sold they give us a billing on the cars and we so switch to destinations.

Q. That inspection takes place on your tracks, does it not?

A. That is right; yes, sir.

Q. That is an instance of a car coming in here billed to a broker, the destination of which is changed after it gets here?

1310 A. That is right.

Q. Do you consider that a reconsignment? Do you charge extra for that or is that all comprised in the freight rate?

A. We charge a reconsignment if it is held over 24 hours.

Q. But up to 24 hours you make the change in destination without any charge?

A. Yes, sir.

Q. That is a common practice on your Road, is it?

A. That is the tariff; yes, sir.

Q. Do you have situations where you permit loading and unloading by customers on your railway-owned tracks?

A. Yes, sir.

Q. Is that a normal practice?

A. Why, it is very rare on our Railroad because our team tracks are so closely united, but occasionally, if we have a car which a man wants to get a piece of machinery out of there in a hurry and it is to our advantage to place the car so we do not have to run to a team track, we do it and let them take the machinery out.

Mr. Bromley. That is all.

Mr. Craig. Plaintiff moves that the testimony of the witness Dwyer, relative to service rendered by the New York Central

1311 to its customers and shippers, be stricken from the record.

The Court. Denied.

Cross-examination by Mr. Craig:

Q. Mr. Dwyer, in your switching which you have described do you serve any steel-manufacturing plants?

A. We have three small ones.

Q. What are they?

A. Buffalo Steel, Tonawanda Iron, Wickwire.

Q. Is Wickwire a steel manufacturer?

A. Well, it is wire, that they manufacture. I don't know whether they got any steel—I don't believe they have much steel out of there; mostly heavy wires and mesh.

Q. Do they operate blast furnaces?

A. No.

Q. Or open hearth?
A. No.
Q. The steel is shipped in to them?
A. That is right.
Q. They do not manufacture steel?
A. I think it is shipped into them. I don't know.
Q. What about these other plants which you have referred to?
A. Buffalo Steel, I think, manufactures their own. That is in Tonawanda.
Q. Do they have blast furnaces?
1312 A. I am not sure. I never was in there. Very small.
Q. Do you do any intraplant switching for the Buffalo Steel Company?
A. We would if they asked us to do it; yes.
Q. No, no. Do you do it?
A. I don't know.
Q. What is the third company?
A. Tonawanda Iron. We do not go in there. They have their own power.
Q. It is the third company you are talking about?
A. Yes.
Q. Tonawanda——
A. Iron.
Q. Your tracks do not go in their plant?
A. No.
Q. You spoke about crew and locomotive being at one industry three or four or five hours. That is in connection with given work, is it not?
A. That is right.
Q. Specified work?
A. Yes, sir.
Q. When that work is completed by the crew and locomotive, the crew does not stand by for further orders from the customer, does it?
A. No, sir.
1313 Q. Any further orders will come from the New York Central, will they not?
A. That is right; yes, sir.
Q. Relative to holding empty cars for customers, it is done in the expectation, at least, that the cars will be used the following day; isn't that true?
A. Yes, sir.
Mr. CRAIG. That is all.

RALPH C. RAUGLEY, a witness called by and on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Raughley?

A. Buffalo.

Q. Are you connected with a Railroad?

A. I am.

Q. Which one?

A. Pennsylvania Railroad.

Q. In what capacity?

A. I am a Trainmaster in this territory.

Q. How long have you been employed by the Pennsylvania Railroad?

A. Since January 1, 1903.

Q. How long have you been in Buffalo?

1314 A. Twelve years.

Q. As Trainmaster?

A. Yes.

Q. And as Trainmaster do you have to do with all of the Railroad operations at least in the Buffalo switching district?

A. I do.

Q. Does the Railroad perform terminal switching service for itself in this district?

A. It does.

Q. Has it a connection with the South Buffalo Railway?

A. It has.

Q. And the Buffalo Creek?

A. It has.

Q. Can you give me some idea, within the Buffalo switching district, how many customers the Railroad serves?

A. About 45.

Q. Can you give us any idea about the extent of your terminal switching trackage in this area?

A. Only to the extent that it extends about six and one-half miles south or east.

Q. But you do not know the total mileage incolved in all the side tracks, yard tracks, leads and main tracks?

A. No; I do not.

Q. How many switching crews are you now maintaining

1315 in service?

A. About 50 to 55.

Q. How about switching locomotives have you?

A. I think there is 28 on the list this morning.

Q. In oil service, your Railway, of course, switches tank cars?
A. We do; not in the Buffalo district.
Q. Not in the Buffalo district?
A. No.
Q. You do not handle any tank cars in the Buffalo district?
A. Only in transit through the terminal or individual car here and there.
Q. There has been some reference in the testimony here to the placing of a blue flag on a track at or near the unloading location of an oil tank car. Is that blue flag common accepted railroad practice and what does it mean?
A. Blue flag is used as a protection on the track where men are working on cars.
Q. And that is used as a warning against other trains, cars or engines coming in on that track?
A. That is correct. It is a standard rule of operation.
Q. What does your line in this district do with loaded cars received in such numbers as to exceed the ability of the consignee to take them?
1316 Mr. CRAIG: Plaintiff objects to the question relating to any service rendered by the Pennsylvania Railroad to any of its customers, on the ground that it is irrelevant and immaterial.
The COURT: Overruled.
Mr. CRAIG. May we have the same stipulation, one objection will apply to succeeding questions?
Mr. BROMLEY. Yes, sir.
A. We hold such cars under constructive placement.
Q. And at the appropriate time put them on demurrage?
A. That is correct.
Q. Is there any limit to the time during which you held such cars, Mr. Raughley?
A. No. They are held until they are ordered by the consignee or some disposition provided for them.
Q. Just as long as the consignee wants you to hold them, is that right?
A. That is true.
Q. And those cars are held on your tracks?
A. That is correct.
Q. Is there any special place that you hold them on your tracks, or whatever is convenient for you?
A. We would hold them where it was most convenient to us, depending on the conditions.
Q. Is the situation like that where loaded cars are held
1317 for placement orders by consignees a usual daily occurrence on your lines?
A. Yes.

Q. What can you tell us with respect to your spotting practice? Do you make exact spots at exact predetermined times, as directed by the industry, or don't you?

A. We do.

Q. And do you assemble cars and deliver them to industries in the order in which the industry requests or directs that they be delivered?

A. We do.

Q. What does that involve from the time those cars come into your possession until the time you deliver them to an industry in that prerequested order?

A. It involves the assembling of the cars in the order before they are switched into the plant.

Q. And where do you do that?

A. In the supporting yards.

Q. In the what?

A. In the supporting yards, railroad yards.

Q. How many such yards have you in this district, about?

A. We have a total of six yards, two main yards, one locally termed an in-bound yard, one an out-bound yard, and four supporting units to the local operation.

Q. In those supporting units do you perform, among
1318 other things, this task about which you have just spoken, of arranging cars in specified order for delivery?

A. We do.

Q. And I suppose that the first operation that your switching crew has to perform is to go to the train in which one or more of those cars is contained, as it comes in to you; isn't that correct?

A. That is the first move in disposing of an in-bound car, that is broken out in classification of the in-bound road train and the process continues up until the time of actual placement for unloading.

Q. A freight train coming from New York City to Buffalo, upon arrival here in Buffalo, is hauled into one of your yards just as it arrived over the trunk line, is it not?

A. That is correct; into the receiving yard.

Q. And left there?

A. Yes.

Q. Then your switching engines and crew go in there and break it up?

A. That is correct.

Q. And separte the cars that go to one consignee and put in another group of cars that go to another consignee?

A. That is right.

Q. After that occurs or during the process of separating

1319 the cars, they are arranged, if the consignee requests, that they be arranged in any order; is that true?

A. No; it is not at that time that you assemble cars for an individual consignee for placement.

Q. When is it?

A. In the receiving yard you break up, you make the original switching involved in the breaking up of the train for the several supporting units or for delivery to connecting lines. And normally it is through one of the supporting yards that you do the refined work of setting up in the order requested by the consignee for placing on his tracks.

Q. Do you spot cars within the limits of industry buildings?

A. We do.

Q. And transport them under crane runways?

A. We do.

Q. Do you take them up on trestles and spot them?

A. I don't recall that we have a trestle in our Buffalo Division.

Q. Do you move around on your line industry-owned cars, if requested?

A. I do not recall the movement of any industry-owned cars.

Q. Do you deliver cars to consignees at the times requested by consignees?

A. We do, as far as possible.

1320 Q. And is there any practice on your Railroad which prevents you from delivering a later-arrived car ahead of or behind an earlier-arrived car?

A. No.

Q. You will do whatever the shipper wants you to do in that respect?

A. That is right.

Q. Do you ever permit the unloading of cars consigned to shippers on tracks owned by your Railroad?

A. In unusual cases we do.

Q. Do you have any grain elevator work to perform here?

A. We do.

Q. And is it customary for you to spot the cars under loading chutes?

A. Yes; we spot the cars on the loading tracks and they are moved up to the chutes by winch and cable by the industry.

Q. What do you do about maintaining a supply of empty cars available for your shippers?

A. By daily contact with our patrons we endeavor to anticipate the requirements of the shippers. That applies particularly in the flour, feed, and grain trade, where it is necessary to prepare cars for that particular service.

1321 Q. Is it a part of your obligation or duty to clean out a car and make it fit for use by your shippers?

A. It is.

Q. And you do that with respect to all empty cars, do you?

A. That is correct.

Q. Where do you do that, in one of these supporting yards?

A. We have a unit for that purpose here.

Mr. BROMLEY. That is all.

1322 Mr. CRAIG. The Plaintiff moves that the testimony of the Witness Raughley relative to service rendered by the Pennsylvania Railroad to its customers and shippers be stricken from the record.

The COURT. Denied.

Cross-examination by Mr. CRAIG:

Q. Mr. Raughley, in connection with the switching service which you have described does your railroad serve any steel-manufacturing plants?

A. The Hanna Furnace is the only one.

Q. Do your tracks extend inside the Hanna Furnace Company property?

A. They do not.

Q. Do you do any intraplant switching for Hanna Furnace?

A. We do not.

Q. In connection with your holding of empty cars for the needs of your customers, as I understand it you make daily contact with your customers, don't you?

A. That is correct.

Q. And that is in connection with the following day's business?

A. That is right.

Mr. CRAIG. That is all.

Mr. BROMLEY. That is all.

1323 JAMES M. HOOD a witness called by and on behalf of the Defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. BROMLEY:

Q. Where do you live, Mr. Hood?

A. At Washington, D. C.

Q. And your business is what?

A. I am President of the American Short Line Railroad Association.

Q. And what is the American Short Line Railroad Association?

A. It is a voluntary nonprofit organization of 312 railroads of varying lengths, types of business and ownerships.

Q. All of which are known as short lines? Is that right?

A. There is no very commonly accepted definition of a short line. They all have characteristics of short lines.

Q. Now, do you have among your members terminal switching railroads?

A. More than 100.

Q. And are they industry-owned terminal-switching roads?

A. About half of that number, perhaps 60 are industrially owned.

Q. Switching and terminal railroads?

1324 A. Switching and terminal railroads.

Q. All over the country?

A. Substantially so; yes, sir.

Q. Are you familiar with the lines and operations of any substantial number of these 60 railroads?

A. I am familiar by continual examination of their records to a reasonable extent in all cases, and I have examined the physical property of perhaps 100 railroads in the last 30 years, of which maybe 25 or 30 are industrially owned.

Q. Have you been familiar with the operations of the South Buffalo Railway Company over the years?

A. Just as to the physical characteristics of the property as shown by public records filed with the Commission and as to the financial results and the capital structure; a not on the ground familiarity.

Q. Well, have you inspected the railroad on the ground?

A. I have been over the railroad once.

Q. And are you familiar in a general way with the lay-out of its yards and tracks, particularly to the west of the Hamburg Turnpike?

A. I am in a general way.

Q. Can you tell us whether or not it is usual or unusual for steel mills to be served by industrially owned switching terminals similar to the South Buffalo Railway?

1325 Mr. CRAIG. I object to that, your Honor.

The COURT. Is your question directed particularly to steel mills?

Mr. BROMLEY. Yes; in the first instance steel mills. I want to know whether this situation at Lackawanna——

The COURT. A situation in what respect?

Mr. BROMLEY. The fact that an industrially owned switching terminal road serves plants engaged in the manufacture of steel.

The COURT. I will let him answer.

The WITNESS. There are more than 25 similar instances.

By the COURT:

Q. You mean where it has service by some other railroad at its plant?

A. I mean, your Honor, where there is a financial relationship substantially similar to this one as between the carrier and the manufacturing steel company.

The COURT. I understand your question relates to the financial condition?

Mr. BROMLEY. I wanted to know whether there were instances of industry-owned roads serving steel plants, and that is what he means, industry-owned roads serving steel plants like this one.

The COURT. That does not involve the question of the financial set-up.

1326 Mr. BROMLEY. Only the ownership, that is all.

The COURT. Well, limiting your question that way I will let him answer.

By Mr. BROMLEY:

Q. How many do you say?

A. More than 25.

Mr. BROMLEY. That is all.

Mr. CRAIG. Your Honor, I move that the testimony of this witness be stricken. I do not know what the situation is.

The COURT. All that I get out of his testimony is the statement that there are 25 industries that have a set-up which includes tracks of some railroad company within the confines of the steel company and also tracks of the steel company itself.

Mr. CRAIG. I take it that counsel would have the Court infer from that situation that those situations are all right, and therefore this situation is all right. I do not know anything about the other situations.

The COURT. His inquiry is just as to the physical situation, that is all.

Mr. BROMLEY. That is all.

The COURT. I do not think it is of great value.

Mr. CRAIG. That is all.

Mr. BROMLEY. The Defendants rest.

1327 The COURT. Is there any rebuttal?

Mr. STRANGE. May it please the Court, we have one witness which we wish to use in rebuttal.

RUSSELL F. HANDWERK, called as a witness in behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

Direct examination by Mr. STRANGE:

Q. Mr. Handwerk, by whom are you employed, and in what capacity?

A. The South Buffalo Railway as General Agent.

Q. How long have you occupied the position of General Agent for the South Buffalo Railway?

A. Since 1933.

Q. In your position as General Agent, do you have occasion to understand and to apply tariffs in connection with the operations of the South Buffalo Railway Company?

A. To some extent; yes, sir.

Q. Do you recollect testifying before the Interstate Commerce Commission's Examiner in Buffalo, New York, September 18, 1940, or thereabouts in connection with the Ex Parte 128 investigation?

A. I believe I did; yes, sir.

Q. Do you recollect being questioned by Mr. Robinson
1328 relative to certain tariffs and application of moves to those tariffs?

A. I have a recollection; yes, sir.

Q. Have you any recollection of being asked whether demurrage on Bethlehem Steel cars standing on South Buffalo tracks was charged by the South Buffalo Railway Company?

A. I was asked a question in that respect; yes, sir.

Q. Do you recollect what your answer was?

A. I believe I answered that it was not charged.

Q. And do you recollect the date prior to which or after which no charge was made?

A. I don't recollect the dates.

Q. Let me read this question to you [reading]: "Q. Was demurrage charged on Bethlehem Steel Company cars on South Buffalo tracks prior to March 1, 1939?" And that your answer was "No, it wasn't"?

A. I believe I made that answer; yes, sir.

Q. Now, do you recollect further, Mr. Handwerk, that shortly thereafter on September 20, 1940, or thereabouts you were asked the following question——

The Court. You are calling him as your own witness. Why don't you ask him what the facts are? You can use that to refresh his recollection, but I do not understand this method of examination.

1329 Mr. Strange. May it please the Court, I asked him exactly what his recollection was, and I came to a point where he said he didn't recollect quite what his answer was, and I thereupon referred to this transcript.

The Court. Prior to that you were inquiring about his testimony as to the charges prior to 1939. You should ask him what the facts are about it. You are inquiring first whether he testified to that in his other proceeding. Of course, you can do that to refresh his recollection.

Mr. STRANGE. It has been testified to——

The COURT. You asked him if he recollected that he testified to that. Now ask him what the fact was, whether there was any charge after [redacted], or whether there wasn't. If he does not know then you may call his attention to the record.

By Mr. STRANGE:

Q. Mr. Handwerk, was demurrage charged by the South Buffalo Railway Company on Bethlehem Steel owned cars standing on South Buffalo Railway Company tracks prior to March 1, 1939?

A. If it was assessable under the demurrage rule; yes, sir.

Q. I am asking you now if demurrage was so charged?

A. I don't know whether it was charged.

1330 Q. But you recollect having testified on September 18, 1940, that it was not so charged prior to March 1, 1939?

A. Because it was not assessable.

Q. I say, do you recollect that you testified that no demurrage was charged?

A. I may have made that statement; yes, sir.

Q. Mr. Handwerk, do you further recollect that a few days later on or about September 20, 1940, you were asked this question: "Q. I believe you testified that the present practice is for the South Buffalo to charge demurrage on loaded cars of Bethlehem Steel ownership when they are on the South Buffalo track? A. I think I did, yes."

Do you recollect that question being asked and that answer being made?

A. I think it was asked, yes.

Mr. BROMLEY. I object to this line of cross-examination unless he asked what the facts are.

The COURT. It is not a cross-examination. It is direct examination. First, as I pointed out before, without referring to this prior record at all, you may inquire about the facts, and then if you claim that his testimony is not refreshed enough, or he doesn't recall it, or that the testimony is incorrect, then you may

1331 cross-examine your own witness to that extent.

Mr. STRANGE. May it please the Court, in the first place, he is an officer of the Company.

The COURT. Let us ask him out and out what the fact is and see what he says. Perhaps he will answer as he did before. Then we do not need to go to this record.

Mr. STRANGE. I have asked him that, and his reply was that he didn't recollect.

By Mr. STRANGE:

Q. Now, then, may I ask——

The Court. What is the fact with reference to charges subsequent to 1939 where cars of the Bethlehem Steel Company were kept on the tracks of the South Buffalo Railway?

The Witness. The cars of the Bethlehem Steel or any other private car-owner if they are detained on the tracks of the South Buffalo Railway for a period beyond the 48-hour free time period as provided in the demurrage rules are subject to demurrage charges.

The Court. That includes the Bethlehem cars as well, you said?

The Witness. Yes, your Honor.

By Mr. Strange:

Q. And the testimony in regard to that situation prior
1332 to March 1, 1939, was that demurrage was not charged on Bethlehem Steel cars under those circumstances; is that what you testified?

A. I believe I made that statement, but in order to qualify that I should add that they were not charged because the demurrage was not assessable under the tariffs.

Q. Do you mean by that that prior to March 1, 1939, there were no Bethlehem Steel owned cars standing on the South Buffalo Railway Company tracks for longer than 48 hours, and that thereafter, after March 1, 1939, that there were cars standing on South Buffalo Railway tracks for longer periods than 48 hours?

A. I can't answer that of my own knowledge. I might add that I was told that.

The Court. You said something about the tariff; you claim there was some change in the tariff after March 1, 1939?

The Witness. No, sir, your Honor; the tariff is the same today in substance as it was prior to this date in 1939.

The Court. What do you say then as to whether the charges were made and the reasons why, if any, that charges were not made for cars kept stored on the tracks of the railway owned by the Bethlehem Steel Company?

The Witness. Because the cars didn't stand on the tracks
1333 of the railway for a sufficient length of time to permit of a charge.

By Mr. Strange:

Q. The Witness R. S. Booth has heretofore testified in this case that he was informed by Mr. Ensinger that demurrage was not charged on cars owned by the Bethlehem Steel Company while in Bethlehem Steel Company's service and standing in South Buffalo Railway Company's yards in 1938. Will you kindly state whether that statement made by Mr. Ensinger as referred to by Mr. Booth is correct or incorrect?

Mr. BROMLEY. I object to that as incompetent.

The COURT. Objection sustained to the question in that form.

Q. Do I understand your testimony to be that demurrage was or was not charged on Bethlehem Steel Company-owned cars standing on South Buffalo Railway Company tracks in Bethlehem Steel Company's service prior to March 1, 1939?

A. If the cars stood on those tracks a sufficient length of time which under the demurrage tariff would provide for a charge, those charges should have been made.

Q. I am not asking that question. I am asking if demurrage was charged on these cars prior to March 1, 1939.

A. I can't answer that question.

1234 Q. And you are General Agent of the South Buffalo Railway Company?

A. I did not maintain the record.

Q. You have spoken heretofore about a conversation that you had with regard to this matter and that you were told something about this demurrage. With whom did you have that conversation?

A. Well, I can't remember anyone in particular. The operating men on the railway.

Q. Did you have any conversation with Mr. Trageser about this matter?

A. Those matters are discussed from time to time.

Q. Did you have any specific conversation with him with regard to the question of whether or not demurrage was charged on these cars prior to March 1, 1939?

A. These practices are discussed many times.

Q. I am simply asking you now if you had any such conversation as that with Mr. Trageser?

A. I presume I did.

Q. What was his reply? What was his statement in regard to that situation?

A. I don't remember.

Q. Now to refresh your recollection I refer to the investigation before the Examiner of the Interstate Commerce Commis-

1235 sion on or about September 20, 1940, and ask you if you recollect being asked the following questions and having made the following answers:

"Q. I believe you testified that the present practice is for the South Buffalo to charge demurrage on loaded cars of Bethlehem Steel ownership when they are on South Buffalo track?

A. I think I did; yes.

Q. Is that practice as a result of your instructions?

A. It is the result of instructions after consideration of the subject with my superiors.

Q. Whom did you consult?
A. I consulted Mr. Trageser.
Q. Who else?
A. That is the only party I consulted. But he probably consulted some other officers of the South Buffalo. I really don't know.
Q. Do you know whether he did?
A. I do not know.
Q. So far as you know then he did not consult with anybody?
A. That is true.
Q. When did you consult with Mr. Trageser about this practice?
A. Some time prior to March, 1939.
1366 Q. What was the occasion for considering the subject?
A. Well, the general opinion that prevailed prior to that time was that cars of the Bethlehem Steel ownership were loaded and unloaded on the tracks of that industry, of that company, and in view of the amount of cars that were owned by them, and the length of movements and the quick turn-around the general feeling was that there was no detention of cars of that kind."
Mr. BROMLEY. I object to the reading of this testimony. He has finished the part about his conversation with Mr. Trageser.
The COURT. What was the last statement you read there?
Mr. STRANGE. May I read it over?
The COURT. The last clause.
Mr. STRANGE. The last clause, may it please the Court, is to the effect that there was a general feeling.——
The COURT. Read it.
Mr. STRANGE (reading). "And in view of the amount of cars that were owned by them and the length of movements and the quick turn-around the general feeling was that there was no detention to cars of that kind."
The COURT. Detention beyond the limit fixed by the demurrage?
1367 Mr. STRANGE. 48 hours. There was a general feeling——
The COURT. That they were not kept over that time?
Mr. STRANGE. Yes; that is right; a general feeling.
The COURT. Go on with the question.
Mr. STRANGE (reading):
"Q. What do you mean by 'there was no detention'?
A. On the South Buffalo Railway."
Now, do you recollect those questions having been asked and those answers made, Mr. Handwerk?
The WITNESS. I have a recollection.
Mr. STRANGE. That is all.

Mr. BROMLEY. That is all.

Mr. CRAIG. That is all, your Honor. Plaintiff rests.

The COURT. This completes the testimony?

Mr. BROMLEY. Yes, your Honor.

Renewal of defendants' motion to dismiss, etc.

May the record show that I renew the motion which I made at the close of the Government's case in all respects, and in addition thereto that I move for judgment for the Defendants.

The COURT. That motion is denied at this time.

(The brief on behalf of the Plaintiff is to be submitted in six weeks, and the answer of the Defendants in three weeks.)

1338 *Plaintiff's Exhibit 15*

South Buffalo Railway Company. (Abstract of) journal voucher

DEBIT	CREDIT
Name of Account—Property and Plant as below.	Name of Account—Reserve for Depreciation as below.

Date Made Jan. 16, 1923. Month of December 1922. General Ledger Reference No. 16.

For—To place at original value road and equipment purchases as per Indenture of Sale dated October 10, 1922.

Description	Amount	Total
Debit:		
Property and Plant:		
Road	$125,921.55	
Equipment	175.00	
		$126,096.55
Credit:		
Reserve for Depreciation:		
Road	125,921.55	
Equipment	175.00	
		126,096.55

Approved for entry (signed) F. A. Schick, (signed) J. F. Findlay.

1339 *Plaintiff's Exhibit 17*

NOVEMBER 29, 1940.

Subject: Track Changes—East Side #6 Mill

Mr. F. M. BENNIN
Vice Pres. & Gen'l. Supt.,
South Buffalo Railway, Lackawanna, New York.

DEAR SIR: In connection with providing additional billet yard capacity for our #9 Mill, we will construct a billet transfer be-

tween old #6 Mill Building and #9 Mill Billet Yard. In order that this transfer can be installed, it will be necessary for you to make some track changes in this area. Sketch 112908 has been issued to show the trackage that must be retired, colored green, and the trackage that you must provide, colored yellow.

Will you please take the necessary steps to have this work done as soon as possible.

Very truly yours,

———, ———, *General Manager.*

Enc.

1340 *Plaintiff's Exhibit 18*

DECEMBER 31, 1940.

Subject: Track Connection North End of Structural Shipping Yard

Mr. F. M. BENNING,
General Superintendent,
South Buffalo Railway, Lackawanna, New York.

DEAR SIR: In connection with track changes which we propose to make at the Structural Shipping Yard as shown on our drawing 112910, it will be necessary for you to make some track changes in this area. Our work in this connection is covered by our Works Order AD–363, Bill of Material 1418, page 119.

Will you please take the necessary steps to have this work done as soon as possible?

Very truly yours,

———, ———, *General Manager.*

1341 *Plaintiff's Exhibit 19*

MAY 29, 1945.

C. F. DULLENKOPF,
Vice Pres. & Genl. Supt.,
South Buffalo Railway Co., Lackawanna, N. Y.

DEAR SIR: In connection with our operations at our No. 14 Mill, we are considering an eastward extension to the building now identified as Covered Runways No. 3 and No. 4 of the Structural Shipping Yards.

The proposed building extension will make necessary rather extensive track alterations, and we are accordingly enclosing three prints of our drawing SK–114784, colored to show the changes required in the Steel Co. trackage, and three prints colored to show the changes required in the Railway Co. tracks.

Please let us know at your earliest convenience if the Railway Co. is in a position at the present time to service the proposed layout. In the meanwhile, we are issuing our Miscellaneous Purchase Order AD-2225 to cover the proposed work so that if you approve there will be no delay in the beginning of the work.

Yours very truly,

E. F. Entwisle,
General Manager.
Per F. S. Eckhardt,
Chief Engineer.

-7.
Enc.

1342 *Plaintiff's Exhibit 20*

EXECUTIVE OFFICES AND CHIEF OPERATING OFFICIALS OF SOUTH BUFFALO RAILWAY COMPANY FROM 1922 to 1944

	Period of Office
Presidents:	
F. H. Burnett*	Sept. 8, 1922, to May 3, 1926.
C. L. Leonard	May 3, 1926, to Jan. 9, 1930.
W. L. Guyer*	Jan. 9, 1930, to Apr. 20, 1932.
K. A. Kemmerer*	Apr. 20, 1932, to Nov. 29, 1933.
P. A. Trageser*	Nov. 29, 1933, to Jan. 18, 1940.
D. M. Petty*	Jan. 18, 1940.
Vice-Presidents:	
R. S. Brenhesholtz	Sept. 28, 1922, to July 11, 1923.
F. M. Benning	Sept. 28, 1922, to Feb. 1, 1941.
W. H. Peters, Jr.*	July 11, 1923, to July 19, 1938.
P. A. Trageser*	Jan. 18, 1940.
J. W. St. Clair*	Feb. 1, 1941, to Aug. 26, 1941.
H. B. Royer*	Oct. 1, 1941, to Aug. 31, 1943.
C. F. Dullenkopf*	Sept. 1, 1943.
General Superintendents:	
F. M. Benning	May 10, 1920, to Feb. 1, 1941.
J. W. St. Clair*	Feb. 1, 1941, to Aug. 26, 1941.
H. B. Royer*	Oct. 1, 1941, to Aug. 31, 1943.
C. F. Dullenkopf*	Sept. 1, 1943.
1343 **Secretary-Treasurer:**	
J. E. Donnelly*	Sept. 28, 1922, to July 19, 1938.
A. J. Ensinger	July 19, 1938, to June 15, 1939.
J. F. Craig	July 18, 1939, to Jan. 18, 1940.
G. E. Sellers*	Jan. 18, 1940.
Asst. Secy. and Asst. Treas.:	
L. H. Hemmerly*	Sept. 28, 1922, to Dec. 27, 1935.
A. S. Doster*	Dec. 27, 1935, to Dec. 5, 1939.
J. F. Craig	Jan. 18, 1940.
Auditors:	
J. F. Findlay*	Sept. 28, 1922, to Apr. 20, 1932.
C. J. Fatzinger*	Apr. 20, 1932.

Purchasing Agents:

E. W. Thomas*	Apr. 20, 1932, to Nov. 29, 1933.
R. B. Mayo*	Nov. 29, 1933, to Feb. 10, 1936.
T. D. Sims*	Feb. 10, 1936, to Feb. 12, 1937.
A. F. Brooke*	Feb. 12, 1937, to Nov. 30, 1942.
R. F. Maguire*	Dec. 1, 1942.

1344 Chief Engineers:

W. A. James*	1922 to June 30, 1940.
H. M. Dalziel*	June 30, 1940.

Each of the above-named officers and operating officials who was in the employ of Bethlehem Steel Company before his association with South Buffalo Railway Company is indicated by an asterisk (*) following his name. R. S. Brennesholtz became associated with Bethlehem Steel Company after his association with South Buffalo Railway Company. None of the above-named officers and operating officials of South Buffalo Railway Company became so associated with Bethlehem Steel Corporation.

1345 *Plaintiff's Exhibit 21*

THE SOUTH BUFFALO RAILWAY COMPANY,

Buffalo, N. Y., January 5th, 1923.

Mr. W. A. JAMES,
Chief Engineer, South Buffalo Rwy. Co.,
Lackawanna, Erie Co., New York.

DEAR SIR: I am sending you herewith a copy of your Map 28125 which I believe you prepared for the Accounting Department covering transfer of certain tracks from the Bethlehem Steel Company to the South Buffalo Railway Company. It is necessary that this map be changed to cover the following:

The title of the map will have to be changed to read "Map Showing Land, Including Railroad Roadbed, Leased by Bethlehem Steel Company of New York, Inc., to South Buffalo Railway Company, October 10, 1922."

The last item of the key chart in the upper right hand corner will have to be changed to read "B. S. Co. of N. Y. Tracks Not Transferred to S. B. Ry. Co."

The South Buffalo Railway Company is shown on this map as owning a strip of land 450' wide, just South of the City of Lackawanna, and Town of Hamburg line. This strip of land should be shown as "South Buffalo Railway Company" instead of "The South Buffalo Railway Co."

May I ask you to make these changes promptly and forward ten copies of the revised map to this office.

Yours very truly,

(Signed) JNO. M. GROSS,
General Traffic Manager.

KAK/MC.

1346 *Plaintiff's Exhibit 22*

JANUARY 25, 1923.

W. A. JAMES, *Chief Engineer* to
J. M. GROSS, *General Traffic Manager, Bethlehem, Pa.*

Maps Showing Transfer of Tracks from Bethlehem Steel Co. to South Buffalo Ry. Co.

Under separate cover we are mailing you ten (10) copies of our large plant map #28125 prepared to illustrate the transfer of tracks and other property from Bethlehem Steel Co. to South Buffalo Railway Co., which maps have been revised in accordance with your letters of January 9th, January 11th, and wire of January 16, 1923.

As there has been considerable labor invoived in preparing and checking over these maps we have been unable to furnish them at an earlier date.

——— ———, *Chief Engineer.*

1347 *Plaintiff's Exhibit 23*

BETHLEHEM, PA., *January 30, 1923.*

JNO. M. GROSS, *General Traffic Manager* to
W. A. JAMES, *Chief Engineer, Lackawanna Plant, Lackawanna, New York.*

Subject—Map showing Transfer of Tracks from Bethlehem Steel Co. to South Buffalo Ry. Co.

In reply to your letter of Jan. 25th we would very much appreciate it if you will return to us the original map which accompanied our letter of January 9th.

(Signed) JNO. M. GROSS,
General Traffic Manager.

KAK/Mc.

1348 *Plaintiff's Exhibit 24*

JANUARY 31, 1923.

W. A. JAMES, *Chief Engineer* to
J. M. GROSS, *General Traffic Manager, Bethlehem, Pa.*

Map showing transfer of Tracks from Bethlehem Steel Co. to South Buffalo Railway Co.

Complying with your letter of the 30th instant we are returning herewith original map which accompanied your letter of Jan-

uary 9th. We have been retaining this map as we did not understand from previous letter that you wished it returned.

——— ———, *Chief Engineer.*

Encl.

1349 *Plaintiff's Exhibit 25*

T. BURNS to MARCH 8, 1924.
Messrs. BURNETT, BENNING, and CLARKE,
South Buffalo—Transportation Account

I am sending you a comparative statement of the transportation costs of all steel plants in which the Lackawanna plant looks very much out of line.

Please understand tha the Lackawanna column includes South Buffalo railroad charges against the steel plant, all narrow gauges and trucks, and as compared with Bethlehem and Steelton, we look very much out of line although we have no narrow valleys and probably an easier topographical situation than they have.

Our transportation costs per ton of ingots produced, total shipments cost per ton, steel shipments cost per ton, are all out of line—the details are given also with this file.

One item we look bad in is fuel for narrow gauge locomotives. Are we sure that charges are made right for this commodity and is it not true that narrow gauges on miscellaneous and roustabout work make a good many trips with a light load, which should be improved by proper handling and dispatch. Perhaps some of the narrow gauge roustabout work could be done by trucks and the trucks devote more time to steel plant transportation and less to commercial outside work.

It is necessary that we give this matter careful study so that we may get in a better condition on this comparative statement.

I would like to have a report from you on it explaining the differences.

——— ———, *General Manager.*

TB: JW.

1350 *Plaintiff's Exhibit 26*

MARCH 12TH, 1924.

Mr. T. BURNS
General Manager,
South Buffalo Railway Company, Lackawanna, N. Y.

DEAR SIR: Your joint letter March 8th, your total Transportation cost per ton of ingots was as follows:

January 1924		Lackawanna per ton (cents)	Bethlehem per ton (cents)
Narrow gauge tracks	5,825.47	6.82	
Narrow gauge locomotives	26,893.21	31.50	
Narrow gauge cars	3,714.04	4.35	
Standard gauge cars	6,110.68	7.16	
Standard gauge F. F. dump locomotive	584.82	.68	
Standard gauge tracks open hearth No. 1	367.14	.43	
Standard gauge O. H. No. 2 stockyard	4,414.80	5.17	
Standard gauge O. H. No. 2 charging floor	1,769.96	2.06	
Standard gauge locomotive coke ovens	945.28	1.10	
Autotrucks and autos	1,404.46	1.64	
Total plant charges	52,029.86	60.93	28.8
Switching—South Buffalo Ry. Co.	41,276.00	48.33	32.4
Demurrage	9,129.00	10.69	.3
	102,434.86	119.95	31.2

Plant charges and demurrage are thus 42.51 cents above Bethlehem, while switching is 4.07 cents below Bethlehem. The latter item is a surprise to me.

Demurrage is pretty well understood.

Plant charges 60.93 cents need analysis. The Narrow Gauge System cost 42.67 cents or 70% of the total. Of this, the operation and maintenance of locomotives furnish 31.5 cents.

This is composed of: Fuel $6,243.26 or 7.29 cents per ingot ton; labor $11,542.55 or 13.47 cents per ingot ton; repairs $6,755.26 or 7.90 cents per ingot ton; other items $2,352.14 or 2.75 cents per ingot ton.

1351 For the amount of service performed these figures do not seem excessive. Fuel 31.5 tons per day, is reasonable. Wages $372 per day is also reasonable in view of the hours worked.

I believe there is some radical difference not disclosed between Narrow Gauge operations in the two plants that cause the disparity in cost of fuel, producing labor, repairs and distributive expense. The engine hours worked at each plant, length of haul, capacity of engines and size of trains should be known in order to solve this point.

The remainder of plant charges 18.26 cents is mainly in repairs to Standard Gauge plant cars and plant tracks, each of which is over 7 cents per ton. The cars are expensive because they have run down and receive rough usage at the mills and furnaces. The same may be said of the tracks. Now that Open Hearth No. 1 is in

full blast the track expense promises to increase. Unavoidable damage seems to occur so that large gangs are required every Sunday and sometimes during the week to keep them in usable condition. New rails costing $20 each may be put in today only to be destroyed tomorrow. The 105# rails seem to fare but little better than the 80#. The only remedy I can suggest is cultivation of more careful practice where destruction is greatest, such as the Open Hearth Works, Bessemer, Stripper Tracks and No. 7 Mill. The last named has shown a vast improvement in the last two months.

The one large item, Repairs $20,701.09, amounts to over 24¢ per ton made up as follows:

Transportation Cost Per Ton of Ingots January 1924—85,392 tons

		Cents
Repairs:		
Narrow Gauge tracks	$5,750.18	6.73
Narrow Gauge locomotives	6,755.26	7.91
Narrow Gauge cars	1,144.05	1.34
Standard gauge cars	6,059.88	7.09
Standard gauge engine (cinder dump)	3.59	
Tracks open hearth No. 1	108.02	.13
Tracks open hearth No. 2 stock yard	448.31	.52
Tracks open hearth No. 2 charging floor	193.76	.22
Locomotive coke ovens	121.53	.14
Auto trucks	105.91	.13
Automobiles	10.60	
	20,701.09	24.21

I am handing copy of this letter to Mr. Clarke to use in making his comments.

1352 So far as the South Buffalo is concerned I will say that its charges are below cost. The volume of hours charged should be reduced however but this can be done only by cooperation of your operating departments. Many calls for special trips are made such as to move a car of burned lime from Calcining Plant to Open Hearth, which may take an hour and cost $8. Another occasional call is to move an armature from Electrical Shop to Coke Ovens which may take longer and cost still more.

Again, on Sundays an engine is often kept busy rounding up cars from wherever made empty to keep pig casting machine supplied.

These are fair samples of special service. Blast Furnace service is costing about $920 per day or 30¢ per ton in round figures.

Treadwell ladle service is costing about $80 per day for dumping.

Handling billets at No. 1 Mill cost $7 per hour and varies from 60 to 100 hours per week. This week it promises to run up to 120 hours, indicating that the month's total may be more than $2,000 and probably 25¢ per ton to move billets from No. 1 Mill

to No. 9 Mill and elsewhere. This engine is used for other work between trips whenever possible but as a billet run is required on the average every two hours and only two men in the crew not much other service is open for her.

I am certain however that we get more service out of our engines than any other yard in this vicinity.

_____, _____,

Vice Pres. & Gen'l. Supt.

FMB/MFC.

1353 *Plaintiff's Exhibit 27*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

JULY 8, 1925.

In Reply Refer to CLL.

Mr. T. R. NIVIN,
Supervisor of Forms & Printing, Bethlehem, Pa.

DEAR SIR: Our requisition RR T #2 of May 8th called for 15,000 shipper's orders in pads, and to that order was attached a copy of form which we used showing at the bottom of the form—C. L. Leonard, General Agent.

This special shipping order is used entirely for outside industries on the line of the South Buffalo Ry. Co. and the connecting lines will only accept that as authority for billing when it bears the signature of the General Agent of the South Buffalo Ry. Co.

We have now received the new supply of 15,000 and the printed signature of the agent has been left off. This necessitates our office stamping each and every sheet of the 15,000 with my signature, which is certainly a great deal of unnecessary labor. I cannot understand why in printing you could not have followed sample forwarded to you. You also at the same time printed 10,000 sets which covered the original bill of lading, memo copy, and shipper's order, which is an entirely separate and distinct matter, and it was alright in that case to leave off the signature.

Will you please explain this error?

Yours truly,

C. L. LEONARD,
General Agent.

JB.
Copy to Mr. J. M. Gross, G. T. M.
Attention Mr. Kemmerer.

1354 *Plaintiff's Exhibit 28*

JULY 14, 1925.
BFA-5144-A.

F. A. SHICK, *Auditor.*
C. L. LEONARD, *General Agent, South Buffalo Rwy. Co., Lackawanna, N. Y.*

Shipping Order Forms

Your letter of the 8th addressed to Mr. Nivin regarding the stamping of your name on Shipping Order Forms for the South Buffalo Railway Company: We wish to advise that we have placed a general order with our Printery Department that in no case should a name be printed on any form. Mr. Nivin followed these instructions, and that is the reason why the name was not printed on the forms in question. Under the circumstances, however, we might, in the future, reconsider the question as to the advisability of printing the name on the form in this instance.

I understand you have a stamp which can be used, and I suggest that you let the messenger boy stamp these particular forms.

------ ------ *Auditor.*

Copy to: Mr. T. R. Nivin, Printery.

1355 *Plaintiff's Exhibit 29*

SENECA IRON & STEEL COMPANY
BUFFALO, N. Y.

MARCH 12TH, 1926.

MR. F. M. BENNING,
Vice Pres. & Gen'l Mgr., South Buffalo Ry.,
Lackawanna, N. Y.

DEAR SIR: Confirming our verbal request of the 4th for reduction in charge of $4.00 per car now assessed for Intraplant switching at our works; your Local Movements Tariff #9; it is our thought this cost should not exceed $2.00 per car and cite the following facts for your consideration:

For the length of haul involved this charge is relatively out of proportion as compared with either your intermediate or maximum "Between Districts" haul, viz: Between Dist. #3 and #2, 5.00 per car; between dist. #3 and #1, 6.00 per car; and further, classification or break-up is not necessary. You also avoid crossovers, grades and track-scale delay as cars we have switched are not weighed.

This service is done at the time of our regular daily switch and in cars that have paid a revenue in-bound; in other words at no

time have we requested cars be brought in light to provide this service.

The necessity for this Intraplant movement is to expedite or accommodate manufacturing conditions. To assist mills
1356 at our West Plant we frequently transfer sheet bars from East Plant or vice versa. To avoid congestion at some one Finishing Dept., we transfer semifinished sheet steel to the plant where this particular department can best handle to conclusion.

In performing this work after cars are once transferred the switching crew is not held awaiting unloading but proceeds with their regular work.

To illustrate the movements involved we attach sketch showing South Buffalo Ry.: West Plant bar track to East Plant scrap track the length of haul is 4,075 ft.; East Plant submerged track to West Plant submerged track the length of haul is 1,125 ft.

The length of haul and transportation conditions of either these hauls bears no comparison to such moves and details as between your Districts #3 and #2 or #3 and #1; therefor the charge assessed should reflect a spread materially less than what we asked to assume.

How we arrive at basis of $2.00 per car charge:

All the Trunk Lines publish in their Local Switching tariffs a uniform Intraplant charge of $3.15 per car and this is from one-third to one-half of their minimum Interterminal or Between Districts charge.

We accordingly have taken your Between Districts #3 and #3 charge of $4.00 and are asking fifty percent of this or $2.00 per car which we still feel will allow you a good margin, considering the service rendered.

1357 For the months November 1925 to and including February 1926 you switched a total of 184 cars—$736 on the basis of $4.00 per car.

What will you do for us?

Very truly yours,

SENECA IRON & STEEL CO.,
(Signed) H. E. MITCHELL
Traffic Manager.

1358 *Plaintiff's Exhibit 30*

MARCH 15, 1926.

Mr. J. M. GROSS,
G. T. M., South Buffalo Railway Co.,
Bethlehem, Pennsylvania.

DEAR SIR: Herewith please find request from Seneca Iron & Steel Co. for special rate for their intraplant switching.

This concern has now advanced to the class of having two mills, between which there is an interchange of traffic. We have been charging the tariff rate of $4.00 per car and this is considered excessive by the patron.

We have regular service at that plant, one engine on the 3 to 11 P. M. shift being assigned to do nothing but the work on that branch which serves both Seneca and Kalman.

Occasional extra trips are made by other engines when sheet bar is running or when an extra setting of box cars is required for shipments, but the regular engine usually does the internal shifting.

The sketch received with the reques' is enclosd for your information.

Do you wish to make a special rate for this service?

I assume that whatever is done would be applicable to other patrons and localities substantially similar, of which there may be several, such as transfers between tracks at Buffalo Brake Beam Company, Maritime Milling Company, etc.

Vice President & Genl. Supt.

FMB/MFC.

1359 *Plaintiff's Exhibit 31*

SOUTH BUFFALO RAILWAY COMPANY

LACKAWANNA, N. Y.

MARCH 18TH, 1926.

Mr. F. M. BENNING,
Gen. Supt., South Buffalo Railway Company,
Lackawanna, N. Y.

DEAR SIR: In reply to your letter of March 15th:

We are not in a position to take any action in reducing our local switching rates, on the contrary, the thing that has been troubling me is whether or not we should increase them. You know that these rates produce a return which is very much out of line with the cost of operation.

We appreciate the merit of some of the arguments as outlined in this shipper's complaint but we do not think they are of sufficient importance to be controlling. What they have attempted to do is to pick out the choice work in a group service under a group rate situation. Such a comparison naturally shows a favored condition but it is not proper. We must consider the entire service and the entire rate situation.

With reference to the measure of our charge as compared with the intraplant charge of the trunk line carriers. This is not fair. The trunk line people are in a much better position to take action of this kind because they always have the line haul service to bring them out of any red figures, whereas in our case we have no such opportunity. Our line haul service is practically an enlarged switching movement.

We have considered the other arguments that have been advanced but I think you will understand that they cannot be involved in this consideration. Fundamentally, they refer to this company being relieved of services which were never an obligation and have not been voluntarily performed.

I would like to help them but I do not see how it can be done.

Yours very truly,

JNO. M. GROSS,
General Traffic.

KAK/BB.

1360 *Plaintiff's Exhibit 32*

MARCH 25TH, 1926.

SENECA IRON & STEEL COMPANY,
Post Office Box #485, Buffalo, N. Y.
Attention of H. E. Mitchell, Traffic Manager.

GENTLEMEN: I have to acknowledge your letter of recent date requesting consideration of a reduction in the charge for switching between points within your plant property.

The same has had the earnest consideration of this Management, and while it is realized from your point of view a reduction is desirable, it is a source of regret that it is not consistently possible. If any change were to be made, it would be more probably in the direction of an increase in revenues rather than a decrease, having in mind the entire rate situation and the services performed. It must be remembered that we have no real line haul service with its attendant rate increment to help balance losses in switching, and it would be practically impossible to set

up a line of rates for all the varying conditions of our service in place of the group plan.

I am sorry your request cannot be acceded to.

Yours truly,

——— ———, *General Superintendent.*

FMB/MFC.

1361 *Plaintiff's Exhibit 23*

MAY 12TH, 1928.

Mr. T. BURNS,
General Manager,
Bethlehem Steel Company, Lackawanna, N. Y.

DEAR SIR: There are upwards of 150 BMIX hopper cars in need of repairs and stored here, taking up valuable track space and we are crowded.

It has been suggested that some of these be repaired and transferred from the Bethlehem Mines to Bethlehem Steel for local service. Some time ago I recommended that 75 such cars be transferred to avoid using foreign cars. We are forced at times to use some foreign cars for Poco. Coal and all foreign cars for slag to the slag crushing plant and back to the Cement Mill. These cars would answer the purpose.

Shreenan's estimate of cost of repairs is $400 per car which appears rather high; but the fact remains that cars in storage deteriorate the same as a vacant house and this expense will have to be shouldered eventually, whatever final disposition is made.

My present concern is to save per diem and to relieve pressure on our track space.

——— ———, *General Superintendent.*

FMB/MFC.

1362 *Plaintiff's Exhibit 24*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

FEBRUARY 12th, 1931.

Mr. J. M. GROSS,
G. T. M., South Buffalo Railway Co.,
Bethlehem, Pennsylvania.

DEAR SIR: Within the last month or so the Buffalo Sintering Corp. found it necessary, in order to handle frozen flue dust and ore coming from the Bethlehem Steel Co. to build a thawing house at its Marilla Street plant.

This house and the track serving it were built as shown on Sketch 71836 submitted herewith, and it now seems desirable to formulate the conditions of occupancy of South Buffalo Railway property.

No part of the job was done by the Railway, the switch, turnout, frog and track were all supplied and built by the Sintering Corporation, but our engines operate the track and will continue to do so until the industry procures a gas engine. This it is now negotiating for and this engine will then move cars over our rails between the thaw house and the hoppers.

The Sintering Company people state they were unaware that the lay-out encroached on us but are now willing to do whatever we wish: remove it all, release the property or enter into an agreement.

I think we would be sufficiently protected by an agreement and if you agree would request that you have it prepared. Will it be necessary to have exact measurements of the land under the end of the house in order to make a lease in addition?

Another point is the treatment to be given to the track material. As it is located on our land and interlaces with our track, I presume it becomes our property as a donation under the valuation orders.

(Signed) F. M. BENNING,
General Superintendent.

FMB/MFC.

1363 *Plaintiff's Exhibit 35*

MARCH 4th, 1931.

MR. F. M. BENNING,
Gen. Supt., South Buffalo Railway Company,
Lackawanna, N. Y.

DEAR SIR: In reply to your letter of February 12th and in confirmation of our telephone exchanges concerning the additional track facilities located at the plant of the Buffalo Sintering Corporation, I believe the correct solution to this problem is for either the Sintering Company to locate the track serving the thawing house in such a manner so that it will connect directly with the siding immediately west of it so as to permit the movement of the Sintering Corporation's engines to and from the thawing house without the necessity of this operation fouling your main line or side tracks, and if this is done, we in turn to convey for its value such portions of the siding as are required in this operation; or for this company to perform all services to and from the thawing house. I believe you understand the reasons for this recommenda-

tion and if you agree, I would suggest you confer with these people and secure their concurrence.

Please let me know what decision is made.

Very truly yours,

(Signed) J. M. GROSS,
Vice President.

KAK/BB.

1364 *Plaintiff's Exhibit 36*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

MARCH 25TH, 1931.

Mr. J. M. GROSS,
G. T. M., South Buffalo Railway Co.,
Bethlehem, Pennsylvania.

DEAR SIR: Referring to your letter March 4th answering mine of February 12th on the subject of our relations with the Buffalo Sintering Corporation, a study is being made of whether a change in the track system can be made so the industry can use its own power for spotting of cars.

In the meantime a separate study has been made of the service we accord and I submit herewith a copy of the report for March 19th.

The removal of cars from the thawing house in cold weather seems to be the only real case of intraplant service, although the spotting of cars at the two hoppers for unloading may be on the border line. If the latter could be done as the cars come there might be no question; but the in-bound raw materials consisting of Flue dust direct from blast furnaces, Flue dust from the old stock pile, Ore from the ore dock, Roll scale from rolling mills, are wanted in proportions as ordered by the industry and this involves making up cuts of cars accordingly.

The doubling of plant capacity last year on an area sufficient only for the original operation, plus the recent practice of sending ore and roll scale for treatment, has resulted in more intricate as well as more frequent spotting.

I would ask your judgment as to our obligations as a carrier in these conditions. At no other place is exactly the same service performed, all the others being considered simple siding delivery or interchange track delivery.

At two industries having their own internal power, Republic Steel Co. and Hanna Furnace Co., I believe the terminal allowance of 90 cents per car is still being paid by the trunk lines; while the other two, Donner Hanna Coke Corp. and Buffalo Slag Co. plant

No. 2, receive no allowance for spotting service. These four accept interchange track delivery.

(Signed) F. M. BENNING,
General Superintendent.

FMB/MFC.

1365 *Plaintiff's Exhibit 57*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

MAY 18TH, 1931.

Mr. J. M. GROSS,
G. T. M., South Buffalo Railway Co.,
Lackawanna, New York.

DEAR SIR: In further considering the Buffalo Sintering Corporation's proposal to acquire a locomotive to do their internal work we have made a tentative sketch (enclosed) in order to determine the possibilities within the limited area available, regardless of ownership of land or tracks.

Assuming that the main stem is the track leading from switch 29.2 at the south end to the scales, then Switch A leads to the Thaw House; Switch B leads to the interchange track where we would deliver in-bound; Switch C leads to the West Hopper; Switch D leads to the East Hopper.

The industry engine would operate over all these tracks and also farther south, but not beyond switch 29.1, in getting cars off the interchange track to be weighed and then placed at the hoppers, or on occasion, in and out of the thawing house.

Wherever these tracks lay on our land the operation would therefore be on South Buffalo tracks. The tail room south of each switch is sufficient for the purpose without fouling the main line.

The question to be decided is one of policy—whether use of any of our property could be permitted. If not, there would be no object in acquiring a plant locomotive and we should have to continue our present practice.

Personally I would have no objection to this use of our tracks provided it is not too great a departure from our policy. However no other small industry has this privilege. Those performing their own internal shifting have provided interchange tracks on their own land where we deliver and receive.

What is your view of this matter? The cost of the job is estimated at from $2,700 to $3,000 nearly all labor as the material will about balance.

(Signed) F. M. BENNING,
General Superintendent.

FMB/MFC.

1366 *Plaintiff's Exhibit 38*

SOUTH BUFFALO RAILWAY COMPANY

LACKAWANNA, N. Y.

JULY 8TH, 1931.

Mr. J. M. GROSS,
G. T. M., South Buffalo Railway Co.,
Lackawanna, New York.

DEAR SIRS: As requested by telephone on or about June 8th last the Engineering Department has prepared information comprising—

A. Inventory of track material concerned in transfer to Buffalo Sintering Corporation.

B. Dates of building.

C. Cost.

D. Map of the area involved.

These are submitted herewith and with respect to the last item it will be noted that the boundary lines of the area to be leased or demised to the Sintering Corporation enclose about 0.4876 acre. The westerly line is irregular so as to permit the Sintering Corporation to operate as far south as possible, viz to a clearance point with our first siding. This is the point marked 29–2 and is approximately 80 feet south of the switch point immediately above the word "Acres." This switch is the governing point in the scheme as it permits access by the Industry to the Industry's storage track for inbound cars delivered by us.

This 80 feet is considered sufficient for the industry, with its plant locomotive, to transfer cars one at a time from the Thawing House to the two hopper tracks.

To move cars from the interchange to the Thawing House the same space of 80 feet is available, but to move them from interchange direct to hoppers an additional 70 feet are available, or space for the motor and 3 cars.

Before submitting this plan to the Sintering Corporation it is forwarded for your consideration. I do not know that it will be acceptable to that concern, but with the space available and the peculiar environment I can devise nothing better.

Kindly advise your wishes.

(Signed) F. M. BENNING,
General Superintendent.

FMB/MFC.

1367 *Plaintiff's Exhibit 39*

SOUTH BUFFALO RAILWAY COMPANY

LACKAWANNA, N. Y.

AUGUST 26TH, 1931.

Mr. J. M. GROSS,
G. T. M., South Buffalo Railway Company,
Bethlehem, Pa.

DEAR SIR: Referring to my letter of July 8th in relation to change of tracks to enable Buffalo Sintering Corporation to use its own locomotive for plant work, involving the sale or lease of a plot of ground north of Marilla Street, I am instructed by General Manager Burns to proceed at once with this work as laid out on Sketch 73615 sent you on date above mentioned.

Mr. James is preparing to place stakes immediately so work may begin.

We would appreciate your advice as to allocation of the expenditure involved. It will be noted that certain green tracks partially on our land and partially on the proposed lease are to be retired; certain other tracks on leased land (not colored) may be transferred with the lease: certain pink tracks are to be laid on leased land; and some shifting is indicated.

We will endeavor to keep our charges in such shape while waiting the accounting instructions that they may be properly allocated on receipt.

(Signed) F. M. BENNING,
General Superintendent.

CC–Mr. W. A. James.

1368 *Plaintiff's Exhibit 40*

JULY 16TH, 1931.

MR. T. BURNS,
General Manager, South Buffalo Railway Co.,
Lackawanna, New York.

DEAR SIR: The six track yard leading to the sweat house is in a decrepit condition. It has been used for storage of cars with lake steel and if continued in service it will require a goodly expenditure for repairs.

Rather than do this I would recommend the building of a yard more suited for this purpose as well as other purposes in the coke oven district.

A tentative sketch is enclosed which indicates this proposal, under which the yards known as the Sweat House Yard, Boat Yard and Dock Yard would be removed and a smaller yard sub-

stituted. In other words a mile of track properly situated would replace 2⅓ miles and vastly facilitate operations.

In recent rebuilding of tracks necessitated by the relocating of the benzol plant, No. 4 scale has been isolated. There is still a need for a scale in that section and its relocation is contemplated so that it will be convenient to its present and prospective uses. Not only the byproducts of the Coke Ovens but a considerable tonnage from the docks is weighed there, thus saving movement south of Smokes Creek and back.

If you feel that this proposition should be pushed I will have a more detailed map made.

It should be done in order to save expenditure on the old yards. It is probable more than enough usable material could be obtained from them to build the new yard and we would be saving in operating expenses forever after.

The lay-out of the highway system would be simplified I believe, but that can be settled when the detailed map is made.

——— ———, *General Superintendent.*

FMB/MFG.

1369 *Plaintiff's Exhibit 41*

JULY 31ST, 1931.
W. A. J.

Re: Railroad Yard East of Sweat House

Mr. T. BURNS,
General Manager, Lackawanna, New York.

DEAR SIR: Referring to the attached letter from Mr. Benning, suggesting the retirement of certain tracks in the vicinity of the Sweat House at the Coke Ovens and the construction of a new yard having capacity for the storage of 100 cars, we submit print of SK-73616 on which we have indicated in yellow a yard comprising 7 tracks having a capacity to hold 100 cars.

The construction of this yard involves the laying of 5,727 feet of track and 17 turn-outs, all of which can be reclaimed from tracks which it would be possible to retire if this yard is constructed.

In the construction of this new yard it is contemplated that the tracks leading to the old Sweat House will be abandoned and will leave #4 Track Scale in a location that will not be satisfactory for weighing purposes. It is therefore proposed to relocate this scale placing it in the west track of the proposed new yard.

In making this improvement it will be possible to retire approximately 10,758 lineal feet of track including 21 turn-outs. On the attached print of SK-73616 we have indicated in red the track to be retired.

The total cost of retiring old track, constructing new yard by making use of materials reclaimed from tracks retired and the relocating of #4 Track Scale is estimated as follows:

Track work	$38,000
Relocate #4 Track Scale	10,000
	48,000

Attention is called that of the amount of $38,000 set up for track work, the cash outlay for labor and material will amount to only about $15,000, the balance of $23,000 representing the book value of relayer material used.

1370 The amount of $10,000 covering the cost of relocating track scale is a cash expenditure and represents the cost of new foundations, new scale house, and the dismantling and reerection of scale.

Yours truly,

——— ———, *Chief Engineer.*

-8.
Enc.

1371 *Plaintiff's Exhibit 42*

OCTOBER 6th, 1931.

Mr. T. BURNS,
General Manager, South Buffalo Railway Co.,
Lackawanna, New York.

DEAR SIR: On July 16th last a recommendation was submitted to build a yard east of the Calcining Plant to take the place of the sweat house yard, the boat yard and some other tracks.

When the current season at the docks closes, the sweat house yard will be idle until next Summer. If it is to be continued in service a considerable sum will be required to make it safe. It is now so far gone that only with the utmost care are derailments avoided and more or less patching is necessary from time to time. New ties and switch timber alone would cost upwards of $5,000, and we would still have our storage of boat steel in an inconvenient place.

We are now considering the retirement of No. 4 Scale and if that is found possible, the cost of its relocation elsewhere would be deducted from the cost,

Not the least advantage that would result from these proposed changes is the better facility afforded in handling the dock business. It would be directly in line with the other track changes of the last few years which have enabled crews to handle more cars per locomotive hour, which in turn profits the company as well

as the men. Reduction of congestion at Smokes Creek bridge just south of No. 3 Open Hearth would of itself benefit several other streams of traffic which converge there from several directions.

I am aware that the estimate of cost runs into a large sum; but as often occurs, I feel that the job could be done for a rather less expenditure than that named.

I would suggest that the project be again considered with a view of putting it through so the benefits flowing from it could be realized next season.

I believe Mr. James has the file in suspense.

———— ————, *General Superintendent.*

FMB/MFC.

1372 *Plaintiff's Exhibit 43*

NOVEMBER 3RD, 1931.

Railroad Yard East of Former Sweat House Site

W. A. JAMES, *Chief Engineer.*
T. BURNS, *General Manager.*

With reference to the attached letter from Mr. Benning relative to the construction of a railroad yard east of the former Sweat House site, we have reviewed this matter further with Mr. Benning with a view of constructing a yard that will meet his requirements and at the same time reduce the cost materially below the estimated cost of $48,000 indicated in our letter of July 31st last. At that time Mr. Benning contemplated the construction of a yard having a capacity for 100 cars, and included the cost of relocating #4 track scale and the retirement of the tracks or yard on the site of old Sweat House.

The suggestion is now made by Mr. Benning that the yard be constructed with five instead of seven tracks, having a capacity to hold about 83 instead of 100 cars, that the use of #4 scale be abandoned, but for the time being left in its present location and that no expense be incurred in connection with the proposed yard for the retiring of tracks on the Sweat House site.

On this basis the proposed new yard would involve the laying with relayer material of 6,743 feet of standard gage track, including 13 turn-outs divided between material and labor as follows:

Relayer material (inventory)		$17,000
Labor laying new yard	$10,781	
Labor retiring track on site of new yard	1,119	11,900
Total		29,500

From the above it will be noted that the cash outlay for this work including the removal of tracks on the site of proposed yard is $11,900, while the balance of $17,609 represents the book value of relayer material used, and is a transfer of this amount from inventory to construction.

In Mr. Benning's letter of October 5th, he calls attention that it will be necessary to spend approximately $5,000 on the existing yard on Sweat House site to make it safe for use next season, all of which expense represents a cash outlay for labor and new material such as ties, and still leave the yard for the storage of
1373 boat steel in an inconvenient location. Mr. Benning further indicates that the proposed yard would improve facilities for handling dock business and reduce congestion at the Smokes Creek bridge south of #3 Open Hearth.

The attached print of Sketch #73616 shows in full yellow lines the proposed location of the new yard and in dotted red lines the existing tracks necessary to be removed in order to construct yard.

———, *Chief Engineer.*

—3.
Enc.

1374 *Plaintiff's Exhibit 44*

DECEMBER 1ST, 1931.
W. A. J.

Railroad Yard East of Former Sweat House Site

W. A. JAMES, *Chief Engineer.*
T. BURNS, *General Manager.*

In the list of work considered for the relief of unemployment is the item of $29,509 covering the construction of a railroad yard east of the former Sweat House site, made up as follows:

Labor laying new yard	$10,781	
Labor retiring track on site of new yard	1,119	
		$11,900
Relayer material on hand from inventory		17,609
		29,509

This proposed yard would have a capacity for 83 cars and would improve the facilities for handling dock business and relieve the congestion at Smokes Creek Bridge.

Mr. Benning estimates that if the new yard is not constructed it will be necessary to spend approximately $5,000 in repairs to

the existing yard on the site of the former Sweat House to make it safe for use next season, this expense representing the cash outlay for labor and new ties. In the event the new yard is constructed the existing Sweat House yard could be retired in the interest of saving maintenance.

Further, it is conservatively estimated that the minimum saving resulting from the construction of the new yard would be about $2,500 annually, based upon a saving of two locomotive hours per day for only 200 days in the year at an out-of-pocket cost of about $7.00 per hour. This saving includes only benefits accruing to boat operations.

The new yard should relieve the congestion now existing under normal operating conditions at Smokes Creek Bridge, where several routes of traffic converge, and result in a further saving of hours to other operations equally as great.

——— ———, *Chief Engineer*,

-3.

1875 *Plaintiff's Exhibit 45*

DECEMBER 15TH, 1931.

W. A. J.
Order A-5208.

Re: Yard East of Sweat House

Mr. F. M. BENNING,
V. P. & G. S., South Buffalo Railway Co.,
Lackawanna, N. Y.

DEAR SIR: This is to advise that the above appropriation covering the construction of a railroad yard east of the former Sweat House has been returned approved for construction.

We attach two prints of track drawing #73630 for your use in construction, work to be carried on under the supervision of Mr. Robert E. Bratton, as Superintendent of Under-Employment Relief for this project.

Yours truly,

——— ———, *Chief Engineer.*

-3.
Encl.

1376 *Plaintiff's Exhibit 46*

JANUARY 16TH, 1932.

Mr. T. BURNS,
General Manager, South Buffalo Railway Co.,
Lackawanna, N. Y.

DEAR SIR: The survey of track conditions which is customary at this season has been made and a summary of materials indicated for replacements is given in some detail on the attached sheet.

A minor portion of the list submitted last February 10th was accomplished in 1931 so that the present list includes a considerable volume of deferred maintenance as well as that which another year has developed.

There still remains more or less 80 lb. and 65 lb. rail in yard tracks, some of which ought to be replaced, such as in the working yards at Stations C and H, and at several points in the Lackawanna yards; but that in purely standing yards may carry on for better times.

It is always difficult to determine the amount expended in any year for track repairs from the statement tendered by the Accounting Department as the month of December is usually affected by a mass of accumulated adjustments many of which are charges growing out of retirement of tracks. This includes cost of labor (offset by credits for salvage) and in addition certain charges to operating expenses which seem to be the value of the tracks upon discontinuance.

Account 1202, repairs to tracks, for December is shown as $30,255 whereas the month's operations stripped of "Adjustments" give a credit of $354. That is, the amount actually expended was more than overcome by the salvage of materials, and the expense for the whole year would thus become $48,614 or some $512 per mile and $4,054 per month. This includes $2,938 for removal of snow and ice in the first quarter of 1931.

For this it would appear undesirable to retire track at all were it not to save future costs of repairs.

Reverting to the future, it is not expected that all the items in the accompanying list will be undertaken. They would cost upwards of $150,000 which is out of the question, but it is deemed advisable to have a true picture of conditions from which to select the most pressing for attack. However, with 95 miles of track containing some 240,000 ties, 30,000 rails and more than 1,000 switches, renewals from 6 to 10% per annum for shear
1377 obsolescence would amount to at least $75,000 with no allowance for derailments, ballast, surfacing, snow removal and the like. During the last few months there have been many vexatious derailments due to undermaintenance. This is the most

expensive way to maintain track, manifestly. We ought to spend $120,000 on track maintenance alone this year. Our bridges and buildings ought not to need much attention this year, which item amounted to some $19,000 last year; but the reserves for depreciation and injuries to persons at about $2,000 per month seem to be inevitable.

These items for maintenance of way and structures, including supervision and engineering, would total some $160,000 for the year as against approximately $140,000 for 1931. For the present nothing but absolutely necessary work is being done. Effective January 16th the force is reduced to about 25 individuals per day. Most of the men, about 60% will work one day per week and the remainder one day in four, those having special qualifications or the greater family responsibilities being chosen for the latter. The net pay-roll force of 105 will therefore be assigned as follows:

Track foremen and laborers	63
Track walkers, lamp tenders, crossing flagmen, janitor, machine operators, and supervision	42
	105

This will continue until further revision is deemed advisable, barring snow storms which will be treated as necessary on occasion.

This statement does not include the Emergency Relief force which now includes names of 18 railroad men.

———— ————, *General Superintendent.*

FMB/MFC.

1378 *Plaintiff's Exhibit 47*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

FEBRUARY 17th, 1932.

Mr. W. A. JAMES,
Chief Engineer, South Buffalo Railway Co.,
Lackawanna, New York.

DEAR SIR: It has been decided to retire locomotives 6 and 53 and demolish them for the scrap that may be salvaged.

Please prepare the necessary documents for the purpose.

Mr. Burns has approved this disposition of these two locomotives.

(Signed) F. M. BENNING,
General Superintendent.

CC W. H. Peters, Jr.
J. M. Gross.
FMB/MFC.

1379 *Plaintiff's Exhibit 48*

JULY 11TH, 1934.

Mr. T. BURNS, *General Manager.*
Mr. P. A. TRAGESER, *President.*

GENTLEMEN: The Republic Steel Company own acreage south of Marilla Street on which it now desired to dump refuse, similarly to the operation it has conducted north of Marilla Street where the Sintering Plant stands.

From an operating standpoint there is no objection as a switch can be taken off our main track to reach the property.

From a business standpoint it is seen that the present marsh on our land will be filled up to a level with the main line all the way from Marilla Street to the long bridge. This area is rather large, as the accompanying map shows, and the depth will be some 35 feet.

The estimate of cost of the turn-out to the clearance point, 150 feet, is $1,000, which sooner or later will be charged to us. When the fill has progressed to our property line the additional trackage on our land will be about 280 feet. This can be at first applied by Republic, using material which is suitable for dumping and shifting day by day. When we come to the permanent replacement of this, there will be an additional outlay of about $1,800.

Our policy as to the financing of these extensions of trackage should be determined now, so we can negotiate an agreement with Republic if you approve.

The subject of charges for transportation of the refuse I assume will be considered by Mr. Trageser. Our present tariff (PSC-NY No. 75) names a charge from the Republic Plant to Dumping Ground North of Marilla Street. This area is south of Marilla Street. If the same charge is deemed just, then only a slight change in tariff is necessary. The difference in length of haul will be about 4,400 feet, that is, longer.

The Republic, I understand, is contemplating early action here, and, at the start, dumping will have to be done from our main track, as was done in the former operation in 1919, and I have already given the representative of the Republic our estimate of cost of turn-out.

I believe we could hardly refuse to furnish this facility to a patron. The only benefit to us, aside from continuation of this traffic, is the dubious one of acquiring the additional area on which to build some industry. This is remote and I would rather sell

the Republic the swamp than keep it. We now pay taxes on it and the additional fill, although donated to us, would doubtless be assessed higher by reason of the "improvement."

Kindly advise what policy should be adopted.

(Signed) F. M. Benning.
General Superintendent.

FMB/MFC.

1380 *Plaintiff's Exhibit 49*

July 25, 1934.

T. Burns, *General Manager*, to
A. N. Roberts, *Manager of Real Estate, Bethlehem.*

Sale of Land South of Marilla Street

The Republic Steel Corporation who own an acreage of land south of Marilla Street contemplate using this land for dumping blast furnace slag, this slag to be hauled over the South Buffalo Railway. However, in order to reach their land, they must cross with a switch over land of the South Buffalo Railway which lie contiguous to it. Insofar as the construction of the switch is concerned, there is nothing physically to prevent it and arrangements can be made to cover it.

It has occurred to us that this might be an opportune time to dispose to them of what we regard as surplus land in this vicinity. In arriving at this surplus acreage, we have established a new property line 20 feet eastwardly from center of present track, with the understanding that Republic in filling will begin at the top edge of our present bank and continue eastwardly over to their property.

This surplus acreage is indicated in red on the enclosed print. It amounts to 1.828 acres and has an assessed value of $5,549.18 which represents $166.47 in taxes.

In our opinion this surplus area has no prospective value for future improvements.

In presenting this proposal for sale of this land, please understand that no mention has been made to Republic and we are not certain that they would want to purchase. However, we believe that, before closing for the right to switch over this area, we should endeavor to sell it, providing that you consider it policy to do so.

———, *General Manager.*

CC to Mr. F. M. Benning.

1381 *Plaintiff's Exhibit 50*

MAY 9, 1935.

Mr. T. BURNS;
General Manager, South Buffalo Railway Co.,
Lackawanna, New York.

DEAR SIR: Returning Mr. Trageser's file, the 2-cycle 600 h. p. oil-electric locomotive (No. 426) made by the Electro-Motive Corp. was in Buffalo May 3–5 and was visited by our representatives.

The report written by our General Foreman Mr. C. H. Nichols, is submitted herewith.

So long as the builders confine themselves to machines of comparatively low power only moderate additional interest is stimulated here. We are already satisfied that such have demonstrated some utility and economy in operation notwithstanding their high initial cost. But we await the appearance of the 1,200 h. p. unit which shall not weigh over 220,000 lbs. and cost not more than these 600 h. p. engines, viz. about $85,000.

In the meantime we are pleased to note this evidence of progress.

(Signed) F. M. BENNING,
General Superintendent.

FMB/MFC.

1382 *Plaintiff's Exhibit 51*

For inter-office Correspondence

SUBSIDIARY COMPANIES OF BETHLEHEM STEEL CORPORATION
BETHLEHEM, PA.

Traffic Department. File reference Desk R-1.

From
To
Subject: Pick-up and Store Door Delivery on Less Carload Shipments

This arrangement, inaugurated by carriers and published to become effective April 1, 1936, was suspended by the Interstate Commerce Commission for a period of seven (7) months to permit them to make an investigation of the plan in its entirety. Meantime, there will be no change in our present methods of handling L. C. L. shipments.

At the time we received the notice of suspension by the Interstate Commerce Commission we were about to distribute the attached explanation of the plan. We have decided to now submit it to you in order that you may have a careful analysis made

to determine the effects of it on any L. C. L. movements in which you have an interest. That analysis should include the following information:

Plants, Warehouses, Mines, Quarries, Etc.—The effect on both in-bound and out-bound L. C. L. shipments and the benefits (or handicaps) which would result from the adoption of the plan in lieu of ferry car service.

Trade.—The effect on out-bound L. C. L. shipments to our customers where they might wish to substitute the arrangement for the one under which they now operate. In considering this phase of the problem please bear in mind that free delivery service (or a 5¢ allowance) would be made on long-haul movements (say over 200 miles) but not on short hauls (under 200 miles).

Purchases.—The possible effect on in-bound purchased materials where the product might be bought from a nearby shipper instead of from a remote shipper.

We desire this information for use in case we decide to take any part in the proceeding before the Interstate Commerce Commission.

H. C. CRAWFORD, *Traffic Manager.*

WHG/AS.
gh.

1383 *Plaintiff's Exhibit 52*

For inter-office Correspondence

SUBSIDIARY COMPANIES OF BETHLEHEM STEEL CORPORATION
BETHLEHEM, PA.

MARCH 28, 1936.
File Reference

From: H. C. Crawford, Traffic Manager,
To:
Subject: Pick-up and Store-Door Delivery on Less Carload Shipments

On April 1st railroads generally will put into effect a system for picking up and delivering without charge less-carload freight at the plants of shippers or receivers of such freight where the freight rate is 30¢ per one hundred pounds or over. The details of the system and territory affected are explained briefly in the attached memorandum. There are certain qualifications, restrictions and inhibitions in addition to the rate minimum mentioned, as explained in the memorandum. We had a meeting in the office today of certain interested departments to explain the

new system and to endeavor to ascertain what our course should be, in the beginning at least, in the application of the new set-up to our business. One major point to which attention is directed is that in cases where shippers or receivers perform their own trucking of shipments subject to the new tariff, an allowance of 5 cents per hundred pounds will be made to them by the receiving or delivering railroad.

It is our opinion that for the present we should continue the practice in effect at our plants of shipping and receiving less-carload freight in freight cars rather than to extend our trucking activities to and from freight stations in order to collect the allowance of 5 cents per hundred pounds referred to. There are good reasons from the standpoint of service for our continuing in that way. We should, however, be sure, that, on such shipments as are trucked to and from freight stations at any of our plants, warehouses, mines, etc., subject to the allowance, we collect the 5¢ allowance rate, and steps will be taken by the Accounting Department to have the necessary records obtained to substantiate our claim in all such cases.

There are many details to be worked out and this is merely to inform you in a general way of this new departure. We believe the plants should be informed of the decision to continue as at present rather than to extend their trucking activities.

1384 For the general information of the Sales organization, the 30¢ less carload rate on iron and steel articles covers hauls up to about 200 miles from the shipping point. Any less carload shipment moving within this range at a rate less than 30¢ will not be accorded pickup and delivery service, nor will carriers pay the 5¢ allowance to buyers who themselves perform the delivery.

Since free delivery will be accorded by carriers where the rate is over 30¢ (or a 5¢ allowance will be made to receivers who perform their own service) a competitive situation will no doubt arise between the long haul and the short haul shipper, and by reason of this we may be called upon to make a trucking allowance to meet long haul competition. It will not be our purpose to bring up this question in a general way with our customers, but rather allow each order on which customers request store-door delivery to be handled individually between the Traffic and Sales Departments to determine the transportation service we will use, i. e., whether railroad store-door delivery or trucking by ourselves from the mill to customer's plant, as well as any question of allowances in cases where customer performs his own trucking service from the destination freight station to his plant.

Mr. Holton will probably also wish to advise his Branch Purchasing offices.

Perhaps it may be thought advisable to distribute the attached memorandum to all plants and District Sales Offices, and if so, additional copies can be supplied.

H. C. CRAWFORD, *Traffic Manager.*

gh.

1385 *Plaintiff's Exhibit 53*

APRIL 20TH, 1936.

Mr. T. BURNS,
General Manager, South Buffalo Railway Co.,
Lackawanna, New York.

DEAR SIR: Returning Mr. Crawford's analysis and proposed instructions on "Store Door pick-up and delivery," our comment follows:

By J. W. ST. CLAIR:

The Company's proposition is a large one, but narrowed down to this plant, and ourselves.

1. The Company now trucks a part of its l. c. l. freight for its own reasons. Whatever it can get out of the new arrangement by virtue of this service will be in the nature of reduced freight costs. ("A" in attached letter.)

2. In-bound ferry cars do not pay the S. B. Ry. the cost of handling, but they probably are the best economy for the parent industry in view of the plant set-up for distributing such freight, until the new service is definitely determined.

3. Out-bound ferry cars do not pay the S. B. Ry. but they are probably the cheapest and quickest way to get l. c. l. shipments moving until the new service is definitely determined.

4. If the proposed service were general it might then be practical to handle all the l. c. l. business both ways on contract trucks, with facilities at plant for both receipt and delivery, but that should not be considered until the system is completely authorized and established.

By F. M. BENNING:

Would Bethlehem Steel Company consent to receive and ship all less carload freight at a single point, as the Storehouse?

Or would it require a truck to peddle to each department, including not only Lackawanna Plant but the Strip Mill, Seneca, both Kalman Shops and the Fabricating Shop, if the load were a mixed one?

If the latter, would it provide a pilot for the truck, and if so, would it have pilots for three or four railroad trucks arriving 15 minutes apart?

1386 Would it be good strategy to constitute each department (or its Superintendent) a separate consignee and consignor? If so, would he have petty cash to pay charges on delivery?

And would each department telephone railroad agent to send a truck to pick up a shipment?

The peddler plan might have its merits but railroads would probably object and argue for a central depot for all Bethlehem Steel l. c. l., except truck loads to or from some definite outlying point.

The foregoing comprehends more particularly in-bound plant supplies and repair parts and out-bound articles for repair or replacement by vendors. But it is also applicable to small lots of product, particularly structural.

My impression is that the whole project was conceived on the assumption that only literal "store door" service was involved. Manufacturing plants beyond their storehouses were overlooked. Further the delivery end was magnified and the pick-up end minimized. We are a long way from a satisfactory solution.

(signed) F. M. BENNING,
General Superintendent.

FMB/MFC.

1387 *Plaintiff's Exhibit 54*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

SEPTEMBER 16, 1936.
A-5353

Mr. T. BURNS,
General Manager, South Buffalo Railway Company,
Lackawanna, N. Y.

DEAR SIR: Minnesota Steel Co. engine No. 10 was delivered to us early this morning. Preliminary examination indicates it is in good condition but the close inspection and tests will not be completed for a few days.

The voucher will be held here until we are satisfied and until the official specification cars is received from the builder and verified by the Chief Mechanical Officer as required by the Interstate Commerce Commission.

The new number will be South Buffalo Railway Company No. 31.

(signed) F. M. BENNING,
General Superintendent.

CC P. A. Trageser.
A. J. Ensinger.
C. H. Nichols.
W. A. James.

1388 *Plaintiff's Exhibit 55*

OCTOBER 26, 1936.

Mr. T. BURNS,
Gen'l Manager, South Buffalo Railway Co.,
Lackawanna, N. Y.

DEAR SIR: In our file is a letter to me dated May 3rd, 1936, and dictated by Mr. Kemmerer, giving six points as to the then proposed crossing of Lakeview Avenue in Woodlawn.

"1. Crossing over Lakeview Avenue must be single track and may be at grade.

"2. The location of this crossing must be in accordance with the location as shown on the map which was submitted to the Supreme Court of Erie County under date of February 14, 1921, which according to the records here at Bethlehem is Map SK-45359 of December 4, 1920. I presume Mr. James has full information on this point.

"3. After the crossing at grade is constructed, Lakeview Avenue must be restored to its former state or to such state as not to have unnecessarily impaired its usefulness.

"4. The roadway must be at least 16' wide, located in the center of Lakeview Avenue.

"5. Roadway to be constructed of planking or equally serviceable material.

"6. The planking or equally serviceable material must extend at least 1' outside of the rails."

By court decree issued I believe about 1921 the elevation of this crossing was fixed at 578.30 feet above sea level and the crossing was so built for dumping cinder balls along the lake front; but in 1926 the track was swung over to serve as the desired route to the Federal Cement Plant then building.

This extension, measured from said Lakeview Avenue to Rush Creek, is about 2,200 feet in length. In the passing years we have found it necessary to raise this line between 2 and 3 feet as a recent survey (profile 103507 herewith) discloses. Storms on Lake Erie had caused washouts and sometimes cut the communication with Federal.

1389 But this elevation of track has left an awkward dip at Lakeview Avenue. We start at 583.53 at the north end of this branch line, drop to 578.30 in 1,100 feet to Lakeview Avenue, and rise to 582.47 at the peak 1,500 feet further south. However, at some time we have fudged at the crossing and its elevation is now 578.87.

Even that has not prevented water from the lake rolling in, coursing through the low spot, and flooding the village of Wood-

lawn. However, the last flood, coming from inland last March, broke through in the reverse direction (toward the lake) and washed out the track. The natives assisted by trespassing on the track and digging passageways for the water between the ties so the surplus water could flow into Lake Erie. Fortunately our trackwalker discovered the danger before any engine went down there.

The cure as well as the defense for Woodlawn is to raise the track at the crossing to about 582.5 and install one or more cast iron pipes to carry flood water out. If desired there could be gates at the pipes to be closed against Lake Erie if and when it ever becomes boisterous again.

A court proceeding would be necessary and there might be objection from Woodlawn; but it might be possible to show the residents that we are proposing a barrier against storms for them. I have seen one case where the water backed up into the village and measured at least two feet over the floors along the lake front.

Bear in mind that the court did not constitute this roadway a public street, but called its order a license for property owners of the village only, for the reason that their forebears had brought property there on the strength of a long standing and unopposed passage to and enjoyment of the bathing beach over private property. I believe the Bethlehem Steel Company could police the road and turn back any who are not land owners, even tenants and perhaps descendents of deceased original purchasers. This it has not done so far, nor has it apprehended those who cross its property at any other point in the whole 2,300 feet of village frontage. Some of this has been done by trucks whose drivers have constructed clandestine crossings of our rails, some to procure sand and some to serve fishermen.

Do you not think we should proceed to have the court modify its injunction so we can raise this crossing about 3 feet?

(Signed) F. M. BENNING,
General Superintendent.

CC–P. A. Trageser.

1390 *Plaintiff's Exhibit 56*

NOVEMBER 13, 1936.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: The oil-electric locomotives now coming weigh about or just over 200,000 lbs. The rate of pay for firemen on steam

engines weighing on drivers 140,000 to 200,000 lbs. is $5.68 per day of 8 hours. Over 200,000 lbs. the rate is $5.93 per day.

A neighboring line which uses oil engines at two or three places in this state has provision in its agreement with its enginemen and firemen for a lower rating for the additional man on these locomotives. In the firemen's pay schedule two columns are published as follows:

Weight on drivers	Firemen	Helpers
Less than 140,000 lbs.	$5.68	$5.68
140,000 to 200,000 lbs.	5.81	5.68
200,000 to 300,000 lbs.	5.93	5.68
300,000 and over	6.11	5.85

The term "helper" is defined as "the second man employed on electric locomotives or other than steam power."

The position of helper is open for bidding to steam firemen.

We have the same rates for steam firemen in yard service as those shown above but none are named for helpers. In order to establish the lower rates for helpers it is necessary to have a conference with the representatives of the enginemen's group.

Do you desire that this shall be done and would the rate of $5.68 per day be satisfactory?

———— ————, *General Superintendent.*

EMB/MFC.

1391 *Plaintiff's Exhibit 57*

NOVEMBER 26TH, 1936.

Mr. A. J. ENSINGER,
General Agent, South Buffalo Railway Co.,
Lackawanna, N. Y.

DEAR SIRS: By understanding with Employee Representatives and approval of Mr. Entwisle on November 24th, 1936, the rates of pay for operatives of Diesel-Electric locomotives 51 and 52 are as follows:

Engineers: Rule 1, Classification "A," Item 2, per 8-hour day $7.40.

Helpers (Firemen): Rule 1, Classification "B," Item 1, per 8-hour day $5.68.

———— ————, *General Superintendent.*

1392 *Plaintiff's Exhibit 58*

DECEMBER 10TH, 1936.

F. M. B.

The Blast Furnaces are getting coke from outside. It is of various grades, making a situation where there are about 11 different grades of coke and all have to be placed on the trestle in the order desired.

The Furnaces are also making new record production and it becomes a question of incessant classification and constant deliveries to keep the furnaces working.

We accordingly placed a day turn yardmaster at the Coke Yard Bridge on December 2nd and one crew under his jurisdiction to keep the situation in line. There was nothing else to do.

The crew assigned there keeps the coke to and from the screen weighed up, handles coke and empties between the Blast Furnace and Coke Ovens and gets things shaped up so the afternoon and night trestle engines can keep the trestle supplied.

This will be necessary as long as the Blast Furnace operations keep at present level.

We took the old coach that had been stored at Roundhouse, set it off on the ground at Coke Yard Bridge, and had phone put in it.

There is probably a permanent arrangement now on account of #3 OH. There always was too much detention and confusion at the Coke Yard Bridge.

J. W. S.

1393 *Plaintiff's Exhibit 59*

FEBRUARY 8TH, 1937.

MR. E. F. ENTWISLE,
A. G. M., Bethlehem Steel Company,
Lackawanna, New York.

DEAR SIR: Capital expenditures contemplated for 1937, submitted January 13, did not include recommendations for additional locomotives.

Continuous increase in demand for service has absorbed the several units acquired and three rented engines besides.

The Open Hearths are now using four of their five engines, now undergoing repairs, and I am now on notice that if any failures among the four occur we would be asked to help out.

I would recommend consideration of purchase of three more of the oil-electric locomotives of the type purchased in 1936 with certain modifications suggested by our experience so far.

BENNING, *General Superintendent.*

1394 *Plaintiff's Exhibit 60*

FEBRUARY 23RD, 1937.

Mr. E. F. ENTWISLE,
Gen'l Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: Attached is report of Scale Inspector Brown condemning the hot metal scale south of No. 4 Blowing Engine House. For some reason this is owned and operated by the railroad and I am asked to install a new scale to accommodate heavier ladles.

I am not equipped to decide the question and, if you are agreeable, I would suggest an inspection be made by the Mechanical Engineer.

If report is corroborated an estimate of cost and preparation of necessary papers would be in order.

Brown usually knows what he is talking about.

(Signed) F. M. BENNING,
General Superintendent.

FMB/ajm.

1395 *Plaintiff's Exhibit 61*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

MARCH 19TH, 1937.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: Since completion of the new welfare building near furnace B our crews have moved in with their personal effects. But they cannot take along the lantern and oil station which still remains in north end of the old house now used for brick storage. Doubtless this house is doomed for demolition soon, but, whether or not, our outfit should now be removed. This house is not only a fire hazard, but is dark (no windows) and has no supervision.

There are now 15 crews changing there of which 10 need lanterns, three per crew, and five engines to be provided with oil daily. Mr. Harlan has heretofore helped us out with some oil storage but we should have room for more oils and the lanterns should go along with the rest.

A recommendation is made to put this utility convenient to and in charge of the yardmaster whose quarters are in the hot metal scale house where the weighmaster is also available as a clerk. An extension southward of the present brick house would be required,

possibly 16 to 20 feet. Same should be fitted with two or three oil pumps, a lantern rack, shelving, a sink for cleaning lanterns, a bin for prepared waste, snow brooms, heavy brooms, scoops, headlight and cab bulbs, and other miscellaneous supplies.

Are you agreeable to preparation of a plan and estimates? We have in view not only reasonable facilities for conducting our business, but economy of supplies and, last but not least, cleaning up the landscape which has been begun by building the new welfare house. This is a handsome outfit in poor surroundings. That is, we have furnished a palace for the personnel but next to nothing for the tools indispensable in their work.

(Signed) F. M. BENNING,
General Superintendent.

FMB/ajm.

1396 *Plaintiff's Exhibit 62*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

APRIL 2ND, 1937.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: Consideration of the future supervision of the car repair shop and of the railroad's car inspection force has been active for some months. The present incumbent is approaching retirement, now 68, and his successor should be in training now.

There is no one in that organization who could fill his place and it is debatable whether the dual capacity should be continued No one man can now fill it, due to the increase in activity in both jobs.

Cars repaired per month have doubled in the last year, that is, from approximately 800 to 1,600, not including lubrication and some minor repairs in the field. The company has recently acquired 225 new cars and some 160 second-hand cars, besides 50 additional Westmorelands to come. The last two items, 210 cars, are an immediate liability and some are already being torn down.

Similarly the railroad's load has nearly doubled. Cars interchanged in March 1935, 13,600; in March 1936, 25,634. There are receipts and deliveries from and to 8 railroads, day and night, besides inspections of receipts from certain industries and the required terminal inspection and air brake tests of trains dispatched from our Lackawanna out-bound train yards.

This force is 22 men. There are 6 or 7 other men provided by the Steel Co., mostly for special service cars, who are also supervised by the General Foreman. A comparable number of railroad inspectors out of the 22 are also assigned to the plant area and the two contingents work reciprocally on both plant and railroad cars as they find them in their districts, thus avoiding duplication of effort and confliction in duties.

The interchange rules comprise a book of over 300 pages which is reissued January 1st of each year. Supplements are issued as needed between times. There is also a file of Decisions of the Arbitration Committee, now totalling some 1,800 decisions, and more coming out every few months. These can be interpreted only by a man raised in the interchange service. Fortunately our man is capable in both his fields but it is improbable that he can be replaced. I can train a man from present force for the interchange job. He should be at once appointed as assistant to Mr. Shreenan who is now bound too much to his office.

1397 The assistant would take over the field work and if he develops capacity to run the shop also that might be advantageous; but even he would need a field assistant when Mr. Shreenan retires.

I would appreciate your views on this phase of the subject at this time. Eventually the car shop should be moved elsewhere and considerably expanded. This would vacate space for another improvement which must soon—an addition to the train yard along the turnpike from No. 3 to No. 4 Gate where we are often cramped to suffocation. These will be treated separately at some future time.

(Signed) F. M. BENNING,
General Superintendent.

FMB/ajm.

1398 *Plaintiff's Exhibit 63*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

MAY 9TH, 1937.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, N. Y.

DEAR SIR: In building the new welfare house at the locomotive repair shop, our old flue repair shop is in the way. It is only an old shed and will probably fall of itself when the pile of boiler tubes is taken out.

1401 *Plaintiff's Exhibit 66*

August 24, 1937.

Mr. E. F. Entwisle,
Lackawanna, New York.

Dear Sir: Upon receipt of Mr. Benning's letter of April 13, which is attached hereto, we have investigated the charges reflected against South Buffalo Railway Company's No. 4 Track Scale and track construction under Order A–5374, and have found that $10,000, charges for which have not yet been posted, should be added to the South Buffalo Construction Statement issued July 1937, which will bring it up to $110,913, leaving an unexpended balance of $10,087, which Mr. Benning desires to use to build the additional track.

The building of the additional track was not contemplated when the original job was approved, but, as it appears now, there is more than enough money available to build the thousand feet of track with No. 6 turn-outs. This addition of track could be charged against the original order A–5374.

We are, therefore, awaiting your approval before informing Mr. Benning to proceed with the construction of this track.

Very truly yours,

_____, *Chief Engineer.*

Attached—letter.

1402 *Plaintiff's Exhibit 67*

South Buffalo Railway Company
Lackawanna, N. Y.

February 25, 1938.

Mr. E. F. Entwisle,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

Dear Sir: A further reduction in the Track Department daily force will be effective February 28th by reason of work getting scarce. Reductions in pay roll force were made from time to time during the last half of 1937, and on December 6th the 32-hour week was adopted. In January, 15 additional men were placed on waiting list.

Today a conference was held with a committee of track foremen, the same who functioned last November for this class of men who are permitted to have a representative under the Representation Plan.

The situation was explained and two alternates were presented, viz. either lay off 15 more men or reduce to a 24-hour week.

The latter was chosen by the men themselves. It is understood that this will prevail for the month of March, at the close of which another survey will be made.

For the record, the high point of pay roll force of 184 in May 1937, working 48 hours per week, is now reduced to 84 names at 24 hours per week, a reduction in man-hours of approximately 77%.

(Signed) F. M. BENNING,
General Superintendent.

FMB/ajm.

1403 *Plaintiff's Exhibit 68*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

FEBRUARY 26, 1938.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: There is a possibility that some of our oldest and lightest steam locomotives could be disposed of to occasional buyers, one nibble being in hand now.

There are 18 engines of the earliest type adopted here (built from 1905 to 1910) which seem destined to be replaced by oil engines and it would seem advisable for us to adopt a receptive attitude. If we can dispose of a few to users in preference to second-hand dealers we may be able to get fairly good prices. Such buyers would usually require that the engines be made ready for service without further shopping while dealers might take a job lot without conditioning.

Is this not the reasonable view, considering that this lot of engines lack some modern improvements, such as superheat. Walscheart valve gear, etc?

If so, should we not be furnished some information as to sale prices? This applies to engines numbered 10 to 19 inclusive for the time being.

(Signed) F. M. BENNING,
General Superintendent.

FMB/ajm.

1410 *Plaintiff's Exhibit 74*

JULY 16, 1937.

Re: Station "H"

MR. F. M. BENNING,
Gen'l Supt., South Buffalo Railway Company,
Lackawana, N. Y.

DEAR SIR: In accordance with your request of June 29, 1937, we have prepared the attached sketch for the above building.

The estimated cost of the structure as planned of brick construction, is $5,200. The building to be heated by stoves.

If a room 8' x 16' is added on the north end to provide space for fuel, heating equipment, etc., and a heating system installed, add $1,700 to the above amount.

Yours very truly,

(Signed) W. A. JAMES,
Chief Engineer.

6.
Sketch attached.

1411 *Plaintiff's Exhibit 75*

OCTOBER 27, 1938.

W. A. JAMES, *Chief Engineer* to
E. F. ENTWISLE, *General Manager.*

Floodlight—Station "H," South Buffalo Railway

Mr. Benning has made a request that a floodlight be installed at Station "H" south of the roundhouse, at a point where the South Buffalo Railway tracks connect with the New York Central Railroad. He points out that when switching is done at night at the north end of the yard, where there are eight or ten tracks adjoining a switch lead, when classifying cars for distribution to the New York Central and Lehigh Valley in the darkness the switchman cannot see whether the cars have run in the clear of the frogs on the lead, so that the work is slowed up in the interest of safety for the workmen and property. Trainmen, enginemen, and station employees have requested that a light be installed to expedite work in the interest of safety.

The estimated cost of a steel pole equipped with a light service platform and ladder, together with two floodlights and power line extended about 100 ft. from the present supply will cost $900.

As an alternate for economy, we have considered a wood pole fitted with a light service platform, step irons, two floodlights and the power line, which would cost $840.

You will note that according to railroad accounting schedules that this improvement must be handled as new construction and that an AFE form must be issued after approval of a Construction

Requisition. The improvement cannot be handled by a "B" Order as suggested by Mr. Benning in his letter of October 19th, attached hereto.

Will you please advise which of the two proposals you would recommend and we will issue a Construction Requisition and Appropriation Request to cover.

Attached is one print of Drawing L–10200, showing location of the proposed light.

————————, *Chief Engineer.*

1412 *Plaintiff's Exhibit 76*

DECEMBER 22, 1938.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: As directed, an observation of the Union Pacific 5,000 horsepower locomotive, so styled, built at the Erie, Pa. shop of the General Electric Company, was made Tuesday, December 20th. Our Mechanical Department head, Mr. Nichols, accompanied me. I had seen the engine in process of construction while on another mission to this shop some months ago and asked then some questions in passing.

We now found the engine finished and rode it several trips on the 5-mile experimental track. It easily made 80 miles per hour, pulling only a service car. The machinery seemed to work perfectly and the combination brakes, air and electric, produced satisfactory retardation and stops.

The chassis, or truck frames are cast integral in two nearly equal lengths with the necessary points of contact and fastening for the superstructure, which is 80 feet long over-all.

The enclosed pamphlet describes generally some of the features but to us it would be only a text on which to base a lot of questions. For instance, the boiler was said to be of the Scotch type. It was said to have a mass of very fine tubes, diameter of which was unknown to anyone of whom we inquired. A second unit under construction was observed but no boiler was visible for us to examine internally.

There were many American Locomotive Company officials present, including the president, some vice presidents, and attendants. The exhibition goes on all week. Monday it was General Electric people while Wednesday it was railroad people and so on. We were invited to attend Tuesday. The whole party may have numbered 30, a distinct advantage to us in some ways, but a more intimate session would be necessary to make a worth-while report.

For welding safe-ends it is a necessity but has never been properly equipped. It is necessary to send flues by the hundred to the plant shop and the operation of rattling and cleaning at that location is slow and often interferes with provision of adequate power.

The DL&W is dismantling such a shop at East Buffalo by reason of concentrating flue work at the general shops at Scranton, Pennsylvania, and the equipment at East Buffalo is for sale.

Inspection of it by our Mr. Nichols reveals that it is just what we should have, consisting of a rattler with machinery to operate it (except motor), a superheat flue welder and furnace, a 2" flue furnace, a saw for 2" flues and a swedging furnace for same.

This lot is offered to us for $1,500 which we consider cheap. I would recommend that we acquire it on the best terms possible. We shall not be rid of all our steam engines for a long time and this outfit will pay for itself in a few years.

———— ————, *General Superintendent.*

FMB/ajm.

1390 *Plaintiff's Exhibit 64*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

AUGUST 14TH, 1937.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: The response dated August 11th to my letter of June 23rd to G. D. Brooke, Vice President of the Nickel Plate Road, proposing to purchase the piece of track reaching the Seneca Division reads as follows:

"We have very carefully considered our possible future need for this property and decided not to dispose of it. We trust you will find it desirable to continue to use the track."

My paramount object throughout was not disclosed in these exchanges, viz: Possession of the site next to our own main line to restore one or more side tracks formerly on that property to enable us to assemble traffic for Seneca. It is a ready-made and seasoned yard.

The result of this correspondence now constrains me to revert to the proposal which gave it birth—expansion of the Barrow Pit site of which I wrote you in detail January 11th, last. We elected to sound out the Nickel Plate first.

The Barrow Pit matter will be revived in a separate communication but it involves permission of the Nickel Plate to put a switch in their track about where it was 20 years ago, at the bottom of the grade leading over Lake Avenue.

Immediately we must demand of the Nickel Plate that their present track be rebuilt; but whether to combine it with a request for restoration of the switch is the question. Their track must be fixed up quickly to save us from derailment and they are ready to proceed.

Our Barrow Pit project cannot be settled quickly. We must make plans and obtain an appropriation for about $15,000 which may take some time. Then the Nickel Plate will have to leisurely consider the switch.

What would you advise, bearing in mind that we need not at this time answer the last sentence of Mr. Brooke's letter quoted above?

(Signed) F. M. BENNING,
General Superintendent

CC—P. A. Tregeser.
FMB/ajm.

1400 *Plaintiff's Exhibit 65*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

OCTOBER 28TH, 1937.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: Referring to the proposed "Barrow Pit" yard which was described in my letter August 14th, attached hereto, the necessary permission of the Nickel Plate to connect with its line is at hand, a copy also attached, and the Chief Engineer has submitted a plan and estimate.

The estimated cost is $21,080 for a three track yard which may be taken as an outside figure, we should do better.

I have written the Nickel Plate, copy attached, indicating that we expect to make the connection but deferring further action to next year. This is done as a safeguard against withdrawal by reason of our default in saying at least something in acknowledgment of the permission.

(Signed) F. M. BENNING,
General Superintendent.

FMB/ajm.

1404 *Plaintiff's Exhibit 69*

MARCH 5, 1938.

E. F. ENTWISLE:

Per your recent request, a review of power requirements for the year 1937 indicates the following:

I

Locomotives needed	Locomotives required on 7 a. m. to 3 p. m. turn when above 26					Total days
	27	28	29	30	31	
		Days				
January		1				1
February		6				6
March	1	5	17	7	1	31
April			3	15	7	25
May			16	14	1	31
June	13	11	3			27
July	13	3	1			17
August	9					9
September	3	1				4
October	4					4
November	0					0
December	0					0
	43	26	41	36	9	155

The day turn is of course the governing feature on this property.

II

The year 1937 started with 26 steam and 2 oil engines owned, and 1 engine rented. But a number of the steam engines were either unfit or approaching unfitness for service, the result of the long depression. The number of unfit engines during the year ranged from 4 to 7 and was 7 at the end. But after early August when the new oil engines were arriving and service demands were diminishing we began storing steamers until at December 31st there were 18 stored out of 26 besides one in shop for heavy repairs. The last rented engines were also released during August.

This table represents the approximate amount of power available in fair to good condition month to month:

1405 1937	Steam	Oil	Rented	Total	In storage or shop	Locomotive hours
January	24	2	2	28		15,960
February	24	2	3	29		14,964
March	24	2	5	31		16,275
April	22	2	7	31		16,275
May	22	2	7	31		16,275
June	21	2	6	30		17,550
July	21	2	6	30		16,170
August	21	2	6	29		15,225
September	20	2	0	22		11,550
October	19	2	0	21		11,025
November	19	2	0	21	12	5,670
December	19	2	0	21	18	4,410

Total locomotives now owned is 27 steam and 9 Diesels, or 36 units. The 9 Diesels should be equal to at least 13 steamers. Therefore we have equal to 40 locomotives. The highest demand in 1937 was 31 in any one day. I would advocate disposing of 4 or 5 of the oldest engines, having in mind that among the 27 steamers is Engine 32, the 8-wheel switcher rebuilt late in the year at Lebanon and immediately placed in storage on arrival here. She has not as yet worked one hour in actual service.

During 1937 other steam engines, 14 in number, spent 1,020 calendar days in shop for more or less heavy repairs. The periods for these units ranged from 17 to 210 days, depending upon the nature of the job and the urgency for power.

We now have an inquiry for one engine, a Mr. John P. Kelly, evidently a trader, whose client is some industry in Pennsylvania. On receipt of some approximation of the price, the client will send a representative here for a conference.

(Signed) F. M. BENNING.

1406 *Plaintiff's Exhibit 70*

SOUTH BUFFALO RAILWAY COMPANY.

LACKAWANNA, N. Y.

MARCH 24, 1938.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: For some months there have been in preparation plans for fencing in the Seneca and Kalman properties as a whole. They contemplate a gate I understand at the South Buffalo Railway entrance at top of the grade leading south from Lake Avenue bridge, that is, at the Nickel Plate property line.

It occurred to me that there might be some law or rule prohibiting blocking off by an obstruction of a railroad's operating tracks, especially the main line or a branch, by an industry.

A similar condition does not exist at any other point on the line, even the entrances to Lackawanna Plant over the two bridges in Hamburg Turnpike being free from gates.

Industries do place gates or doors at their property lines in many places and we respect them, but at the Seneca and Lackawanna plants the railroad I believe owns the fee through the industry's property.

I believe this precaution was thought necessary at time of building the railroad against a possible invocation of eminent domain by other railroads in the distant future.

Should we not seek reassurance before proceeding?

(Signed) F. M. BENNING,
General Superintendent.

FMB/mfc.

1407 *Plaintiff's Exhibit 71*

APRIL 26, 1938.

Mr. ENTWISLE:

During 1937 there were 16,426 cars given light repairs of which about half were repaired in the field.

Assuming one half of the remainder, or in round figures 4,000 cars, could have been handled in the field by a tool car crew, and that switching the shop tracks averaged only ten minutes per car, the result is 666 locomotive hours saved.

In 1937 the operating cost per locomotive hour, not including depreciation, taxes, etc., was a few cents over $10.00. At this rate the estimated saving would be $6,660 per annum.

As 1937 was active somewhat above the average, this figure might be discounted as much as 50% and yet leave a saving of $3,330, in engine service alone. To us there are other benefits, chief of which is quicker return of cars to service, ultimately resulting in a prospective saving in per diem, whether plant cars or foreign cars.

Again, the effect would be postpone, at least for the present, further consideration of extension or relocation of car repair facilities which was before us last year and in busy times before that whenever there was accumulation of cripples.

(Signed) F. M. BENNING.

1408 *Plaintiff's Exhibit 72*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

MAY 16, 1938.

Mr. E. F. ENTWISLE,
General Manager, South Buffalo Railway Company,
Lackawanna, New York.

DEAR SIR: There being no present prospect of a new building for Station H office as recommended in my report of September 9, 1937, we placed Works Order RRW–1377 April 5th last with the Mechanical Department to make temporary repairs so the place would be habitable.

The representative of the Miscellaneous Group of employees had made a strenuous report at our meeting March 29th and was promised consideration.

Nothing having been done to date a written appeal has now come in as follows:

"The building really is in terrible condition. The flooring has loosened up, some of the ends sticking above the rest of the floor. Someone is liable to trip over them causing an injury. The roof leaks and when it rains we have several puddles on the floor.

"The window sashes and frames are all warped and during stormy weather the rain and snow blows in through the openings. Some of the windows are wedged so tight they can't be opened; others we don't open for fear they will fall out.

"At the chimney, on the south side, the wall has sprung away from the floor about six inches. As the chimney is not built to the ground there is a great strain on the wall which may at some time collapse."

In this extremity I am arranging to take the body of Coach #4 off its trucks and use it at Station H for an office until other quarters are provided. This is the coach which I recently recommended be retired as rolling stock and this move will not interfere with that ultimate disposition.

If no objection I will recall Works Order RRW-1377 from the Mechanical Department and place new works orders for relocation of telephone, lights, and stove in the coach. Our own force can do the rest.

You may recall that this old building has been condemned for more than two years by the Insurance and Fire Departments and by the General Safety Committee. Now the Representatives are forcing action.

(Signed) F. M. Benning,
General Superintendent.

FMB/ajm.

1409 *Plaintiff's Exhibit 73*

October 20th, 1938.

Mr. W. A. James,
Chief Engineer, South Buffalo Railway Co.,
Lackawanna, New York.

Dear Sir: On July 28th, 1937, you transmitted to me a print, which I believe was Scheme 2, for a new building at Station H. The matter has been deferred but you will note from attached file that General Manager Entwisle has now approved preparation of Construction Order for a brick building as last planned.

Will you kindly prepare the necessary papers for an appropriation and the construction order?

———— ————, *General Superintendent.*

FMB/mfc.

This was essentially simply a ride back and forth about four round trips.

However, Mr. Nichols has made some notes which are submitted herewith, giving further details from the point of view of a builder and operator of prime movers. He also was handicapped.

It should be borne in mind that when 5,000 horsepower is mentioned it envisions two of these 90-foot, 2,500 horsepower units. Each unit is 4–6–6–4 or 20 wheels on rail.

We understand this engine is to be tried out on the New York Central, first on freight and later on passenger trains. It will probably be on exhibition both at Grand Central in New York and at Central station in Buffalo later on.

(Signed) F. M. BENNING,
General Superintendent.

FMB/ajm.

1413 *Plaintiff's Exhibit 77*

APRIL 6, 1938.

E. F. ENTWISLE:

Further in connection with my memorandum of April 4th, use of plant cars for handling lake steel, pig iron, and scrap tonnage, as long as Strip Mill operations are low there is no necessity for holding 223 cars in the slab service. We had not raised this question up to now on account of the cars not being needed for other uses but I now suggest that 100 of them be withdrawn and put into general use which will make them available for many purposes such as billets, pit scrap, and pig iron, thus increasing the total from which boat traffic cars can be taken.

It is also proposed to change blocking on the flat cars formerly used for handling 8 Mill sheet bars to Seneca, for use as permanent twin cars for handling long bars from 6-9 Mills to Kalman, Spring Perch, Rail Dock, etc. These cars are also stored awaiting need for them.

(Signed) F. M. BENNING.

1414 *Plaintiff's Exhibit 78*

APRIL 4, 1938.

E. F. ENTWISLE:

In prospect for lake transport at this writing:

Rolling date	Boat due	Tonnage	Destination
April 4th	April 18th	5,100 billets	Welland.
Do	April 8th	1,000 coils	Detroit.
April 11th	April 26th	1,962 rails	Canadian Pacific.
		1,000 tie plates	Soo Line.

There are ample plant cars to take care of considerable boat tonnage of boat steel unless it stands too long.

There are no wooden-bottom gondolas for Strip Mill and Seneca sheets. They have heretofore objected to loading steel-bottom cars.

This indicates that some foreign cars may have to be used even though plant cars are plentiful just now. Should we not consider at once:

1. How long ahead should boat steel be loaded?
2. Can plant cars be used indiscriminately for boat steel, regardless of steel bottoms?
3. Will the Yard Department clean plant cars suitable for boat steel loading at Strip Mill and elsewhere?

(Signed) F. M. BENNING.

Plaintiff's Exhibit 79

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

JUNE 12, 1936.

Mr. P. A. TRAGESER,
President, South Buffalo Railway Co.,
Bethlehem, Pennsylvania.

DEAR SIR: It develops that there is, and probably always will be, accumulation of cars bearing slabs at the Strip Mill. They have arrived on a local (pink) bill and are classed as railroad service up to their arrival at the patron's plant.

The unloading track holds 12 cars and rarely can the initial spotting be made at once. Later an order is issued specifying certain cars from among those stored to be placed for unloading. This service has been charged to the mill on locomotive rental basis on the ground that the railroad's obligation is fulfilled when a car is brought to the point where the consignee's disability prevents completion.

Is or is not this in conformity with the views of the traffic and accounting departments?

Mr. Ensinger is of the opinion that it is not while we have held that in view of decisions by the ICC in similar cases that the second movement is subject to an additional charge.

Can you reconcile these divergent views so we can be assured of correct practice.

(Signed) F. M. BENNING,
General Superintendent.

cc—A. J. Ensinger.
FMB/MFC.

1416 *Plaintiff's Exhibit 80*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

JUNE 18, 1936.

Mr. F. M. BENNING,
Vice President, South Buffalo Railway, Lackawanna, N. Y.

DEAR SIR: Replying to your letter of the 12th. I am glad to have an opportunity to review this question.

Our position is, and as I understand it, always has been, that the freight rate covers the movement to final point of unloading. We have not subscribed to the contrary theory so voluminously advocated in the last few years in the Ex Parte 104 proceeding. But wholly aside from that fundamental concept of the rate carrying the car through to final delivery, I think the disability of which you speak is no different than the ordinary disability when cars are constructively placed and as you know two separate transportation charges are not assessed in such cases—one to the point of holding and a second to the final destination.

You have other situations of this kind on your railroad, as pointed out in your letter of August 31, 1935, where you are not following the practice outlined in yours of June 12.

For the reasons outlined above and for other reasons, I think Mr. Ensinger is right when he says that the practice of making an additional charge for the final placement is not in accord with the views of the Traffic and Accounting Depts. I regret I cannot agree with your view as I am, of course, anxious to see your revenues maintained at a high figure.

As stated above, we are not yet ready to adopt the fallacious theory which has been advanced that shippers must take cars when it suits the convenience of the railroad to give them service and that interference of any kind with that convenience vitiates the obligation to give the service for which the rate was paid and on which it was based.

Very truly yours,

(Signed) PAUL A. TRAGNER.

Cc: Mr. A. J. Ensinger.

1417 *Plaintiff's Exhibit 81*

SEPT. 3, 1943.
BFA-304-A.

Mr. D. M. PETTY,
President, South Buffalo Railway Company,
1275 Daly Avenue, Bethlehem, Pa.

DEAR SIR: Referring to the requests that my office heretofore from time to time has made for information regarding the affairs

of South Buffalo Railway Company, and particularly to the conference which I recently had with you Mr. Trageser and your counsel regarding that subject.

I am writing this letter for the purpose of indicating to you in concrete and definite form as shown in the enclosed statement the minimum of information which I think it is necessary that my office periodically have regarding the affairs of South Buffalo Railway Company, in order that I may discharge my duties as Comptroller of Bethlehem Steel Corporation.

As you know, it has been the practice of Bethlehem Steel Corporation for a very considerable period of time to prepare for the officers of Bethlehem Steel Corporation and its directors as soon as possible after the end of each calendar month a statement in considerable detail of the operations during the previous calendar month of Bethlehem Steel Corporation and its subsidiary companies, of which South Buffalo Railway Company is one. It has also been the practice of Bethlehem Steel Corporation to issue to the public quarterly and to its stockholders and to the public annually reports of the operations of Bethlehem Steel Corporation and its subsidiary companies during the previous period specified in such reports.

1418 In order to continue the practice which the directors of Bethlehem Steel Corporation deem necessary, my office must have reports from South Buffalo Railway Company and the other subsidiary railway companies of Bethlehem Steel Corporation which will enable me to make each of such reports complete. It, of course, goes without saying that the reports cannot be complete, if information regarding the operations of the railroad subsidiaries should be omitted.

As I have stated above, the enclosed statement states the minimum of information which I think it is necessary for my office to have, in order that I may discharge my duty to the Board of Directors and officers of Bethlehem Steel Corporation and to its stockholders and to the holders of other securities of the Corporation. We do not intend to ask for any information regarding such railroad companies other than such as is necessary in our opinion to enable us to perform such duty.

I shall appreciate it if you will further consider the subject in the light of the enclosed statement and advise me whether you think that South Buffalo Railway Company either cannot or should not furnish to us the information described in the statement and periodically as therein stated.

Very truly yours,

BETHLEHEM STEEL CORPORATION,
———, *Comptroller.*

Encl.

1419 BETHLEHEM STEEL CORPORATION

STATEMENT OF INFORMATION DESIRED PERIODICALLY AS STATED FROM SOUTH BUFFALO RAILWAY COMPANY

Statements desired by the Comptroller of Bethlehem Steel Corporation from South Buffalo Railway Company (hereinafter referred to as South Buffalo) are as follows:

1. Monthly, trial balance of the general ledger accounts.

2. Monthly, Statement of Income on South Buffalo's Form R 79, and, in addition, the following information for the month covered by each such statement:

(a) Intercompany revenue;

(b) Intercompany rent payable;

(c) Intercompany receivables;

(d) Cost of Intercompany service rendered (details not required);

(e) Interest on United States Treasury obligations;

(f) Telephone-tax provision;

(g) Provision for Federal normal income tax; and

(h) Provision for Federal excess-profits tax.

3. Monthly, Statement on South Buffalo's Form R 138, showing "Provisions for Unemployment Insurance, Victory, and
1420 Carrier Taxes," and also showing taxes paid on telephone tolls.

4. Monthly, Statement showing the information required by South Buffalo's Form R 133, except information called for by the first bracket (that is, eliminate information called for by such form relating to Way and structure, Equipment, Transportation, General-local, General-administration, and Vacation allowance). This will mean that he first items shown will be the totals.

Under the heading "Hours Worked," relating to salaried employees, the total should be starred and a note put at the bottom of the Statement reading as follows: "*Based on 173 hours per month as an assumed average plus overtime hours worked."

5. Monthly, Statement on South Buffalo's Form R 132, showing "Additions and Betterments."

6. Monthly, Statement on South Buffalo's Form R 240b, showing "Retirement Orders."

7. Monthly, Statement on Bethlehem Form 2393 giving, with reference to South Buffalo, the information required by that form. A new form will be prepared for the subsidiary railroad companies which will call only for information asked to be furnished by them.

8. Monthly, within four days after the end of the month

1421 (by telephone will be sufficient), an estimate of operating profits.

9. Monthly, Statement showing securities purchased or sold or otherwise disposed of during the month (description, principal amount and price) and interest accrued to end of month.

10. Annually within 30 days after the close of the calendar year, the following described statements:

(a) Statement showing separately salaries and amounts of incentive compensation paid during the year to the respective officers and superintendents, naming them;

(b) Statement of legal expenses during the year;

(c) Statement of repair and maintenance expenses during the year; and

(d) The financial statements and schedules required by Price, Waterhouse & Co. for its annual audit.

11. Annually, Statement showing the following with reference to provisions made for depreciation:

(a) Classes of property;

(b) Unit rates applied; and

(c) Amounts of depreciation provided for each class.

12. Semiannually, as of June 30 and December 31, Statement of Profit and Loss on special form giving informa-
1422 tion required for state tax determination.

13. If and as Bethlehem Steel Corporation shall be required to make reports with reference to employement to government departments, South Buffalo will be asked to furnish such information regarding its employees to enable the Corporation to prepare its reports in so far as that company is concerned.

SEPTEMBER —, 1943.

1423 *Plaintiff's Exhibit 82*

SOUTH BUFFALO RAILWAY COMPANY
BETHLEHEM, PA.

SEPTEMBER 16, 1943.

Mr. F. A. SHICK,
Comptroller, Bethlehem Steel Corporation,
25 Broadway, New York, New York.

DEAR SIR: I have received your letter of September 3, 1943, and the memorandum which you therewith enclosed relative to statements which you ask that South Buffalo Railway Company furnish to you periodically as shown in the memorandum.

In the light of the explanation which you made at the conference referred to in your letter as to the necessity of your office having

the information which you request in order that you may discharge your duties as Comptroller of Bethlehem Steel Corporation, I think that it is proper that South Buffalo Railway Company furnish such information to you. I shall, accordingly, take steps to have such information compiled and furnished to you periodically as indicated in your above-mentioned memorandum, and with such promptness as the conditions existing from time to time shall permit.

Yours very truly,

D. M. PETTY,
President.

DMP: jem.

1424 *Plaintiff's Exhibit 83*

OCTOBER 2, 1943.

C. E. DULLENKOPF:

Regarding your note about the 229 cars out of service awaiting repairs on 9/30 wish to advise as follows.

While the figure 229 represents the total number out of service, the picture is not as bad as it looks due to the fact the 112 of this number are hopper cars of which we have an oversupply. The real pinch comes from having 101 gons, 11 flats and 5 dumps out of service when they are so badly needed. This represents eight days work for our Car Repair Shop making repairs of a permanent nature.

You people can be of much assistance to us in this matter in the following ways:

1. Give gons, flats and dump cars preference over hoppers when placing cars in the repair shop daily.

2. See that the cars requiring minor repairs only are promptly repaired and returned to service.

With your cooperation I am sure we can get the bulk of these cars back in service in a reasonable length of time.

1425 *Plaintiff's Exhibit 84*

LACKAWANNA, NEW YORK,
October 6, 1943.

J. E. JACOBS:

With reference to your October 2, 1943, note as to the high number of cars now out of service, awaiting repairs, and your suggestions, the attached instructions to carry out such have been issued, and which should help.

However, with the high rate that the cars are being set aside, it may be readily apparent that while this condition warrants, it

will be impossible to have all the gondolas, flats, and dump cars repaired in eight (8) days. However, if no other cars are damaged, the estimated rate would be correct.

With the importance of this situation, it may de desirable to have consideration given to having the repair work carried on for seven (7) days of each week. The use of any car-repair facilities at any other point or by any other concern with the allocation of the required materials for such, may also be essential to consider, to have an early improvement in this serious situation.

The allocation of new cars, to replace the present old cars, is strongly recommended for consideration.

C. F. D.
C. F. DULLENKOPF.

CFD/dk.

1426 *Plaintiff's Exhibit 85*

OCTOBER 6, 1943.

J. J. DALEY, *Supervisor of Transportation.*
M. SHREENAN, *Gen'l Foreman, Car Department.*

In the placing of the Bethlehem Steel Company private cars to their repair shop, and due to the high number of such cars at present sidetracked, arrange for the following:

1. The car-inspection force to look over the gondola, flat, and dump cars, and select such of these that require the least repair and have such placed into their shop, in order to have the largest possible number of cars repaired promptly and returned to service. In this, it will be necessary to have the inspection made by Shreenan's force and the car numbers advised to Daley's force, so that such cars may be set aside in a suitable manner, with the least switching and inconvenience. The Yardmasters to be advised of such cars and to place only such cars, unless otherwise ordered.

2. For the present, set aside the hopper cars, as these are not urgently required now. If however a need develops, any hopper cars, requiring the least repairs, can be given preference.

3. Any of the hopper cars and any of the gondola, flat, and dump cars that require extensive repairs should be sidetracked at suitable locations, so that such need not be moved about, until the car-repair shop is ready to do any work on them.

Arrange to cooperate to have the above ideas placed into effect at once.

C. F. D.
C. F. DULLENKOPF.
Vice President and General Superintendent.

CFD/dk.

1427 *Plaintiff's Exhibit 86*

SOUTH BUFFALO RAILWAY COMPANY

NOVEMBER 17, 1943.

Yardmasters, Junction.
Yardmasters, West Side.
Yardmasters, South End.,
Yardmasters, Station "D".
Relief Yardmasters.

Effective this date coal must be handled in direct runs from Station D or H to the Car Dumper Yard of Bethlehem Steel Company. In the event Car Dumper Yard will not accommodate all coal at this point, move the oldest cars and hold the balance on Interchange tracks until it can be run direct.

Coal from Station C should move to the Junction and be handled direct from that point and not yarded in the coal yard.

Greater care will have to be exercised to insure the placing of oldest cars at Car Dumper, and effective this date cancel previous instructions relative to assignment of Bethlehem Steel Company Car Dumper tracks and substitute the following. The most important point, that we must not fail, is to keep the Car Dumper Yard tracks filled at all times. These tracks are to be filled with coal as specified and as soon as possible after receipt on our line.

Car Dumper No. 2 track—capacity 30 cars—to be used for low volatile coal such as Heisley, Revlock, Bird etc.

Car Dumper No. 3 track—capacity 35 cars—to be used for high volatile coal such as Invoice Mine Run Coal.

Car Dumper No. 4 track—capacity 35 cars—to be used for high volatile coal such as Invoice Mine Run Coal.

Car Dumper No. 5 track—capacity 29 cars—to be used for high or low volatile coal, but not in a mixed train.

Car Dumper No. 1 track—capacity 24 cars—to be used for only such coal as you are instructed to move to this track by either this office or from the Bethlehem Steel Company Plant of the Coke Oven.

Car Dumper No. 6 track—capacity 25 cars—to be used for only such coal as you are instructed to move to this track by either this office or from the Bethlehem Steel Company Plant of the Coke Oven.

It should be thoroughly understood that Car Dumper tracks from No. 2 to 5 inclusive have been definitely assigned and coal of

proper type is to move to designated tracks as soon as possible after arrival at interchange.

J. J. DALEY,
Transportation Supervisor.

Approved:

C. F. DULLENKOPF,
Vice President and General Superintendent.

1428 *Plaintiff's Exhibit 87*

SOUTH BUFFALO RAILWAY COMPANY
BETHLEHEM, PA.

MARCH 27, 1941.

Subject: Dumping Cinder Ladles with air

Mr. E. F. ENTWISTLE,
General Manager, Bethlehem Steel Company,
Lackawanna, New York.

DEAR SIR: We are planning to purchase three (3) additional 1000-H. P. locomotives on the South Buffalo Railroad, and I have discussed with the American Locomotive Company the matter of air compressors. I am advised that the new locomotives are now equipped with air compressors which will deliver 175 cu. ft. when the engine is running at 550-r. p. m., and I see no objections to taking advantage of this full capacity for the short length of time required to dump ladles. It may be altogether possible to install larger compressors at a later date, or install larger storage tanks for the compressed air, or possibly both, so that we may be able to solve this ladle dumping problem with the equipment we now have.

In addition to the above, we will have available sometime this Summer four (4) motor driven air compressors, with motors rated at 600-Volts. I am inclined to believe that a scheme may be worked out to use these air compressors as a supplemental supply of compressed air.

It will probably be impossible to make any radical changes in the compressed air supply systems on these new locomotives when they are purchased, because of the difficulties of making deliveries, etc. On the other hand, it is not at all impossible that the necessary changes may be made at a later date when this problem is a little more active than at present. In the meantime I think it would be well for everyone concerned to review the matter in a general way, so that we may incorporate slight changes and provision for other changes at the time the purchase of these locomotives is made.

Very truly yours,

D. M. PETTY, *President.*

1429 *Plaintiff's Exhibit 88*

For Interoffice correspondence

SUBSIDIARY COMPANIES OF BETHLEHEM STEEL CORPORATION

LACKAWANNA, N. Y.

APRIL 3, 1941.

From F. S. ECKHARDT.
To E. F. ENTWISLE.
Subject: Dumping of Cinder Ladles with Diesel Electric Locomotives.

In reply to Mr. D. M. Petty's letter to you of March 27th, attached, relative to size of air compressors on new locomotives, they intend to purchase for the South Buffalo Railway, we wish to advise as follows:

We have developed from tests and calculations that to dump the twin pot blast furnace cinder cars on a three-minute cycle, an air compressor with at least 150 C. F. M. capacity at 130# pressure and a receiver with a volume of 67 cu. ft. would be required on the locomotive.

The 175 C. F. M. compressor proposed by Mr. Petty would be adequate in size to dump the blast furnace cinder ladles, providing the air receiver has sufficient volume, and the compressors will operate at 130# pressure. We would suggest that additional information be obtained from the locomotive builders as to the size of receiver installed on the locomotives and the pressure at which the compressors will operate.

From our point of view, it would be desirable to have the locomotives equipped with the 175 C. F. M. compressor and have the receiver at least 67 cu. ft. capacity to dump the ladles without an auxiliary air supply. If, however, the locomotive air system cannot meet our requirements, a separate Diesel driven compressor and receiver mounted on an idler car could be used.

If the new South Buffalo Railway locomotives would be satisfactory for dumping the blast furnace cinder ladles, we are still confronted with the problem of dumping the open hearth cinder ladles at the scrap drop and also occasionally at the cinder dumps along the lake. At the present time, the ladles at the scrap drop are dumped with a steam locomotive, using steam at 180# pressure. The open hearth ladles are more difficult to turn over than the blast furnace ladles, particularly if the button remains in the bottom of the pot. With our present operation, it is frequently necessary to use the overhead cranes to assist in steam locomotives in tipping the open hearth cinder ladles at the drop. From the information we have on the proposed Diesels, it is very doubtful

that they would be able to handle the open hearth cinder ladles satisfactorily. However, it would be possible to install an independent Diesel driven air compressor at the scrap drop with high pressure air along the columns of the drop for dumping the open hearth ladles in the event steam locomotives were no
1430 longer available. The tracks at the drop are relatively short and it would not involve a very extensive piping system, which step would make the dumping of the ladles entirely independent of the locomotive. The estimated cost of a new compressor and piping at the drop is approximately $6,500.00.

If the new Diesel electric locomotives can be supplied with an air system sufficient to dump the blast furnace cinder ladles, the actual installation of an independent plant for the open hearth ladles at the scrap drop could be postponed until such time as all steam locomotives are definitely out of service.

J. T. ECKHARDT,
Chief Engineer.

-7.
Enc.

1431 *Plaintiff's Exhibit 89*

JULY 15, 1943.

Mr. H. B. ROYER,
Vice President and General Superintendent,
South Buffalo Railway, Lackawanna, New York.

DEAR SIR: Please allow the following men: 594 F. Gassler, Conductor; 651 P. Laffey, Brakeman; 702 A. A. Berger, Brakeman; one day's pay each on account of Crane No. 6 handling cars; BSCO-289416, BSCO-280, BSCO-559, BSCO-914, BSCO-1700.

Crane No. 6 pulled out onto the main track without a clearance at 12 Noon, July 15, 1943; delaying Engine No. 51 ten minutes.

This is a violation of Contract between South Buffalo Railway and Brotherhood of Railroad Trainmen.

Yours truly,

(Signed) Forest V. Cutler,
FOREST V. CUTLER,
General Chairman,
Brotherhood of Railroad Trainmen.

1432 *Plaintiff's Exhibit 90*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

JULY 20, 1943.

Mr. E. F. ENTWISLE,
General Manager, Bethlehem Steel Company,
Lackawanna, New York.

DEAR SIR: I am in receipt of a penalty time claim under date of July 15, 1943, copy attached, from the Brotherhood of Railroad Trainmen, alleging violation of our contract with them on account of Bethlehem Steel Company crane No. 6 handling cars BSCo 289416, 280, 559, 914, and 1700, pulling out onto main track at our Station "D" at 12 o'clock noon, July 15, 1943, without obtaining a clearance, delaying our engine No. 51 ten minutes.

Will you please investigate and let me know promptly whether or not alleged move was made?

Very truly yours,

H. B. ROYER,
General Superintendent.

1433 *Plaintiff's Exhibit 91*

JULY 23, 1943.

Mr. H. B. ROYER,
Vice President and General Superintendent,
South Buffalo Railway Company,
2558 Hamburg Turnpike, Lackawanna, New York.

DEAR SIR: This will acknowledge your letter of July 20th relative to the alleged move made by Bethlehem Steel Company crane No. 6 handling five cars at one time.

We have investigated the matter and wish to advise that the move was made as alleged.

Very truly yours,

———— ————, *General Manager.*

1434 *Plaintiff's Exhibit 92*

SOUTH BUFFALO RAILWAY COMPANY

MISCELLANEOUS PRICE LIST

Effective April 1, 1932

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1435 *Plaintiff's Exhibit 93*

STEELTON & HIGHSPIRE RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective April 1, 1932

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1436 *Plaintiff's Exhibit 94.*

CORNWALL RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective April 1, 1932

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1437 *Plaintiff's Exhibit 95*

PATAPSCO & BACK RIVERS RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective April 1, 1932

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus store expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1438 *Plaintiff's Exhibit 96*

CONEMAUGH & BLACK LICK RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective April 1, 1932

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus store expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1439 *Plaintiff's Exhibit 97*

FORE RIVER RAILROAD CORPORATION

MISCELLANEOUS PRICE LIST

Effective April 1, 1932

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1440 *Plaintiff's Exhibit 98*

PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective April 1, 1932

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1441 *Plaintiff's Exhibit 99*

SOUTH BUFFALO RAILWAY COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1935

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1442 *Plaintiff's Exhibit 100*

STEELTON & HIGHSPIRE RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1935.

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1443 *Plaintiff's Exhibit 101*

CORNWALL RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1935.

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1444 *Plaintiff's Exhibit 102*

PATAPSCO & BACK RIVERS RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1935.

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1445 *Plaintiff's Exhibit 103*

CONEMAUGH & BLACK LICK RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1935.

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1446 *Plaintiff's Exhibit 104*

FORE RIVER RAILROAD CORPORATION

MISCELLANEOUS PRICE LIST

Effective January 1, 1935

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplied other than track material, Cost plus stores expense.
Track materials, Cost.
Track work, Cost plus overhead.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 20%.
Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1447 *Plaintiff's Exhibit 105*

PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1935

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track material, Cost plus stores expense.

Track materials, Cost.

Track work, Cost plus overhead.

Locomotive repairs, Cost plus 5%.

Other sundry services, Cost plus 20%.

Miscellaneous, Cost plus 20%.

C. J. FATZINGER, *Auditor.*

1448 *Plaintiff's Exhibit 106*

SOUTH BUFFALO RAILWAY COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1936

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.

Track materials, Cost.

Track work, Cost plus overhead plus 5%.

Locomotive repairs, Cost plus 5%.

Other sundry services, Cost plus 10%.

Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1449 *Plaintiff's Exhibit 107*

STEELTON & HIGHSPIRE RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1936

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1450 *Plaintiff's Exhibit 108*

CORNWALL RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1936

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1451 *Plaintiff's Exhibit 109*

PATAPSCO & BACK RIVERS RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1936

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.

Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1452 *Plaintiff's Exhibit 110*

CONEMAUGH & BLACK LICK RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1936

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1453 *Plaintiff's Exhibit 111*

FORE RIVER RAILROAD CORPORATION

MISCELLANEOUS PRICE LIST

Effective January 1, 1936

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1454 *Plaintiff's Exhibit 112*

PHILADELPHIA, BETHLEHEM AND NEW ENGLAND RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1936

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1455 *Plaintiff's Exhibit 113*

SOUTH BUFFALO RAILWAY COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1938

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1456 *Plaintiff's Exhibit 114*

STEELTON & HIGHSPIRE RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1938

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1457 *Plaintiff's Exhibit 115*

CORNWALL RAILROAD COMPANY.

MISCELLANEOUS PRICE LIST

Effective January 1, 1938

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1458 *Plaintiff's Exhibit 116*

PATAPSCO & BACK RIVERS RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1938

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.

Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1459 *Plaintiff's Exhibit 117*

CONEMAUGH & BLACK LICK RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1938

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1460 *Plaintiff's Exhibit 118*

FORE RIVER RAILROAD CORPORATION

MISCELLANEOUS PRICE LIST

Effective January 1, 1938

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1461 *Plaintiff's Exhibit 119*

PHILADELPHIA, BETHLEMEM AND NEW ENGLAND RAILROAD COMPANY

MISCELLANEOUS PRICE LIST

Effective January 1, 1938

The procedure to be followed in pricing store supplies, surplus stores, miscellaneous and sundry services, etc., to others is as follows unless otherwise agreed:

Store supplies other than track materials, Cost plus stores expense plus 5%.
Track materials, Cost.
Track work, Cost plus overhead plus 5%.
Locomotive repairs, Cost plus 5%.
Other sundry services, Cost plus 10%.
Miscellaneous, Cost plus 10%.

C. J. FATZINGER, *Auditor.*

1462 *Plaintiff's Exhibit 120*

RAILROADS

OFFICE OF AUDITOR

DECEMBER 30, 1935.

To All Chief Clerks.

It has been decided to allow the railroads 20% profit on track labor and material furnished Bethlehem Steel Company during the year 1935. Your December bill should be rendered in the usual manner and an additional bill rendered covering this profit for the year. The Steel Plant Auditor advises that this profit should be charged to N 1—Inv. Adj. and the credit for the railroad should be included in acct. 143.

It should be understood however, that this change applies to the year 1935 only. Bills rendered for 1936 services should be rendered in the usual manner unless instructed otherwise.

C. J. FATZINGER.

1463 *Plaintiff's Exhibit 121*

SOUTH BUFFALO RAILWAY COMPANY

LACKAWANNA, N. Y.

NOVEMBER 1ST, 1930.

Northern Operating Corporation Branch Line

T. BURNS,
General Manager, Lackawanna, N. Y.

DEAR SIR: In reply to your note of October 13th concerning our position in using the railroad of the Northern Operating Corpora-

tion, an examination of the record here at Bethlehem indicates that all of the right of way on the attached print outlined in red between the point of connection of the new line indicated on this print as P. S. 257 plus 14.8 and extending to a point about 800' north of Lake Avenue as about indicated on this print as P. S. 25 plus 53.4, is now owned by Bethlehem interests. This means that we do not control a right of way from this point (a point about 800' north of Lake Avenue) extending southwardly to a point where this suggested new right of way connects with property owned by this company.

Assuming the continuance of this situation, we have the following conditions:

1. Any track connections made between the suggested new line and other tracks as may be located to serve such industries as may be located on the new lands made in a leading direction (that is to permit continuous movement) would be of such curvature as to be unsatisfactory and would to some extent interfere with the complete utilization of the newly acquired lands.

2. Any track connections made in a tailing direction (that is, pulling ahead and pushing back) would be restricted by the amount of track that might be located, allowing sufficient head room on lands now controlled by the Bethlehem Companies. This, again, would possibly interfere with the full use of the newly acquired lands.

3. A third possibility would be to have the leading track into this newly acquired lands take off on the south end of our Station H yard and this would probably mean securing a crossing right over the lands and track of the Northern Operating Corporation and probably would be the layout that would interfere most with the complete use of the newly acquired lands.

1464

4. Neither of these proposals would safeguard our service in and about Seneca and the Corrugated Bar Mills.

Owing to these circumstances my recommendations are:

(a) That we endeavor to have our Real Estate people secure an option for a reasonable period of time for such portions of the right of way as are indicated on this print and are not located on lands owned by the Bethlehem interests. This would be from a point beginning about 800' north of Lake Avenue south to the point of joining with the lands now owned by this company.

(b) When such an option is at hand, we approach the Northern Operating Corporation in an effort to purchase such portions of their holdings as we are now using. Under such circumstances the measure of value of the Northern Operating Corporation property to us would be the cost of the lands necessary to be purchased and the cost of locating a railroad on these lands, as well as on other lands now owned by Bethlehem contained within this

new right of way, of equal condition to the railroad now located on the Northern Operating Corporation's land. Against this, as a minimum value to the Northern Operating Corporation, would be the value of their lands plus the scrap or second hand value of the existing railroad.

Our compensation for securing a permanent right of way at this point would be:

I. Permanent security in the handling of all business to and from the Seneca and Corrugated Bar Mill district.

II. The absolute control of all railroad service to the newly acquired lands and to lands located adjacent thereto.

III. The elimination of rentals now paid to the Northern Operating Corporation, which during the years 1926 to 1929, averaged $4693.00 per annum.

1465 If these suggestions are acceptable to you, we will be glad to have your advices to that effect and we will then take such steps as may be necessary to clear up this situation to your entire satisfaction; or on the other hand, if the expected development will be such as to change the condition differently from what we understand it, we will be glad to be advised to that effect.

Please return the print attached to these papers or a copy thereof with your reply.

Very truly yours,

JNO. M. GROSS, *Vice President.*

KAK/BB.

CC—Mr. F. M. Benning, Gen. Supt., South Buffalo Railway Company, Lackawanna, N. Y.

1466 *Plaintiff's Exhibit 122*

SOUTH BUFFALO RAILWAY COMPANY

LACKAWANNA, N. Y.

NOVEMBER 11TH, 1932.

Mr. T. BURNS,

General Manager, Lackawanna, N. Y.

DEAR SIR: In compliance with your 'phone request, I am returning herewith some papers which were in our file, they having reached us through the Real Estate Department, all relating to the question of acquisition of the property of the Northern Operating Company and the possibility of constructing a new line on lands adjacent to the Northern Operating Company property.

As you know, the answer to the questions that we raised in our letter of November 1, 1930, was to the effect that we would slow up on this endeavor but the subject has again been revived owing to Bethlehem's interest in Seneca and Kalman. We have had

some preliminary conversation with the Nickel Plate people within the last two weeks and we hope to be in a position within the next two or three weeks to make definite recommendations in connection with this problem. As soon as our preliminary facts have been assembled we will see that you are informed of the possibilities in the suggestions and after that has been done, we will do whatever is necessary in order to make more secure the position of the South Buffalo Railway between the two parcels of property which it owns which are connected by the property now owned by the Northern Operating Company. You will hear from us at the earliest possible date.

Very truly yours,

JNO. M. GROSS, *Vice President.*

Enc.

1467 *Plaintiff's Exhibit 123.*

SUBSIDIARY COMPANIES OF BETHLEHEM STEEL CORPORATION
LACKAWANNA, N. Y.

NOVEMBER 28TH, 1930.
File Reference W. A. J.

From: W. A. James, Chief Engineer.
To: T. Burns, General Manager.
Subject: Northern Operating Corporation Branch Line.

With reference to the attached letter from Mr. Gross dated November 1st, 1930, the substance of it is that an option should be secured on the purchase of a strip of land for right-of-way purposes on that portion of the land lying between Lake View Avenue and our recent purchase of lands east of Hamburg Turnpike and south of the South Buffalo Railway.

We offer the following comments on this matter:

(1) In our opinion this strip should be secured to insure proper leads to our new property. There would be no harm in securing it unless the purchase of the whole piece is now in process of negotiation.

(2) With this strip in our possession, we probably would be in an advantageous position to force a more favorable deal with the Northern Operating Company for the purchase of their right-of-way and track. As you know this right-of-way is our only means of connection to Seneca Iron & Steel Company and the Corrugated Bar Plants, for which connection we pay approximately $4,600.00 per year.

W. A. JAMES, *Chief Engineer.*

3.
Enc.

1468 *Plaintiff's Exhibit 124*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

DECEMBER 15TH, 1930.

In Reply Refer To

Northern Operating Company Branch Line

Mr. T. BURNS,
General Manager, Lackawanna, N. Y.

DEAR SIR: Our Real Estate people have referred to us your file of papers which contain my letter of November 1st addressed to you and Mr. James' letter of November 28th also addressed to you.

We have not received a reply from you to the questions that we raised in our letter of November 1st but I assume that what we have suggested is acceptable to you and you wish us to proceed accordingly. I also understand that owing to general policies which are now in effect in the conduct of our business, that whatever action we do take should be slowed up in accordance with the policy of the Corporation. Is our assumption correct?

Very truly yours,

JNO. M. GROSS, *Vice President.*

Enc. KAK/BB.

M. T. BURNS:

We suggest that they proceed as outlined in our letter to you Nov. 28 (copy attached) in pp. No. 1— When this is complied with, pp. No. 2— naturally follows.

W. A. J.

12/19.

1469 *Plaintiff's Exhibit 125*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

NOVEMBER 29TH, 1932.
In Reply Refer To

Mr. T. BURNS,
General Manager, Lackawanna, N. Y.

DEAR "TIM": Our telephone and letter exchanges re Northern Operating Company land.

I am enclosing a memorandum which briefly outlines all of the facts which are in our possession concerning the South Buffalo's

use of these lands, and in order that we can treat with this subject intelligently we should have your estimate of the answers to the following questions:

1. What is the life of the Seneca and Kalman Plants, expressed in years?

2. Is it the intention to keep the manufacturing activities now engaged in at those plants permanently in that location? If not, to what point would they probably be moved?

3. Is it expected that increased or decreased shipments will move to and from these plants, using as a base the business handled during 1922 to 1931—10-year period.

4. Do your Real Estate people know of any other lands which are now controlled by the Northern Operating Company which they might insist be sold if the South Buffalo moves to acquire the property which is now being used.

5. What is your present intention as to the location of the new line which was laid out as a result of Bethlehem acquiring certain lands, these lands being located between the present main line of the South Buffalo running to Station H and Lake Avenue?

And your opinion as to what action should be taken, if any, in order to make the South Buffalo's position in the use of this property more secure. Your attention at your convenience will be appreciated.

Very truly yours,

JOHN M. GROSS, *Vice President.*

T. B.—The attached memo will refresh your mind.

J. M. G.

1470 *Plaintiff's Exhibit 126*

Memorandum for Mr. Jno. M. Gross, Vice President,

re: South Buffalo trackage rights over land and track of Northern Operating Co.

South Buffalo Railway uses certain lands and track owned by the Northern Operating Company (Nickel Plate Railroad's land owning company), this track being located between South Buffalo's main line running to Station "H" and other track of the South Buffalo which serves the Kalman and Seneca Plants. This track was originally part of the old Wellsville & Buffalo Railway owned by the Buffalo & Susquehanna Railway interests. At the time of abandonment of the Wellsville & Buffalo this property passed into the hands of the Northern Operating Company, which company we understand is the land owning company of the Nickel Plate Railroad. The authority for the use of this property is

through an exchange of correspondence handled in 1914. Our tenancy is based on the following conditions:

1. The right is a trackage right.
2. Compensation is 50¢ per loaded car.
3. The understanding is silent as to maintenance of the property, the presumption being that the owner shall maintain the property, although this has not worked out in practice, the South Buffalo being obliged to keep up the property; however, the amount of repairs has not been great.
4. The payments made over the ten-year period, 1922 to 1931, inclusive, averaged $4,044.00 per year. Payments made during the first nine months of the year 1932 totalled $1,698.00.

1471 Our analysis of investment in, and the value of this property, is as follows:

The original cost was about $31,000.00

The current cost, that is, using cost experience of 1930, is about $48,000.00

The current cost of the property, minus depreciation is about $42,000.00

With the passing of the Kalman and Seneca properties into the Bethlehem family, it seems desirable that South Buffalo's access to these plants be made more secure and owing to these circumstances these facts are submitted to you for your information.

The questions that will be involved in any final action would comprise the following:

(a) If this property cannot be purchased at an amount reasonably less than the capitalization of the rental, say 5%, making a capital value of about $80,000.00, then it would seem to be sufficient that the South Buffalo should secure a long term lease, the length of the lease to be equal to the life of the plants.

(b) If it is expected that the business at the Kalman and Seneca plants will be enlarged in succeeding years, then a lease on a trackage right basis would work to our disadvantage; or on the contrary if the operations at these plants are to be less, the cash outlay on the basis of the past business would work to a disadvantage of this company.

1472 (c) The South Buffalo crosses Lake Avenue above grade. It has been reported for the past several years that this bridge will need some repairs. If substantial repairs are required, the cost of those repairs should enter into any sales-price determination. This problem should be investigated and an estimate of life of the present structure and cost of repairs made.

(d) Within the past two years the Bethlehem acquired lands lying between the present main line running to Station H and Lake Avenue, and at the time of this acquirement of land a new line was laid out, this new line practically paralleling the North-

ern Operating Company line. It should be decided as to whether or not the Northern Operating Company branch, if controlled under favorable circumstances, would fill the need of this new line or whether the Northern Operating Company line should be used for a few years and then this new line constructed.

(e) On getting into this matter we may find that the Northern Operating Company owns additional lands which are not now used by the South Buffalo and as a condition to the sale of the property which is now used by the South Buffalo, we might have to take such other lands. At this writing we have no 1473 knowledge of the substance of any such possibilities but it seems natural that the Nickel Plate would not want to get rid of parts of its property and retain other isolated portions.

Your decision at your convenience is solicited.

K. A. K.

November 29th, 1932.

12

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(f) Most important consideration is a continuous Right of way (Lack. Plant to Seneca) for locating Elec. transmission line.

T. B.

1474 *Plaintiff's Exhibit 127*

SOUTH BUFFALO RAILWAY COMPANY

LACKAWANNA, N. Y.

MARCH 3rd, 1933.
In Reply Refer To

Mr. T. BURNS,
General Manager, Lackawanna, N. Y.

DEAR SIR: May I refer you to my letter of November 29th in connection with our exchanges prior to that time re the Northern Operating Company land which is used by this company. Do you think this matter can rest until things look better or do you think some action should be taken at this time, and if so, will you please give us the information requested in my letter of November 29th.

Very truly yours,

JNO. M. GROSS, *Vice President.*

KAK/BB.

1475 *Plaintiff's Exhibit 128*

SOUTH BUFFALO RAILWAY COMPANY
1275 Daly Ave.
BETHLEHEM, PA.

SEPTEMBER 1, 1942.

Mr. P. J. GANEY,
Manager Real Estate Department,
Bethlehem Steel Company, Bethlehem, Pa.

DEAR SIR: In accordance with the understanding reached with your Company, which we hereby wish to confirm in the nature of an agreement between us, we will continue to use the track at Lackawanna, N. Y., which has been known as the Northern Operating track, and which you purchased from the Nickel Plate Railroad, by a trackage right at 50¢ a loaded car, payable monthly. You will recall we operated over this track by trackage right for many years under its former owner and, until further notice, you have advised us you are willing to have us continue to use the track. Maintenance of the track and structures which you now own, and over which we will operate, are to be for account of your Company—except that damage caused by our negligence is to be paid for by us.

Reasonable notice that our use of the track must be discontinued is to be given by you.

Very truly yours,

(Signed) PAUL A. TRAGESER,
First Vice President.

CC: Mr. R. H. Schlottman.
Mr. H. B. Royer.
Mr. C. J. Fatzinger.

1476 *Plaintiff's Exhibit 129*

EXCERPT FROM THE MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF SOUTH BUFFALO RAILWAY COMPANY HELD AT THE OFFICE OF THE COMPANY, LACKAWANNA, NEW YORK, ON THE 10TH DAY OF JULY 1936

The Chairman then made a statement to the meeting substantially as follows:

Over a period of years the Company has borrowed from time to time substantial sums from Bethlehem Steel Corporation, the New Jersey corporation, which as you know was succeeded by the Delaware corporation of the same name by virtue of the merger effected

on February 26, 1936. These funds were used by the Company in the acquisition and development of properties and for working capital. In view of business conditions which have prevailed since 1936 the Company has not been in position materially to reduce this indebtedness. Interest has not been charged by Bethlehem Steel Corporation on the indebtedness of this Company to it, which, of course, has resulted in giving to this Company a net income larger than it would have had if it had paid interest on indebtedness such as it would have been required to pay had it borrowed the money from a bank.

In view of the fact that it is necessary that each corporation make a separate Federal income tax return without reference to its affiliations, Bethlehem Steel Corporation, of Delaware, has determined that it should not longer carry such indebtedness on open account free of interest to the Company as has been
1477 the policy heretofore and, accordingly, the officers, of that Corporation have been discussing with the officers of the Company a plan for securing for the Corporation a proper return on such indebtedness. In view of the present business and financial conditions the officers of the Company are of the opinion that it would not be desirable at this time to endeavor to procure funds from the public for the retirement of its indebtedness to the Corporation. They have therefore, with the knowledge and approval of the individual Directors, made an agreement with the Corporation to cover the continuance of the indebtedness, until payment shall be required by the Corporation or until the Company shall deem itself in position to pay or reduce the indebtedness, which in the meantime would be carried on open account, and to pay interest at the rate of 6% per anum on the amount of such indebtedness. The agreement provides that such interest for any year shall be paid only out of the income of the Company for such year available for such purpose and, after many efforts to agree upon a workable definition of income fair to both parties, the Corporation has agreed to accept as the most satisfactory definition of such available income of the Company for any year the definition of net income given in the Federal Revenue Act or Acts applicable to such year, plus all interest on investments which is not included in net income as so defined and also before deduc-
1478 tion of any amount payable as interest under the agreement.

I submit herewith a copy of a letter dated April 30, 1936, exchanged between the Company and the Corporation and suggest that it would be in order to have the action of the officers in signing and delivering such letter approved at this meeting.

A copy of said letter is as follows:

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, N. Y.

APRIL 30, 1936.

BETHLEHEM STEEL CORPORATION,
25 Broadway, New York City, N. Y.

DEAR SIR: We have borrowed from you as of April 1, 1936, the sum of $2,054,650.00, and it is our intention, in accordance with the arrangements made with you, to borrow additional amounts from time to time as they may be required by us for the acquisition of new properties, the construction of improvements and additions to properties, the retirement of Funded Debt issued or assumed by us, or for additional working capital; unless otherwise agreed at the time, all amounts so borrowed to be carried on open account and to be repaid by us from time to time as required by you, with the corresponding right on our part to repay the unpaid balances in whole or in part at any time and from time to time.

We hereby confirm our arrangement with you effective April 1, 1936, regarding interest to be paid by us from time to time on all such balances, as follows:

As the amount of principal owed by us to you may fluctuate from month to month and, perhaps, to a limited extent from day to day, beginning with the month of April 1936, at the end of each calendar month interest for such amount at the rate
1479 of 6% per annum is to be computed upon the unpaid balance owing by us to you as shown on our books at the opening of business on the first day of such month, and the amount of interest which is to be payable by us for the calendar year in which such month shall occur is to be the aggregate of the amounts of interest so computed for each of the twelve months of such year (nine months in the year 1936), if and to the extent that the available net income of this Company for such year as finally determined shall be sufficient for the purpose. If and to the extent that our available net income for any such year shall not be sufficient to pay interest for such year (or three quarters of the year 1936) calculated as aforesaid, we shall not be under any obligation to make good the deficiency in any subsequent year.

The term "available net income" of this Company for any calendar year as used herein means the net income for such year as the term "net income" is or shall be defined in the Federal Revenue Act or Acts in effect for such year, plus all interest on investments for such year which is not included in net income as so defined, but before deducting any amount payable to you as interest for such year, pursuant to the agreement herein set forth. In case the amount of available net income of this Company as determined for any calendar year shall thereafter be found to be incorrect, such

amount shall be subject to correction and adjustment and shall be adjusted as of such year in such manner as shall be equitable as between us, and all payments of interest pursuant to such agreement shall be subject to such correction and adjustment.

Very truly yours,

SOUTH BUFFALO RAILWAY COMPANY,
By P. A. TRAGESER, *President.*

After discussion, on motion, duly made and seconded, the following resolution was unanimously adopted:

Resolved that the action of the officers of the Company in signing in its name and on its behalf and in delivering to Bethlehem Steel Corporation a letter a copy of which has been submitted to this meeting covering the payment of interest, if earned
1480 by the Company upon the amount of its indebtedness to said Corporation be, and it hereby is, in all respects authorized, approved, ratified, confirmed and adopted, and that the proper officers of the Company be, and they hereby are, authorized and directed from time to time in accordance with the provisions of said letter to make payment to said Corporation of such sum or sums as may be payable to said Corporation under the agreement evidenced by said letter and, when and as in their discretion it shall be advisable, to make payment or payments to said Corporation on account of the principal amount of such indebtedness as specified in such letter.

1481 *Plaintiff's Exhibit 130*

SUBSIDIARY COMPANIES OF BETHLEHEM STEEL CORPORATION
BETHLEHEM, PA.

NOVEMBER 5, 1936.

File Reference BFD-157

From R. E. McMath, Vice President.
To F. A. Shick, Vice President.

Subject South Buffalo Railway Company—Contribution to Capital

As a reminder of the action of the Board of Directors of the Bethlehem Steel Corporation at its meeting on October 29, 1936, regarding a contribution to South Buffalo Railway Company in order to eliminate the deficit on the books of that Company as at December 31, 1935, I quote below the resolution adopted by the Board in this connection. I understand that payment of this contribution was actually made on October 31 in the sum of $211,616. I take it that proper entries in accordance with the following resolution and the advice already given by counsel have

been or will be made in respect of this contribution. The following is the resolution:

"Resolve that, on or before October 31, 1936 this Corporation make a contribution to South Buffalo Railway Company, a New York corporation (all of the issue and outstanding capital stock of which is owned by this Corporation); in the amount of $211,616; and that proper officers of this Corporation be, and they hereby are, authorized and directed to make such entries on the books of that Corporation and to do any and all such other acts and things, including the making of any credits, and/or charges to the surplus account of this Corporation, as they shall deem necessary or proper to effect and record such contribution."

R. E. McMATH, *Vice President.*

1482 *Plaintiff's Exhibit 131*

(CRAVATH'S LETTERHEAD)

DECEMBER 29, 1936.

DEAR McMATH: I am sending to you herewith a form of letter to be written by Bethlehem Steel Corporation to South Buffalo Railway Company with reference to the acquisition of additional shares of the Capital Stock of the Railway Company of the par amount of $2,800,000, which letter is substantially in the form of the letter which we discussed this afternoon when you were at my office. The few changes that have been made are not of substance, except the statement with reference to the check, which has been changed to meet with what I understand you desire.

The amount as stated in the enclosed letter is on the basis of our discussion this afternoon. Of course, if you think that the amount of new stock issued by the Railway Company should be less than $2,800,000, I should be promptly advised to that effect, so that we may include the correct amount in the papers that we are preparing.

As you doubtless know, the authorized capital stock of Conemaugh & Black Lick Railroad Company is 10,000 shares of the par value of $100 each, and, according to the latest information which I have, 5,000 shares of the aggregate par value of $500,000 have been issued and are now outstanding. You did not tell me when you were here this afternoon the amount of additional
1483 capital which it is desired that Conemaugh & Black Lick Railroad Company shall have. Of course, if it is more than $500,000, it will be necessary to take proceedings in Pennsylvania to authorize such additional amount as shall be desired and, as I understand it, to obtain the approval by the Public Service Commission of Pennsylvania of the authorization.

If you will telephone me in the morning what is desired with reference to Conemaugh & Black Lick Railroad Company, I shall be glad to discuss with you the changes which should be made in the enclosed form of letter in order to make it applicable to the proposed transaction between Bethlehem Steel Corporation and Conemaugh & Black Lick Railroad Company.

Very truly yours,

(S) HOYT A. MOORE.

R. E. McMATH, Esq.,
Vice President, Bethlehem Steel Company,
Bethlehem, Pa.

Enc.

1484. *Plaintiff's Exhibit 132*

BETHLEHEM STEEL CORPORATION
Cunard Building
NEW YORK, N. Y.

DECEMBER 30, 1936.

BFD-199

R. E. McMATH,
Vice President, South Buffalo Railway Company,
Lackawanna, N. Y.

DEAR SIRS: We understand that, in order to improve your credit standing and to obtain additional working capital, you desire to issue and sell $1,900,000 par value of shares of your capital stock, in addition to the 5,000 shares of such capital stock which are now issued and outstanding. As you know, we own all such 5,000 shares of your capital stock, and we desire to acquire the additional shares thereof which you now propose to issue. Accordingly, we write this letter to evidence the agreement between us with reference to the acquisition by us from you of such additional shares, as follows:

You will use your best efforts to do and cause to be done as promptly as possible all things which shall be necessary in order to issue and sell to us at par $1,900,000 par value of the shares of your capital stock, including the amendment of your Certificate of Incorporation so as to authorize the issuance of such shares by you and the obtaining of the approval or consent of any Federal or State authority or authorities which may be required in order legally to issue and sell to us such additional shares.

We have been advised by counsel that in their opinion the proposed increase in your authorized capital stock and the issue and sale to us at par $1,900,000 par value thereof is entirely within the law and that you should be able to accomplish it in due course.

We realize, however, that you desire to have the $1,900,000 at an early date and in any event. We accordingly hand you herewith our check to your order for that amount, and it is a part of our agreement that, if you shall not be able to complete the issue and sale to us at par of additional shares of your capital stock of the aggregate par value of $1,900,000 as of the date of the con-
1485 firmation by you of the agreement as herein set forth, then enclosed check shall be deemed to be a contribution by us to you in the amount thereof as of the same date.

Kindly confirm on the form written below that the foregoing is in accordance with your understanding of the agreement between us.

Very truly yours,

BETHLEHEM STEEL CORPORATION,
By (Ink signed) R. E. McMATH, *Vice President.*

We hereby confirm that the foregoing correctly sets forth the agreement between Bethlehem Steel Corporation and us. Dated Lackawanna, N. Y., December 31, 1936.

SOUTH BUFFALO RAILWAY COMPANY,
By (Ink signed) PAUL A. TRAGESER, *President.*

1486 *Plaintiff's Exhibit 133*

CRAVATH, DE GERSDORFF, SWAINE & WOOD
15 Broad Street
NEW YORK

NEW YORK, *January 19, 1937.*

South Buffalo Railway Company Increase of Capital

DEAR McMATH: At the time when we were discussing the then proposed increase of the capital stock of South Buffalo Railway Company I did not have before me a copy of the First Consolidated Mortgage of Lackawanna Steel Company, and hence did not know the provisions of such Mortgage with reference to the requirement that additional securities that might be issued by any corporation, the capital stock of which was pledged thereunder must also be pledged under such Mortgage.

I find now that Section 13 of Article Six of such Mortgage provides in part as follows:

"Section 13. Except as herein otherwise expressly provided, no company of whose capital stock the half part of more shall be subject to this indenture, shall make any issue of additional shares of its capital stock * * * unless simultaneously there shall be

made effective provision that * * * all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire issued capital stock previously subject to this indenture), forthwith, upon the issue or creation thereof, shall be delivered to and be pledged with the Trustee hereunder, and be made subject to all the trusts of this indenture, and all such additional stock shall be fully paid and be nonassessable."

1487 There is included among the properties that are described in the granting clauses of such Mortgage 4,991 shares of the capital stock of South Buffalo Railway Company out of a total of 5,000 shares, which I understand are all the shares of stock of that Company that are now outstanding.

I am not sure that you had the above-quoted provisions of the First Consolidated Mortgage in mind when we were talking about the South Buffalo Railway Company matter and I am, therefore, bringing them to your attention so that you may advise me whether they have any effect upon the decision which you indicated to me.

Very truly yours,

HOYT A. MOORE.

R. E. McMATH, Esq.,
Vice President, Bethlehem Steel Company,
Bethlehem, Pennsylvania.

1488 *Plaintiff's Exhibit 134*

BETHLEHEM STEEL COMPANY
(Incorporated)
BETHLEHEM, PA.

FEBRUARY 2, 1937.

DEAR Mr. MOORE: I acknowledge receipt of your letter of the 19th ult. regarding the increase of capital stock of South Buffalo Railway Company.

I had overlooked the provisions of the First Consolidated Mortgage of Lackawanna Steel Company which would require the additional stock to be pledged under that mortgage. In view of that provision I suggest that the issue of the stock be deferred until the Lackawanna Mortgage is in some way discharged.

In view of this decision it seems to me that the letter of December 30, 1936, from Bethlehem Steel Corporation to South Buffalo Railway Company which you approved should be supplemented by you in some way so as to either (1) cancel altogether the agreement to issue and sell the additional stock, or (2) postpone the issue and sale of the stock until the Lackawanna Mortgage shall have been discharged. If the obligation is merely to be postponed,

it will be necessary for Mr. Shick to consider how the
1489 payment of $1,900,000 made on December 31, 1936, should be treated on the books of the Railway Company; that is, whether it should be treated as a contribution to capital or as a payment on account of stock to be issued at some time in the future. If you see no objection, I should prefer the latter treatment, and in that case the proposed supplement to the letter agreement of December 30, 1936, would, I assume, merely need to confirm our understanding that at the request of Bethlehem Steel Corporation the issue and sale of the stock was to be postponed until the Lackawanna Mortgage is discharged, and that in the meanwhile the payment of $1,900,000 is to be deemed to be a payment in advance on account of such stock.

Will you consider the question and suggest a form of supplemental letter?

Very truly yours,

R. E. McMATH,
Vice President.

H. A. MOORE, Esq.
Cravath, de Gersdorff, Swaine & Wood,
15 Broad Street, New York City.

1490 *Plaintiff's Exhibit 135*

BETHLEHEM STEEL CORPORATION
Cunard Building
NEW YORK, N. Y.

FEBRUARY 9, 1937.

R. E. McMATH.

DEAR SIRS: Referring to our letter to you of December 30, 1936, and confirmed by you under date of December 31, 1936, covering the agreement by us to purchase an additional $1,900,000 par value, of shares of your capital stock:

In view of some complications which have arisen we desire to postpone indefinitely the issue and sale to us of the additional shares of your stock. If this is agreeable to you, the check for $1,900,000 which we sent you with our letter of December 30, 1936, is to be deemed to be a contribution by us to you in that amount, as provided in our said letter.

Kindly confirm on the form written below that the foregoing meets with your approval.

Very truly yours,

BETHLEHEM STEEL CORPORATION,
By (Signed) R. E. McMATH, *Vice President.*

SOUTH BUFFALO RAILWAY COMPANY
LACKAWANNA, NEW YORK

LACKAWANNA, NEW YORK,
February 10, 1937.

We hereby confirm that we agree to the modification of the terms of your letter of December 30, 1936, as above set forth.

SOUTH BUFFALO RAILWAY COMPANY,
By (Signed) PAUL A. TRAGESER, *President.*

1491 *Plaintiff's Exhibit 136*

SOUTH BUFFALO RAILWAY COMPANY

JOURNAL VOUCHER

Debit

Account No. 9A; Name of Account: Inter-Company Balances—Bethlehem Steel Corporation.

Credit

Account No. 11C; Name of Account: Capital Stock.
Date made 1/6/37. Month of December 1936. General Ledger Reference No. 129.
For Subscription by Bethlehem Steel Corporation at par for $1,900,000, principal amount, of capital stock of this company.
Total $1,900,000.
Cancelled—Journal Entry #154—December, 1936.
Correct: W. F. Heydt.

1492 *Plaintiff's Exhibit 137*

BETHLEHEM STEEL CORPORATION

JOURNAL VOUCHER

Copy. In South Buffalo Railway Co. journal.

Debit

Account No. 2A; Name of Account: Capital Stock of Subsidiary Companies—South Buffalo Railway Company.

Credit

Account No. 9A; Name of Account: Inter-Company Balances—South Buffalo Railway Co.

Date made 2/26/37. Month of December 1936. General Ledger Reference No. 479.

For Additional investment in stock of South Buffalo Railway Company.

Total $1,900,000.

Correct: W. F. Heydt.

1493 *Plaintiff's Exhibit 138*

SOUTH BUFFALO RAILWAY COMPANY

JOURNAL VOUCHER

Debit

Account No. 9A; Name of Account: Inter-Company Balances—Bethlehem Steel Corporation.

Credit

Account No. 17–A; Name of Account: Surplus (paid in).

Date made 2–26–37. Month of December 1936. General Ledger Reference No. 155.

For Additional investment by Bethlehem Corporation in our stock.

Total $1,900,000.

Correct: W. F. Heydt.

1494 *Plaintiff's Exhibit 139*

BETHLEHEM STEEL CORPORATION

JOURNAL VOUCHER

Debit

Account No. 2A; Capital Stock of Subsidiary Companies—South Buffalo Railway Company.

Credit

Account No. 9A; Name of Account: Inter-Company Balances—South Buffalo Railway Co.

Date made 1/6/37. Month of December 1936. General Ledger Reference No. 402.

For Subscription at par for $1,900,000, principal amount, Capital Stock to be issued by South Buffalo Railway Company.

Total $1,900,000.

1495 *Plaintiff's Exhibit 140*

SOUTH BUFFALO RAILWAY COMPANY

JOURNAL VOUCHER

Debit

Account No. 9A; Name of Account: Inter-Company Balances—Bethlehem Steel Corporation.

Credit

Account No. 17A; Name of Account: Surplus (paid in).
Date made 11-2-36. Month of October 1936. General Ledger Reference No. 117.
For Additional investment by Bethlehem Steel Corporation in our stock.
Total $211,616.
Correct: * W. F. Heydt.
Approved for Entry: ** R. H. Schlottman.
* Bookkeeper Bethlehem Steel Corporation.
** Ass't. Comptroller Bethlehem Steel Corporation.

1496 *Plaintiff's Exhibit 141*

SOUTH BUFFALO RAILWAY COMPANY

JOURNAL VOUCHER

Debit

Account No. 20; Name of Account: Lackawanna Plant (Cleared by Ensinger) (A. J. E. 708 "Cash").

Credit

Account No. 9A; Name of Account: Inter-Company Balances.
Month of October 1936. General Ledger Reference No. 118.
Total $211,616.
NOTE.—Amount of $211,616 charged to Lackawanna Plant is cleared by A. J. Ensinger to a/c 708 "Cash"—Check sent to A. J. E. for deposit.
Correct: A. J. Ensinger, C. J. F.
Approved for Entry: C. J. Fatzinger.

1497 *Plaintiff's Exhibit 143*

ROBERT J. VAN DUSEN, a witness called on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. Van Dusen, are you employed by the South Buffalo Railway Company?

A. Yes, sir.

Q. In what capacity?

A. General Yardmaster.

Q. How long have you been so employed?

A. Since January 1942.

Q. Do your duties as General Yardmaster cover the entire South Buffalo Railway Company operations?

A. Yes, so far as supervision over the yardmasters are concerned.

Q. Since you have been General Yardmaster, have you had charge of the method of setting up cars in the high line yard?

A. Well, that comes under my jurisdiction, the point of moving cars in that direction.

Q. Do cars move from the high line yard onto the high line trestle?

A. Onto the high line trestle?

1498 Q. Yes.

A. No; they don't move onto the trestle.

Q. I say onto the high line trestle.

A. Do they move from the yard to the high line trestle, do you mean?

Q. Yes.

A. That is right.

Q. Does the South Buffalo Railway transport those cars on the high line trestle?

A. Yes, we shove them up onto the trestle and place them there for them.

Q. How far is that?

A. Probably about three-quarters of a mile.

Q. Is that on an angle?

A. No; it is on the grade.

Q. Is there any angle involved there in getting the cars onto the high line trestle?

A. The high line is a perfectly straight track up into the trestle. Of course, you get it flat on top.

Q. Is there any grade that the cars have to go up?

A. That is right, there is a grade there.

Q. Do you—I mean the South Buffalo Company—push those cars, or transport those cars up that grade?

A. Yes, we put them up the grade.

Q. And it is after they get on the level that you stop
1499 furnishing the motive power?

A. No; we shove them down and spot them over their bins for them.

Q. For unloading?

A. That is right.

Q. Is there a classification of the cars which you deliver to the Steel Company on the high line trestle?

A. Yes, there is.

Q. How does that come about?

A. Well, the different commodities they require up there such as sinter, roll scale and coke and borings.

Q. By "they" you mean the Bethlehem Steel Company?

A. The Bethlehem Steel Company.

Q. Who makes that classification?

A. Our engine crew, the South Buffalo Railway engine crew.

Q. On what orders?

A. On orders from the foreman of the Bethlehem Steel Company, the blast furnace plant.

Q. How are those orders given and in what substance are they?

A. They are sent down on a form.

Q. What is the substance of the orders?

A. Well, they tell us how many cars of coke they want and how many cars of sinter and how many cars of borings and how many cars of scale, so many cars of each commodity.

1500 Q. Will more than one commodity be involved in a single shipment up there?

A. Yes, sir. Yes, they will.

Q. Are those cars placed in a prearranged order?

A. That is right.

Q. And does that order slip that you told about coming down from the Bethlehem Steel Company to the South Buffalo Railway Company set forth that order?

A. I don't know what you mean there.

Q. Those cars go up in a prearranged order, don't they?

A. Yes.

Q. Who arranges it?

A. Our switching crew arranges it.

Q. On whose orders?

A. The blast furnace foreman.

Q. The blast furnace foreman, as I understand it, says he wants certain cars of certain commodities?

A. Yes.

Q. And he wants them delivered in a certain order?

A. Yes.

Q. And those instructions, of course, are followed out, aren't they?

A. Yes;

Q. Is there a time set for the delivery of those cars by the Steel Company?

1501 A. Well, no, no actual time is set. They just call the yardmaster in that territory as to when they might need them. There may be one run and there may be two runs of them.

Q. They are called on and they say we would like to have certain commodities by a certain time; is that correct?

A. Yes.

Q. And it is your practice to attempt to comply with that?

A. Yes, that is right.

Q. To try to deliver them by the time that the commodities are wanted?

A. Yes, sir.

Q. And as a general rule do you succeed in doing that?

A. Not always. Sometimes we are a little behind time.

Q. Generally do you do it or are you able to do it?

A. Yes, we are, as a rule.

Q. How frequently do you fail to do it?

A. Not very frequently that we fail.

Q. Can you give us some idea?

A. Especially in the wintertime we may not be on time sometimes.

Q. Can you give me any idea percentagewise?

A. The percentage is very small. It may happen once or twice a month.

Q. Out of how many shipments would you say?

1502 A. I say the delay may happen once or twice a month.

Q. How many of these shipments will you have in a typical month, say?

A. How many cars in the train going up?

Q. How many trains or how many cuts?

A. Probably about 10 or 12 cars in a cut.

Q. How many of those a day?

A. We usually make about two trips.

Q. In the average month would you make about 50 trips?

A. Yes, it will amount to more than that. Of course, I don't know how many trips they make on the other turns, because I am not familiar with that.

Q. You have one turn?

A. That is right. I work from 7 A. M. to 3 P. M.

Q. We are just talking about your trick. You think about once or twice a month is a fair estimate in a typical month when you fail to deliver within that desired time?

A. That is right.
Q. Otherwise you are able to make it?
A. That is right.
Q. Where is No. 3 scale yard territory?
A. That is directly west from the Hamburg Turnpike, from the No. 3 gate, almost in the center of the plant across from the Turnpike.
Q. Is it near Station E?
1503 A. Oh, probably three-quarters of a mile.
Q. Which direction?
A. West from Junction E.
Q. About three-quarters of a mile?
A. That is correct. It is more in a northwest direction.
Q. What is the chief inbound traffic received at No. 3 scale yard territory?
A. Brick.
Q. Any coal?
A. Yes, some coal.
Q. The Bethlehem Steel Company orders cars, does it not, from this territory for loading?
A. That is right.
Q. Is there any procedure followed for ordering those cars?
A. Yes; the various plants in that territory deliver what we call Form 1 to the yardmaster in that territory.
Q. Is there any given time for that practice?
A. Two hours' notice, and sometimes we will probably get a notice 24 hours ahead of time.
Q. But generally two hours' notice is given?
A. That is right.
Q. And you are expected, are you not, to have those empties delivered within that two hours' time?
A. That is right.
1504 Q. Do you have any instructions on that subject, or is that just a practice?
A. That is the form 1 that they issue for the amount of cars they want and type of cars they want.
Q. Does that order state the time in which the cars are wanted to be delivered?
A. Yes, it does.
Q. If they want them in 24 hours it says so?
A. That is right.
Q. And if it is two hours it says so?
A. That is right.
Q. What success do you have in getting those empties placed when the instructions call for two hours?

A. Well, sometimes we get them on time and sometimes we don't.

Q. Generally are you successful?

A. Generally we try to do the best we can to make them on time.

Q. And generally do you make it on time?

A. As a rule, but frequently we don't make it on time.

Q. How frequently do you fail?

A. Not so very often. That would be hard to say.

Q. 10 percent of the time?

A. That would be hard for me to answer, because I am not in that territory all the time.

1505 Q. I am talking about your trick, of course.

A. I say I am not at that one particular point all the time, and sometimes they might slip up and I wouldn't know anything about it.

Q. All I want is the best of your knowledge.

A. To the best of my knowledge it probably wouldn't happen but probably two or three times a month.

Q. Have you heard any complaints on that score that cars are not delivered in their specified time?

A. Yes, sir.

Q. So that it is likely that you would hear about it if they were not delivered within a specified time, isn't it?

A. Usually the only one we hear from is the fellow that can't take it. What I mean by that, is that he wants his cars, and he wants them.

Q. And if he doesn't get them he complains?

A. Some other fellow we probably won't hear from him.

Q. What about the pulling of loaded cars? Do you have any system or arrangement for them?

A. Yes; the foreman for the different plants in the plant in general will issue a R–9 on a rail shipment. That is for out-bound shipment. An interplant shipment, that is steel in cars going for boat loading, and scrap, and such as that; we would receive a R–115.

1506 Q. Again, about the R–9's, for what type of shipment is that used?

A. For out-bound shipment to the interchange.

Q. Is there any time specified on the R–9's as to when the load should be pulled?

A. On some of them I have noticed there have been times on, and some of them there hasn't been time on. The time they put on there is the time that they probably issue that to the yardmaster in that territory.

Q. When I say time——

A. What you mean is do they require them pulled at a certain time?

Q. Yes.

A. Well, in some plants there, especially where they load interchange loads, where they want to pull more loads they will mark the time on, when they want sufficient empties in to load and going out again.

Q. You mean the loading space is already occupied by loaded cars?

A. Yes.

Q. And they want to get more empties in there?

A. Yes.

Q. Then the R-9 may specify the time——

A. No; the R-9 won't. The Form 1 will.

Q. What connection does Form 1 have with R-9?

1507 A. The Form 1 is the order for empty cars.

Q. So that you can't get the empties in until you pull the loaded cars out?

A. That is right.

Q. So that of necessity to get the empties in you must pull the loaded cars?

A. You must pull the loaded cars first.

Q. In any of the places or at any of the mills do you have a schedule for the removal of loaded cars or the placing of empties or both?

A. You mean a schedule put up by the Bethlehem Steel Company?

Q. A set time arrangement.

A. Yes, in the structural shipping yard.

Q. What is that schedule?

A. They have three loading tracks there. They just load on one turn. So the set time for that is 7 A. M. in the morning. They just load on the first turn, 7 A. M. to 3 P. M.

Q. That is your turn?

A. That is right. That is a set place that has to be set up for loading purposes by 7 A. M.

Q. When do you pull these cars?

A. They are pulled out on the 3 to 11 turn, the loads are.

Q. You set the empties?

1508 A. No, the 11 to 7 turn sets the tracks up with empties. There may be an occasion that we will go in there on our turn or they might order loads out and additional empties placed.

Q. Is that under the same system that they will order empties placed, and you simply take out the loaded cars?

A. And replace them with empties.

Q. I am not clear as to what you do under this schedule that you have set up.

A. I thought you meant by a set time to set any individual plant up at a set time. That is what I thought you meant.

Q. Under your turn from 7 A. M. to 3 P. M. what do you do?

A. On the 7 A. M. to 3 P. M. turn we don't have no set schedule.

Q. As far as you are concerned then, you just carry out the individual orders as they are received?

A. No, I don't handle the orders at all.

Q. What do you do?

A. I just cover the railroad and different territories where we have the yardmasters.

Q. Do you know how that is handled of your own knowledge?

A. Yes, I do.

Q. How is it handled during your turn; are the individual
1509 orders executed as they come in?

A. That is right.

Mr. CRAIG. Your witness.

Cross-examination by Mr. BROMLEY:

Q. So far as the movement of cars up on the high line is concerned, the Railway Company receives written orders from the Steel Company, doesn't it?

A. That is right.

Q. You said that the engine crew, as I recollect, was given an order for so many cars of one kind of commodity and so many cars of another, and the engine crew classified those cars in accordance with the number desired; is that what you said?

A. The conductor of that crew is given his orders by the yardmaster in that territory.

Q. Now, so far as the written orders are concerned which are received from the Steel Company by the Railroad Company, those orders specify the cars the Steel Company desires to have delivered up on the high line by car numbers, do they not?

A. That is right.

Q. So that all the conductor does is to assembly in one drag the cars bearing the numbers as ordered by the
1510 Steel Company; is that right?

A. That is right.

Q. So that the only selecting that the Railroad Company does is to select the cars bearing the numbers as ordered by the Steel Company?

A. That is right.

Q. The Steel Company owns and operates an electric locomotive on the high line, doesn't it?

A. That is right.

Q. And all that the Railway Company does is to push up the drag of cars which have been ordered by car numbers onto the high line and leave them?

A. That is right.

Q. And then the Bethlehem Steel Company using its electric locomotive places them where it wants them on the high line trestle; isn't that right?

A. I don't know about that one, because I have never been up on the high line trestle.

Q. You do know that the Bethlehem Steel Company has an electric engine operating up there?

A. That is right.

Q. And it is used to shove the cars around and put them in the exact position that the Steel Company wants them? You do know that, don't you?

A. I am recalling my answer to the last question there
1511 as to the cars we put up there. You see it has been some 15 years since I have been up there and the bins are all under those tracks up there and when we shove the train up there we just drop the train on what we call runarounds there, and as far as spotting is concerned, when the cut of cars was cut off, they were spotted as far as we were concerned. They are over the bins when they are on that trestle.

Q. If the Steel Company wants them in any other position than that in which you leave them, the Steel Company moves them with its electric locomotive, doesn't it?

A. Well, I imagine it would, because all we do is shove the trains up there.

Q. And leave them?

A. That is right.

Q. Today it is very rare, isn't it, that you get any orders to shove any coke cars up there?

A. There is some coke; not so awfully much.

Q. After the Railway Company has received an order from the Steel Company to place cars up on the high line, the time at which it is done is a matter determined by the Railway Company, isn't it?

A. That is right.

Q. Coming to the No. 3 scale yard, after you get a Form 1 from the Steel Company calling for the placement of a
1512 certain number of empties, the Railway Company determines the time at which it will place the empties, doesn't it?

A. That is right.

Q. And when you receive a Form R-9 calling for the pulling of loaded cars, the only time that is indicated on the R-9 is the time

when the Steel Company indicates that loading will be completed; isn't that right?

A. That is right.

Q. And that means that the Railway Company on and after that time is free to pull the loads?

A. That is right.

Q. The time at which the pulling of the loads is done is determined by the Railway Company, is it not?

A. That is right.

Q. And coming to the structural shipping yard I understand you to say that the Steel Company at the present time only loads cars there on the 7 A. M. to 3 P. M. turn; is that right?

A. Loading on the center loading tracks, yes.

Q. And prior to 7 A. M. of each day the Railway Company receives a written order from the Steel Company calling for the number of empties that the Steel Company desires to have delivered to it; isn't that right?

A. That is right.

1513 Q. The time that the Railway Company delivers the empties is determined by the Railway Company, isn't it?

A. That is right.

Q. There is no schedule of the Bethlehem Steel Company which binds you to make that delivery at any certain time, is there?

A. No, sir.

Q. You set your own schedule?

A. That is right.

Q. And the Railway Company determines when it will place the empties and when it will pull the loads, doesn't it?

A. That is right.

Q. And the time at which all the individual orders are executed as they come in from the Steel Company to the Railway Company is whatever time the Railway Company determines, having regard to its convenience, isn't it?

A. Whatever time that we can get to it to do it, yes.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. I think you testified in effect that in the high line yard, when these drags were made up for delivery up on the trestle that the orders came down from the Bethlehem Steel Company to

1514 the South Buffalo for certain car numbers to be assembled; is that right?

A. That is right.

Q. Do those instructions also indicate the order in which those cars, the numbers of which are given, are to be placed in the drag?

A. Well, it would not necessarily be that way for the simple

reason that it might be probably three cars of coke, say, and there may be two cars of sinter, so that the numbers wouldn't have to identically follow one another.

Q. You are not concerned with what is in the cars, are you? You are just interested in the car numbers?

A. That is right, and, of course, as we get the car numbers and they have the commodity down there, if it is coke or scale, we handle it that way.

Q. For instance, if you have three car numbers in order given to you and you find, say, that all those cars contain coke of the same size, you do see to it, however, that those three cars are delivered together?

A. If they specify that they want them together, yes.

Q. If it is not specified that they are wanted together, but that they are wanted separated, you separate them, don't you?

A. That is right.

Q. What commodities other than coke do you take in cars up on the high line trestle?

1515 A. That is all, just what I mentioned, coke, sinter, scale and borings.

Q. I want to go back to the placing of these empties. As I understood your statement you said that frequently when the order would come in for the placing of empties, that the orders would specify within what time it was desired that those empties be placed, within two hours or some given time; is that correct?

A. That is right.

Q. I believe you also testified that with some exceptions you were able to deliver those empties within the requested time?

A. That is right.

Q. When you speak of making your own schedule and setting your own time, you mean when it is possible, of course, to fix that time within the given period, such as two hours?

A. Within the period that they want the shipment made.

Mr. CRAIG. That is all.

Re-cross-examination by Mr. BROMLEY:

Q. Well, when it does not suit your operating convenience to deliver them within two hours, you do not do it do you?

1516 A. No, we don't.

Q. In other words, I ask you again, you determine the time of delivery yourself?

A. We determine the time of placing the cars and we try to be on time as far as possible.

Mr. CRAIG. I would like to have your address for the record.

The WITNESS. My home address?

Mr. CRAIG. Yes.

The WITNESS. 1005 Tifft Street, Buffalo, New York.

By Mr. CRAIG:

Q. Do you have any headquarters in South Buffalo?

A. Yes, I do.

Q. I mean, do you have an office?

A. I have an office.

Q. Where is that?

A. In the crew clerk's schedule office.

Q. In the office building of the South Buffalo Railway Company?

A. Yes, sir.

Q. In the South Buffalo Railway Building?

A. That is right. In other words, it is a locker room and a little office combined.

By Mr BROMLEY:

Q. The South Buffalo Railway Company has shippers on
1517 its line other than the Bethlehem Steel Company, doesn't it?

A. That is right.

Q. It is true, is it not, that other shippers on the line other than the Bethlehem Steel Company also specify the times when they want empties placed and loads pulled?

A. That is right.

Mr. CRAIG. Just a moment. I want to enter an objection to the question on the ground that it is irrelevant. What is your answer?

The WITNESS. That is right.

By Mr. BROMLEY:

Q. And in those instances you try to meet those times as nearly as you can, do you not?

A. That is right.

Mr. CRAIG. The same objection.

Mr. BROMLEY. That is all.

Mr. CRAIG. That is all.

(Whereupon a recess was taken until 2:30 o'clock P. M.)

1518 *Plaintiff's Exhibit 144*

SERVICE ORDER No. 120

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 30th day of April, A. D. 1943

It appearing, That, due to stoppage in the production of bituminous coal, the War Production Board has issued its Order No. M-316, generally prohibiting any person from accepting delivery from a railroad of any carload of bituminous coal if such person has, or would have after accepting delivery, more than 10

days' supply on hand; that the War Production Board has certified to the Office of Defense Transportation that it is necessary in the public interest and to promote the defense of the United States that transportation and delivery of bituminous coal be regulated in such manner as to give full effect to War Production Board Order No. M–316; and the Director of the Office of Defense Transportation has similarly certified to this Commission the necessity for appropriate action to give full effect to said order; the Commission is of the opinion that an emergency exists requiring immediate action and that common carriers by railroad will be unable in this emergency to transport bituminous coal so as properly to serve the public;

It is ordered, That:

Title 49—Transportation and Railroads

Chapter I—Interstate Commerce Commission

Subchapter A—General Rules and Regulations

Part 95—Car Service

§ 95.11. Bituminous Coal (a) Restriction of Delivery.—No common carrier by railroad subject to the Interstate Commerce Act shall deliver or place for unloading any carload of bituminous coal which is now in, or is hereafter placed in, a railroad car, whether such car is at the mine not billed for shipment or billed to a destination or in transit to a billed destination, or whether moving in interstate or intrastate commerce, unless and until the consignee, or person eligible to receive a carload of coal, under the terms of War Production Board Order No. M–316, shall certify to the railroad substantially in the form of appendix A to the effect that he has less than 10 days' supply of bituminous coal on hand and, if he is not the original consignee, that he will pay all obligations of the consignee to the consignor with respect to such coal. Each railroad shall deliver bituminous coal for the account of the consignor to any person having less than 10 days' supply on hand who furnishes such certificate, regardless of whether the coal is consigned to another person. As provided in War Production Board Order No. M–316, a railroad may rely upon the truth of statements contained in such certificate unless it knows them to be false.

(b) Bituminous coal moving all-rail to Canada.—Bituminous coal moving all-rail from the origin territory specified above to points in Canada shall not be transported outside of the United States until a certificate has been furnished to the railroad showing that the consignee has not, or will not have after receiving the

carload of bituminous coal, more than 10 days' supply of bituminous coal on hand.

(c) Exceptions.—The provisions of this order shall not apply to:

1519 (1) Coal specifically consigned for export (other than all-rail shipments to Canadian destinations);

(2) Coal specifically consigned for water movement after dumping from cars, but coal which has been loaded into cars after completion of the water movement shall be subject to this order;

(3) Coal specifically consigned for use aboard any vessel;

(4) Delivery to a consignee's siding without the certificate provided for in paragraph (a), if the railroad informs the consignee that delivery is made for the railroad's convenience and that the coal is still subject to diversion or reconsignment under this order. The consignee shall not unload any such coal without giving the certificate provided for in paragraph (a);

(5) Delivery to a connecting carrier;

(6) Any transaction which may be specifically permitted by the Interstate Commerce Commission upon recommendation of the Solid Fuels Administrator.

(d) Ten days' supply.—Ten days' supply includes all bituminous coal of any usable kind, grade or size on hand or available. Any person who has coal in transit (if not restricted by this order) or has coal located away from the place of consumption must take such coal into account in computing whether he has a ten days' supply, to the extent that such coal will be available or can practically be made available at the place of consumption within ten days. A ten days' supply shall be deemed to include any additional amount necessary to avoid delivery of a fraction of a carload. In the case of a retail dealer, ten days' supply shall be ten times the average daily tonnage delivered by the dealer during April 1943.

(e) Disregard of bill of lading—Diversion of shipments—Rates.—Where delivery is made to a person other than the consignee, all common carriers by railroad subject to the Interstate Commerce Act shall disregard the bills of lading covering carloads of bituminous coal to the extent that they shall deliver, without surrendering the bill of lading, such shipments of bituminous coal to persons, now on the carriers' credit lists, presenting evidence of eligibility to receive bituminous coal as provided in War Production Board Order No. M-316 and in this order. Such carriers may divert carloads of bituminous coal using the most available routes to expedite the movement and to prevent congestion; and the rates to be applied shall be the joint rates in effect from the original point of origin to final destination, and in

the absence of joint rates the lowest combination will apply, provided, that, upon receipt of a certificate of eligibility to receive coal and upon making delivery to an eligible receiver other than the original consignee the railroad shall notify the consignor immediately in writing of the name and address of the person to whom and the destination to which such shipment is to be delivered.

1520 (f) Payment of freight charges.—The person to whom delivery of such coal is made will pay to the railroad all applicable transportation charges, demurrage charges, and other accessorial charges.

(g) Reconsignment—Demurrage.—The operation of all reconsignment rules and demurrage rules with respect to the holding of cars at intermediate points between point of billed origin and the final destination for diversion, reconsignment, or disposition orders is hereby suspended with respect to the carload shipments of bituminous coal covered by this order.

(h) Suspension of tariff provisions.—The operation of all tariff provisions insofar as they are inconsistent with this order is suspended for the effective period of this order.

(i) Special and general permits.—The provisions of this order shall be subject to any special or general permit issued by the Director of the Bureau of Service, Interstate Commerce Commission, Washington, D. C., to meet specific needs or exceptional circumstances, upon recommendations from the Solid Fuels Administration for War of the Department of the Interior. (40 Stat. 101, Sec. 402, 41 Stat. 476, Sec. 4, 54 Stat. 901; 49 U. S. C. 1 (10)-(17).)

It is further ordered, That this order shall become effective 6 P. M. Eastern War Time, April 30, 1943, and remain in force until further order of the Commission; that copies of this order and direction shall be served upon all common carriers by railroad subject to the Interstate Commerce Act, upon all State commissions, and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register, The National Archives.

By the Commission, division 3.

[SEAL] W. P. BARTEL, *Secretary.*

A true copy:

W. P. BARTEL,
Secretary of the Interstate Commerce Commission.

1521 APPENDIX A TO SERVICE ORDER No. 120

Undertaking to be furnished in duplicate by person receiving coal.

In order to establish the right of the undersigned to receive delivery of bituminous coal under the restrictions of War Production Board Order No. M-316, the undersigned certifies to ---------- (Name of RR) and to the War Production Board that the undersigned has not, and will not have after receiving the coal identified below, more than a ten days' supply thereof as defined in said Order. The undersigned (if not the original consignee of the coal) agrees, in consideration of receipt of such coal, to pay all obligations of the consignee to the consignor with respect to such coal and to pay to said railroad all applicable transportation charges, demurrage charges and other accessorial charges.

---------- (Date)

---------- (Name of person receiving coal)

By ---------- (Signature of authorized official)

Identification of bituminous coal covered by this undertaking.

1522 *Plaintiff's Exhibit 145.*

SERVICE ORDER No. 120-C

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 4th day of June, A. D. 1943

Upon further consideration of the provisions of Service Order No. 120 of April 30, 1943, as amended, and good cause appearing therefor:

It is ordered, That:

Title 49—Transportation and Railroads

Chapter I—Interstate Commerce Commission

Subchapter A—General Rules and Regulations

Part 95—Car Service

§ 95.11 Bituminous Coal.—This section as amended is hereby suspended, effective immediately, until further order of the Commission.

It is further ordered, That copies of this order shall be served upon all common carriers by railroad subject to the Interstate Commerce Act, upon all State commissions, and upon the Association of American Railroads, Car Service Division, as agent of the railroads, subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register, The National Archives.

By the Commission, division 3.

[SEAL] W. P. BARTEL, *Secretary.*

A true copy:

W. P. BARTEL,
Secretary of the Interstate Commerce Commission.

1523 *Plaintiff's Exhibit 146*

SERVICE ORDER No. 120–B

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 1st day of June, A. D. 1943

Upon further consideration of the provisions of Service Order No. 120 of April 30, 1943, and of Service Order No. 120–A of May 3, 1943, suspending Service Order No. 120 until further order of the Commission; and it appearing that an emergency exists requiring immediate action:

It is ordered, That,

Title 49—Transportation and Railroads

Chapter I—Interstate Commerce Commission

Subchapter A—General Rules and Regulations

Part 95—Car Service

§ 95.11. Bituminous Coal.—This section. (Service Order No. 120) is hereby reinstated and made effective at 6:00 P. M. War Time June 1, 1943, until further order of the Commission, and is hereby amended by eliminating paragraph (b) dealing with bituminous coal moving all-rail to Canada, and paragraph (c) (1) is hereby amended to read as follows:

(1) Coal specifically consigned for export; and by adding the following exception to paragraph (c):

(7) Coal loaded in cars at the mine tipple on and after June 1, 1943, which mine has not suspended operations or which has

resumed operations since June 1, 1943, provided that the billing covering such cars will carry a reference to this amendment (120-B) "mine in operation" as authority that such cars of coal are exempt from the provisions of this order.

It is further ordered, That copies of this order shall be served upon all common carriers by railroad subject to the Interstate Commerce Act, upon all State commissions, and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register, The National Archives.

By the Commission, division 3.

[SEAL] W. P. BARTEL, *Secretary.*

A true copy:

W. P. BARTEL,
Secretary of the Interstate Commerce Commission.

1524 *Plaintiff's Exhibit 147*

JOHN E. JACOBS, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Your name, please?

A. John E. Jacobs.

Q. What is your connection with the Bethlehem Steel Company?

A. Assistant to the General Manager.

Q. Of what?

A. The Lackawanna plants of the Bethlehem Steel Company.

Q. In general what are your duties as such?

A. At the present time they are principally industrial relations.

Q. What have they been in the past?

A. Operation of the plants.

Q. How long has your chief work been industrial relations?

A. Since July 1st.

Q. Of what year?

A. 1945.

Q. Prior to that time——

A. In the operations.

Q. How long have you held your present position?

1525 A. Since October 1938.

Q. What are the chief raw materials that you use at the Lackawanna Plant in connection with the manufacture of steel?

A. Coal, iron ore, limestone, scrap, fuel oil, and refractories. Those are the principal ones.

Q. Are these raw materials stored there at your plant?

A. Yes.

Q. The South Buffalo Railway Company brings in a good many of these raw materials?

A. All of our ore and limestone, and part of our coal comes in by water. The balance of them come in by rail.

Q. What proportion of them come in by rail, would you say?

A. It is pretty hard to hazard a guess. The ore and limestone and coal are your three largest tonnage items, and all of the ore and all of the limestone come in by water, and at the present time a large percentage of the low-volatile coal is coming in by water.

Q. Can you give me some idea percentagewise in the matter of tonnage how much the South Buffalo brings in?

A. Possibly, as a guess, 40 percent.

Q. Has that always been true since 1938?

A. No; during the war years we couldn't get the vessels to bring the coal in, so that we had to bring all of our coal in by rail.

1526 It is only within the recent two or three months that we have been able to get vessels to bring low-volatile coal in by water, although prior to the war we had the same practice that we do today with respect to water shipments of coal.

Q. What about limestone?

A. Limestone has always come in by water.

Q. And the same way with iron ore?

A. The same way with iron ore.

Q. What about dolomite?

A. Most of that comes in by rail, although we do get an occasional cargo by water.

Q. How about scrap?

A. Scrap comes in both by water and rail.

Q. How is that divided, or how has it been divided approximately?

A. Prior to the war I would say we got at least 50 per cent of our scrap by water. Again since the war we have had difficulty in getting vessels to get the scrap down.

Q. During the way years most of it came in by rail?

A. I would say the greater percentage of it did; yes.

Q. I am interested only in that part which is coming in by rail in my questioning. These raw materials are stored for use, are they not?

A. Yes, some of them, and some of them go directly to the

1527 consumption points. For example, a certain percentage of

the scrap which is received goes directly to the point of consumption. Some of it goes to a stock pile where it is unloaded.

Q. Relative to the raw materials which are stored, what ones of them are taken to the blast furnaces?

A. Coming in by rail?

Q. Yes; I am confining this to the rail shipments.

A. Some refractories, some coke. It is not taken there to be stored, however. It is taken there to be consumed. There is nothing taken to the blast furnaces for storage.

Q. I mean for use. I may want to qualify my question or elaborate on it. I said I was interested only in the materials that come in by rail. It would be more accurate for me to say, I believe, that I am referring to the raw materials which go to the blast furnaces, which have been stored and which are transported by the South Buffalo in connection with the shipment to the blast furnaces for use.

A. From a storage location?

Q. Yes; from storage.

A. That could be refractories. It could be coke.

Q. Any of the iron ore?

A. No.

Q. That is not brought from storage?

1528 A. Not at the present time.

Q. Has it been in the past few years?

A. Yes; in the past few years we did have some ore that was stored down in the lower part of the field, because we did not have enough capacity on our ore docks to take care of it.

Q. What about the limestone?

A. The limestone is stored right on the ore dock. The South Buffalo I don't believe gets into that.

Q. At any rate, there are raw materials in connection with the transportation of which to the blast furnaces the South Buffalo participates in?

A. A very, very small percentage, because our ore docks are located adjacent to the blast furnaces. They are unloaded directly from the vessel to the dock, and then they are taken over by the ore bridges over to our Larry cars and transported from there to the bins and to the blast furnaces. The South Buffalo does not have any occasion to touch them.

Q. Is there some that goes up on what I have heard described as the high-line trestle?

A. Yes; some coke goes up on the high line.

Q. The South Buffalo is connected with the transportation to at least that point, isn't it?

A. Only at the present time to the extent that that is coke
1529 brought in from the outside and not coke produced by ourselves unless the conveyor system breaks down.

Q. Now or in the past since you have had your present job in 1938, have there not been raw materials sent to the blast furnaces from that high-line trestle?

A. Prior to the time that we had the conveyor system for transporting the coke from the coke ovens to the blast furnaces, all of it had to be transported that way.

Q. How long has that been in?

A. It went in in about 1942.

Q. Are there any other raw materials that go up to the high-line trestle now?

A. A comparatively small tonnage of sintered ore and some turnings and borings.

Q. Just coke?

A. Coke and a comparatively small tonnage of sintered ore and some turnings and borings.

Q. And that is only when the conveyor does not handle it?

A. You are, of course, referring to the coke. When the conveyor does not handle it or in case we get into a period where are are not able to supply all the coke we need for our own consumption.

Q. Prior to the time that the conveyor was put in was all of that coke handled over the trestle?

A. Yes; it was.

Q. When that was the system will you state whether or not it was important that that coke be moved up there with regularity?

1530 A. Yes; it had to be moved up there with regularity.

Q. Why was that?

A. Because that is one of the raw materials used to produce pig iron. That is the source of fuel in your blast furnaces.

Q. You have to have that going up to keep your blast furnace going?

A. You have to keep a sufficient supply in your bins to take care of your daily requirements.

Q. And that is true now when for one reason or another the conveyor belt does not handle the coke?

A. It is very rarely, however, that that happens.

Q. It does happen?

A. It does happen; yes. Any piece of mechanical equipment will break down.

Q. In the manufacture of steel in general what occurs at the blast furnace?

A. You add iron ore and limestone together along with coke as a source of fuel, and you blow air into the furnace and from the bottom of the furnace you tap slag and metal.

Q. On separate containers?

A. At separate times from separate locations of the furnace.

Q. Where does most of the molten metal go from the blast furnaces?

1531 A. To our various open-hearth plants.

Q. How many of them do you have?

A. Three.

Q. Will you give us in general the location of those three?

A. No. 3 Open Hearth is south and west of the blast furnaces; No. 2 Open Hearth is north and east, and No. 1 Open Hearth is almost directly east. Nos. 2 and 3 Open Hearths are approximately one mile from the scale on which the hot metal is weighed, and No. 1 Open Hearth is approximately one and a half miles.

Q. Does the South Buffalo move that hot metal from the blast furnaces to the open hearth?

A. They do.

Q. Is it important that hot metal be moved promptly?

A. Not necessarily promptly, but regularly.

Q. Within what time after pouring the hot metal will it be moved?

A. Do you mean within what time the metal is cast from the furnace?

Q. Does the metal go into ladles?

A. From the furnace into ladles.

Q. Say that a ladle is filled when should it be moved?

A. We would like to have that metal at the open hearths 2 and 3 within an hour from the time it is cast, and we would like to

1532 have it at No. 1 Open Hearth within an hour and a half.

Q. Why is that?

A. Hot metal—we use the term "hot metal" to refer to molten pig iron, and that is one of the raw materials from which steel is made. We have so many furnaces that are casting at regular intervals. We have refractory-lined reservoirs that hold that metal in its molten state at each of the three open hearths, and we like to keep sufficient metal in those reservoirs to meet our requirements of the steel-making furnaces.

Q. What is the consequence if there is not a sufficient supply on hand?

A. You just can't make any steel if you don't have any hot metal to add to your steel-making furnace.

Q. What about the importance of getting that hot metal out of the ladles?

A. Obviously when you have any molten metal which freezes you have a certain amount of freezing of that metal to the sides of the vessel which is carrying it, and that is known as skulling. We like to keep the amount of skulling in a ladle to a minimum for two reasons, first, the more metal skulls in the ladle the less molten metal you have for your steel-making operation. Secondly, the more metal that freezes in the ladle, the more frequently it must be taken out of the run, and rimmed, which
1533 means taking the skulls out of the ladle and repairing it.

Q. What arrangements now or in the past has the Steel Company had with the Railway Company, if any arrangements, to insure as far as possible the delivery of this hot metal from the blast furnaces to the open hearths, as you have indicated?

A. The only arrangement that I am familiar with is that we give them switching order on the movement of the hot metal to move it from the blast furnaces to the open hearth, and it moves with regularity because we have six furnaces in operation at the present time. Some of those furnaces cast every five hours, some of them cast every six hours.

Q. Is that schedule known to the Railway Company?

A. Yes; it is.

Q. Do you expect the Railway Company to move that metal promptly; that is, within the time that you have indicated?

A. We do.

Q. And is that done?

A. I would say that it is, because I have heard no particular complaints that we haven't had our hot metal moved from the blast furnaces to the open hearth, and I am sure we would have heard of it had we not had it done.

Q. In general what happens at the open hearths in the steel-making process?

1534 A. In the open hearth you mix scrap, limestone, and molten pig iron together in an open-hearth furnace, apply temperature, get it all in a molten condition, add ferro-alloys, and finally tap out a heat of steel.

Q. Into what?

A. Into another ladle.

Q. And where is that product sent?

A. That ladle is just carried from one side of the pit to the other with a crane, and the metal is poured from a nozzle in the bottom of that ladle into what are known as molds.

Q. Who moves that mold or ladle?

A. A crane.

Q. Whose crane?

A. The Bethlehem Steel Company's.

Q. The South Buffalo has nothing to do with that?

A. No; they have nothing whatever to do with that.

Q. Proceed.

A. After the material has solidified in the molds, our narrow-gauge railroad pulls those molds to the various blooming mill soaking pits. They may stop at a stripper in transit to be stripped and have the molds taken off the ingots and ultimately delivered to the soaking pits of the blooming mill.

Q. Who makes the moves that you have just described?

1535 A. The narrow gauge.

Q. That is the Bethlehem Steel Company?

A. The Bethlehem Steel Company.

Q. Not the South Buffalo Railway Company?

A. That is correct.

Q. Then after these deliveries are made what takes place next?

A. The steel is heated and rolled on a blooming mill.

Q. Then what happens?

A. Usually from a blooming mill you get what is known as a semifinished product. It is in the form of a bloom or a slab. Those products are then in some cases loaded onto narrow-gauge buggies and delivered to preparation mills, and in some cases they are loaded onto standard-gauge equipment where they are moved by the South Buffalo to a preparation mill. In some cases they are put on a standard-gauge equipment and moved to a consuming unit.

Q. The first move that you described by narrow gauge, that is by the Bethlehem Steel, of course?

A. That is correct.

Q. What about the third movement of standard gauge to a consuming mill?

A. That is by South Buffalo.

Q. What do you mean by a consuming mill?

A. Take for example our strip mill is a mill which uses

1536 slabs produced on a blooming mill; i. e., as the raw material from which the products of the strip mill are produced. The preparation beds for those slabs are right at the strip mill itself.

Q. Do any other mills come in that classification of consumer mill?

A. There are other mills are consuming mills; but we have a preparation yard where the steel is usually prepared prior to its being sent to the mill, where those semifinished products are rolled into other sections.

Q. What is the nature of this preparation?

A. Well, primarily it is a scarfing torch which takes the defects out of the surface, used to remove defects from the surface.

Q. I think you have stated that your movements then to the consuming mills which you are talking about now are made by South Buffalo?

A. That is correct.

Q. Mr. Jacobs, I would like to go back to the procedure in the high-line trestle. You have described the movement of coke up there to the blast furnaces. Are there different types of coke which are moved up there?

A. When you say "different types," I am not certain what you are referring to. Are you speaking of different sized or dif-

1537 ferent grades, or just what are you talking about?

Q. It might be either; yes. That is, all coke for your purpose is not interchangeable; is it?

A. We like to size our coke so that we don't use sizes indiscriminately.

Q. Well, taking the matter of size in moving up the coke on the high-line trestle, do you have a particular order at any time that you desire to be followed in which that coke is to be delivered?

A. That could possibly be, although I am not familiar with whether or not the blast furnace would order it in that manner or not.

Q. You don't know about that?

A. I don't know; no.

Q. Mr. Jacobs, in the Steel Company property west of the Hamburg Turnpike, is it not true that there are instances where the track owned by the South Buffalo Railway Company and the track owned by the Bethlehem Steel Company join?

A. I am not sure that I can answer that question for you.

Q. Do you know anything about the placing of brass plates on the track at or near the rails and the ties?

A. I knew that was done.

Q. Did you have anything to do with that?

A. No, sir! I did not. I knew it had been done; yes.

1538 Q. Have you seen those plates?

A. No, sir; I haven't seen them.

Q. Who reported it to you, do you recall?

A. Our Chief Engineer told me that it had been done.

Q. Who was he?

A. Mr. Eckhardt.

Q. Chief Engineer of the Bethlehem Steel Company?

A. Of the Lackawanna plants of the Bethlehem Steel Company.

Q. And do you recall whether he reported that they were placed at the point of the junction of the rails?

A. No; I don't recall him having told me anything about that.

Q. Are you able to state the miles of trackage owned by the Bethlehem Steel Company west of the Hamburg Turnpike?

A. Yes, sir.

Q. What is that mileage?

A. As of July 1st, 1940, the mileage of broad-gauge track owned by Bethlehem Steel Company west of the Hamburg Turnpike was 58.06 miles.

Q. And the narrow gauge?

A. The narrow gauge as of the same date was 12.93 miles.

Q. And what is the area of the Steel Company's property west of the Hamburg Turnpike?

A. 1027 acres.

1539 Q. And do you have the frontage owned by the Steel Company on the Hamburg Turnpike; that is, on the west side of the Hamburg Turnpike?

A. 12,157 feet.

Q. The Steel Company has a car dumper for coal cars, has it?

A. Yes.

Q. Will you tell us generally how that operates?

A. Just as the word implies, it is a portion of track on which a car is placed and fastened down to the rails, and the dumper turns over and the coal runs out of the top of the car.

Q. Does the South Buffalo Railway Company deliver coal to that dumper?

A. They deliver coal to the coal yard.

Q. What happens to it there?

A. Then we have an iron mule for pulling it up to the dumper and dumping it.

Q. Do you have occasion to reload that coal in cars?

A. Very infrequently now. We used to have occasion to reload it quite regularly, but since we put in the additional facilities at the coal-handling yard——

Q. What are those facilities?

A. They are conveyors for transporting coal to and from the dumper to stock and back from stock to the crusher and conveyor bins.

1540 Q. That conveyor breaks down sometimes, does it?

A. Not very often, because we have a series of conveyors. We do not limit ourselves to a single conveyor. We have conveyors at various angles, so that if one does break down you can go to another pile.

Q. How long ago were those installed?

A. I will have to refresh my memory on that.

Q. About when?

A. I would say approximately 1942 or 1941; something like that. I don't know whether I have that date here or not [refer-

ring to paper]. It is around 1942. I don't have the exact date here.

Q. Prior to the time the facilities were put in did you reload that coal in cars?

A. Not all of it. We did reload some of it in cars.

Q. Would that then be transported by South Buffalo?

A. No; that would be taken from that location to the car dumper with our iron mule. However, the South Buffalo had to place the cars there for reloading.

Q. In connection with the placing of cars for reloading, do you know whether or not the Bethlehem Steel paid the South Buffalo for that placing?

A. Yes; it did.

Mr. CRAIG. Your witness.

1541 Cross-examination by Mr. BROMLEY:

Q. With regard to the movement of hot metal, you said, did you not, that the Steel Company gave a written order to the Railway Company?

A. Yes, sir.

Q. When the Steel Company was ready to have the cars moved? Is that when the written order is delivered?

A. I believe it is today. At one time we used to cover that by a blanket order for the entire 24-hour period. However, I believe since that time that has been changed to giving the order to the Railway at the time the delivery is requested.

Mr. CRAIG. May I inquire when that change was made?

The WITNESS. I don't recall the exact date.

Mr. CRAIG. Can you give the year?

The WITNESS. Possibly a year ago.

Mr. CRAIG. Thank you.

By Mr. BROMLEY:

Q. It is the fact, isn't it, that the actual time of movement is determined by the Railway Company and not by the Steel Company?

A. That is correct.

Q. All the Steel Company does is to give the order and its
1542 carrying out is up to the Railway Company, isn't it?

A. That is correct.

Mr. BROMLEY. That is all.

Mr. CRAIG. That is all.

1543 *Plaintiff's Exhibit 148*

EXCERPTS FROM TESTIMONY OF JOHN E. JACOBS IN EX PARTE 128 IN APRIL 1945

Q. Did the war cause any change in the type of steel or steel products produced at the Lackawanna plant of the Bethlehem Steel Company?

A. It did.

Q. Will you explain to us what that change was?

A. Prior to the war our principal production were structural sheets, bars, rolls, roll accessories, semi-finished blooms, billets, slabs, hot and colled rolled sheets, and a small tonnage of plate.

Q. What were the largest items in that group of production, before the war?

A. Structural shapes, hot and cold rolled sheets and bars constituted about from 65 to 70 percent of our total production.

Q. Did you produce much shell steel then?

A. We produced some, but not much.

Mr. KUNKEL. What kind of steel?

Mr. ADKINS. Shell.

By Mr. ADKINS:

Q. Can you tell us how many tons of hot and cold rolled sheets, structural shapes and bars were shipped in June of 1941?

A. In June of 1941, we shipped 49,507 tons of structural steel, 35,672 tons of bars, and 49,698 tons of hot and cold rolled sheets.

1544 Q. How many tons of shell steel did you ship in 1941?

A. 4,980 tons of rolled steel billets and bars.

Q. Can you give us the tonnage of those same items, which you shipped in June of 1943?

A. In June of 1943, we shipped 28,157 tons of structural sheets, 36,018 tons of bars, 28,330 tons of hot and cold rolled sheets, and 13,533 tons of shell steel billets and bars.

Q. Were there any other steel products which were produced in large quantities of June of 1943?

A. Yes. In June 1943, our plate production had risen considerably.

Q. How many tons of plate were shipped in June of 1943?

A. In June of 1943, we shipped 58,814 tons of plates.

Q. How many tons of plates had you shipped in June of 1941?

A. In June 1941, we shipped 9,996 tons of plate.

Q. Where were the plates produced at the Lackawanna plant?

A. At our continuous Strip Mill.

Q. Could you give me the corresponding tonnage for December of 1944?

A. In December 1944, we shipped 21,770 tons of structural steel, and 19,910 tons of bars, and 26,487 tons of shell steel, billets and bars, 35,002 tons of plates, 31,272 tons of hot and cold rolled sheets.

1545 Q. How does the shipment of shell steel for December of 1944, compare with the shipment of shell steel of June 1941? How much increase was there?

A. That is an increase of 21,487 tons in December 1944.

Q. Is the production of the shell steel still at a high level?

A. It has increased even over 1944. In the month of March 1945, we shipped 43,257 tons of shell steel billets and bars.

Q. How many tons of structural steel did you ship in March of 1945?

A. 30,150.

Q. How many tons of hot and cold sheets?

A. 45,900.

Q. And how many tons of bars exclusive of the shell steel?

A. 26,071.

Q. How many tons of plates?

A. 34,250.

Q. Do these figures mean there has been a very large increase in the production of plate and shell steel since 1941?

A. Definitely.

Q. What is most of the plate being used for?

A. The bulk of our plate production is being shipped to the United States Navy and Maritime Commission, where it is

1546 used in the construction of ships.

Q. What determines how much shell steel the Bethlehem shall produce at the Lackawanna plant?

A. Our schedule was all allocated to us by the War Production Board.

Q. You cannot do anything about it?

A. Nothing, but produce it.

Q. This production of shell steel, does it require more handling than your other particular prewar products?

A. Yes, it does.

Q. Will you explain why?

A. Well, take for example, structural sheets. Structural shapes are rolled, in one case, direct from the ingot to the finished product in the mill. The finished product is then transported by conveyor lines, roller lines from the mill to what is known as our structural shape yard, where the necessary preparation is done on the thermoces, and at that point the material is loaded into cars for out-bound shipment. That means that the only railroad movement required on that product is at the time it is loaded for out-bound shipment.

Shell steel, on the other hand, in several instances, requires a varying number of moves. For example, shell steel billets are broken down from ingots in the blooming and billet mills.
1547 From there they must be loaded onto railroad cars and be transported to the preparation yards where they are unloaded, and surfacing defects removed. They are then reloaded into the railroad cars for out-bound shipment.

In the case of heat treated shell steel bars, after the billets are rolled, they are transported to the preparation yard where the billets are prepared. They are then reloaded and then transported to the Bar Mill, where the bars are rolled. The bars are then reloaded into a railroad car and transported to the Strip Mill where they are annealed, and again they are reloaded unto railroad cars and are transported to the Bar Mill where the bars are unloaded.

Q. What effect does that necessarily have for the additional handling of cars. Does that increase your requirement for service by the South Buffalo Railway?

A. It certainly increases the number of shipments required per ton of shipment.

Q. During June of 1943, was the new Bar Mill always able to take the billets being moved to it from the billet plant?

A. They were not.

Q. Why not?

A. When the Bar Mill was designed, it was designed to take care of our normal peacetime distribution of business.

With the increase in shell steel tonnage, which required
1548 preparation prior to shipment, the facilities at the Bar Mill billet yard were not ample to take care of the large increase in tonnage, which required surface preparation.

Q. And what is the result of that situation? What happened to the billets on the way to the Bar Mill?

A. The result was the billets had to stand on cars until we were in a position to unload them. We did not have enough space at the Bar Mill billet yard to take care of all the billets shipped to the yard.

Q. Why did you not store the billets at the producing mills until the Bar Mill was ready to take them?

A. There is not a sufficient floor space. If you attempt to store billets there, you would have had to shut down the mill.

Q. And that would curtail the tonnage which you were expected to produce?

A. That is correct.

Q. Has anything been done to relieve the situation?

A. Yes, we built a billet storage, which is served by the crane runway, on which we have two cranes.

By Mr. ROBISON:

Q. At the Bar Mill?

A. Yes.

By Mr. ADKINS:

Q. That has been done since June, of 1943?

1549 A. Yes, sir; it has.

Q. When was that work started?

A. The work was actually started in April 1943

Q. When was it finished?

A. It was put into operation July 3, 1943.

Q. Does that mean then there is no longer any need to delay billets in transit to the Bar Mill, or keep them on cars until the Bar Mill could take them?

A. That is correct.

Q. The Bar Mill is able to handle billets as fast as they are produced? And shipped to it?

A. Yes; that is correct.

Q. So that the situation which you described as existing in June of 1943 with respect to the billets, has been completely eliminated?

A. That is correct.

Examiner BUISLEM. As of what date, was that completed?

The WITNESS. July 3, 1943.

* * * * * *

By Mr. KUNKEL:

Q. Do I understand your testimony, Mr. Jacobs, to indicate that prior to the building of the billet storage yard at the Bar Mill, that you were called upon to use railroad cars to store billets?

A. Well, let me put it this way; we could not accept de-

1550 livery of the billets as fast as they were produced and loaded on the cars so that they had to stand on the cars until we could unload them.

Q. And you could not store them at the origin?

A. No, sir.

Q. And therefore you did have to call upon the South Buffalo to give you car storage, didn't you?

A. We didn't ask for it in that way. We loaded the billets on cars and consigned them to a destination, and we were not in a position to accept delivery at the destination as promptly as they were delivered there.

1551 *Plaintiff's Exhibit 149*

EDWARD F. ENTWISLE, called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. CRAIG:

Q. Will you please state your connection with the Bethlehem Steel Company?

A. I am the General Manager of the Lackawanna Plant.

Q. How long have you held that position?

A. Since November 1936.

Q. Who was your predecessor in that job?

A. Mr. Timothy Burns.

Q. And he is deceased, is he not?

A. That is correct.

1552 Q. Had you been connected with the Bethlehem Steel Company prior to the time you took over your present position?

A. Yes, sir.

Q. Will you tell us about that?

A. From 1914 to 1916 at the Sparrows Point Plant, 1916 to 1928 at the Steelton Plant with the exception of an intervening period of about nine months in 1917, when I was at the Lebanon Plant. I returned to Steelton January 1st, 1918. I went to the Bethlehem Plant in 1928. I came to the Lackawanna Plant in May 1936, as Assistant General Manager, and was made General Manager in November 1936.

Q. What position did you hold at the Bethlehem Plant where, as I undersand it, you went in in 1928?

A. I was superintendent of the Saucon Division.

Q. What is the Saucon Division there?

A. The Saucon Division is the steel producing and rolling operation for structural materials. It is one of the larger tonnage divisions of the Bethlehem Plant.

Q. Who appointed you manager of the Lackawanna Plant?

A. Mr. Quincy Bent.

Q. Will you state if you discussed with Mr. Bent the duties that you were to perform as manager of the Lackawanna Plant at or prior to your appointment?

A. No; I did not. I assumed and Mr. Bent assumed also

1553 that I knew enough of what the duties of a general manager were to perform them.

Q. Did you discuss with anyone else the duties that you were to perform as General Manager of the Lackawanna Plant?

A. May I say this? It may make it a little clearer in your mind. For the period that I was Assistant Manager of the Lackawanna Plant I really was acting General Manager of the plant because Mr. Burns was sick and was not at the plant during any of the period that I was here, so that I was in effect acting General Manager of the plant for that six- or seven-month period, and then was officially made General Manager. Shall I answer your question

as to whether I discussed with anyone what my duties were? I probably did so with the various superintendents of the plant. I think it would be unlikely that there were no discussions that helped teach me what the duties of a general manager were if I didn't already know them.

Q. When you came to the Lackawanna Plant as Assistant General Manager in May of 1936, did you have a discussion at that time with Mr. Bent, or anyone else concerning your duties?

A. No.

Q. When you came to the Lackawanna Plant what did
1554 you find to be the situation relative to whether or not the General Manager exercised any supervision over the South Buffalo Railway Company?

A. I do not mean to be evasive at all, Mr. Craig, but I do not know exactly what you mean by "supervision." If you mean did I assume that I had authority to make a final decision on what the South Buffalo Railway Company should do or not do, no; I never exercised any such supervision. I did exercise supervision to the extent that I felt entirely free to offer such advice and counsel to the superintendent of the South Buffalo Railway from the standpoint that both of us were companies owned by the Bethlehem Steel Corporation. I had an organization which was much larger than the South Buffalo Railway. I had a lot of highly qualified and highly paid talent in it, and I felt entirely free to offer suggestion for improving the mechanics of the operation of the railroad.

Q. Will you explain what you mean by the mechanics of the operation of the railroad?

A. Well, for instance, if I thought that the Railroad could operate more economically by the use of Diesel locomotives instead of steam locomotives, I did not hesitate for a moment to suggest to the railroad that they ought to buy Diesel locomotives.

Q. Can you give us any other examples?

1555 A. I imagine there were plenty of other instances of a similar nature. For instance, if I would observe that a South Buffalo engine stood on a track some place and did nothing I certainly would tell the superintendent that I did not think his crew was doing a very good job of utilizing their time.

Q. Will you state whether or not you made an effort to correlate the operations of the Bethlehem Steel Company with the operations of the South Buffalo Railway Company?

A. Yes; to a certain extent I suppose I did.

Q. In what way would you do that?

A. Well, for example, I would try to make our requirements fit as nearly as I could with what the railroad would tell me they had in the way of available motive power. If they said they

thought they could operate with twenty locomotives on a turn I would look into my own operations to see whether we could fit our operations so that they could operate with twenty. If we could we would make our operations fit. If we could not I would ask Mr. Benning to put more locomotives on.

Q. Mr. Benning was the General Superintendent of the South Buffalo Railway Company?

A. Of the South Buffalo Railway Company.

Q. Is it correct to say that you were interested in in-
1556 creasing the operating efficiency of both the Steel Company and the Railway Company?

A. Yes; I think that is correct.

Q. And why were you interested in increasing the efficiency of the operations of the Railway Company?

A. Because they were a Bethlehem Corporation owned subsidiary, the same as the Company that employed me was. You can call that a big brother attitude, if you want to.

Q. That is, the stock of the Steel Company was owned by the Steel Corporation, was it not?

A. I don't know. I have always assumed that it was.

Q. Do you know who owns the stock of the Railway Company?

A. I do not. I assume it also is owned by the Bethlehem Steel Corporation.

Q. But you don't know?

A. No.

Q. What was your understanding as to the connection, if any, then between the Steel Company and the Railway Company?

A. That they both were subsidiaries of the same corporation.

Q. And as I understand it you felt that as General Manager of the Steel Company at Lackawanna, that you should do what you could to increase the operating efficiency of the Railway Company?

A. That is correct.

Q. And that was because you understood or were of the
1557 opinion that the Railroad and the Steel Company were part of one organization; is that correct?

A. I think that is correct. As I understand it, they are both part of the Bethlehem Corporation.

Q. As I understand you felt that it was part of your job to see that that did come to pass?

A. No; I didn't think it was part of my job. I knew that it was none of my business. They could follow my advice or not as they saw fit. I did consider it was part of my responsibility indirectly to the Bethlehem Steel Corporation through the Bethlehem Steel Company that if I thought I had any good ideas that would help the Railroad I felt free to offer them, realizing that

the railroad could do what ever they wanted to as to following the suggestion.

Q. That is, the suggestions you made, I understand, were made with a view of increasing the efficiency of the operations of the Steel Company and the operations of the Railroad Company?

A. Well, as far as increasing the efficiency of the Steel Company, understand, I was working on that all the time, entirely aside from any question of the South Buffalo Railway. You asked me whether I was working for the increased efficiency of the Lackawanna plants. I was always, but that was not
1558 necessarily the reason that I offered advice to the South Buffalo Railroad.

Q. What other reasons were there?

A. Just as I have stated, to help the South Buffalo Railroad to do a good job for itself.

Q. Wasn't the ultimate you had in mind to enable the Steel Company or the Railroad Company, or both, to make as much money as possible?

A. Certainly.

Q. And you were interested, were you not, in seeing that the Railroad Company did make money, if possible?

A. Yes; although I had very little to do with most of the things that the railroad makes money out of.

Q. Well, of course, I am limiting my question to the railroad operations in connection with the Steel Company.

A. That is right. That is the limit that I put on it.

Q. But with that limitation you were interested in seeing that the Railroad Company, if possible, prospered, were you not?

A. Certainly I was.

Q. Was it your understanding, Mr. Entwisle, that that line of procedure which you have described had been carried on by your predecessor as General Manager of the Steel Company?

A. I am not certain that I got the whole question. I think the answer is "Yes"—that is if I understood you.

1559 Q. Would you like the question read?

A. Yes.

(Question read.)

A. The answer is "Yes."

Q. Can you tell us the basis of that impression?

A. I think as much as anything from the frequency with which the railroad asked for advice.

Q. Of course, I am talking about the time prior to when you came to Lackawanna.

A. I do not know what transpired prior to that. You see I was in this unfortunate position with respect to succeeding Mr. Burns. I had no opportunity to be at the plant with Mr. Burns. Mr.

Burns was taken suddenly sick and I was put in. There was the job. I had to feel my way on everything. I did not have the opportunity of being Mr. Burns' assistant for a period of time to see how he had run the plant himself, and I had to take things as I found them.

Q. I think you spoke of the Railroad Company or its representatives coming to you or to the Steel Company for advice with some frequency; is that correct?

A. That is correct. They came to me and I went to them when I had anything to suggest.

Q. Could you tell us any of the particulars concerning which the Railroad Company sought advice?

1560 A. Well, that could have been in connection with the actual movement of cars from one destination to another, from one plant to another within the plant. Mr. Benning may have had a request—or even a car movement ordered—for doing something, and he might have wondered whether it could be done some other way, and he would ask me whether it was possible to rearrange what we were doing so that it would suit his convenience better. Where it was possible for us to do so we would do it. That frequently happened.

Q. That would be a request, I take it, that he was making of you?

A. Well, that is the kind of a thing I mean, when you ask me if they came to me for advice. They came to me for information probably might be a better way to state it. I think undoubtedly there were cases where they asked for advice, such as for example this matter of the Diesel locomotives. They may have come to me first and asked me what I thought about a Diesel locomotive.

Q. And how it would fit in with their operations?

A. No; I don't think that question would have been asked me. The question would have been asked me, did I think in general a Diesel locomotive was a more efficient prime mover than a steam locomotive.

Q. Did you ever talk with Mr. Benning concerning the
1561 rates of pay to be paid to employees of the South Buffalo Railway Company?

A. Yes; frequently.

Q. How would that come about?

A. He had men on the railroad doing substantially the same kind of jobs that I had men in the Steel Plant, and we would compare notes as to what were the proper rates of pay, either from his standpoint or from the Steel Company's standpoint, and we tried to keep those things in line with each other.

Q. What do you mean by keeping them in line?

A. We did not want to be in a position where we paid a locomotive engineer twice as much as the South Buffalo Railway Company did, nor did we like to see the South Buffalo Railway Company pay an engineer twice as much as we did.

Q. Why not?

A. Because it is hard to keep either organization satisfied if somebody else right alongside of them is making twice as much money for the same work.

Q. Did Mr. Benning make any recommendations to you concerning the rate of pay to employees of the Railway Company?

A. I would like to know what you mean by making a recommendation to me. If you ask that question with the idea that he made a recommendation to me and my approval finally
1562 fixed the rate, then my answer is "No." If it was a recommendation with respect to whether I thought what he was planning on doing was O. K., then, yes, I did.

Q. As a matter of fact, Mr. Entwisle, isn't it true that concerning the rate of pay to the employees of the South Buffalo Mr. Benning was not empowered to act without your approval?

A. Yes; he was. I think Mr. Benning—as a matter of fact I knew then and I know now that the Railway Company and Mr. Benning as its representative could follow my advice or not with respect to rates or anything else.

Q. You recall, Mr. Entwisle, do you not, that you testified in a matter pending before the Interstate Commerce Commission which is styled "In the matter of the Investigation of the South Buffalo Railway"?

A. Yes, sir.

Q. You testified on May 24, 1943?

A. Yes, sir.

Q. And this question was put to you: "Q. Well, did you control the rates of pay of the employees of the South Buffalo?" To which you answered "To the extent I approved Mr. Benning's recommendations; yes."

Q. Do you recall that testimony?

A. Yes.

Q. And that was correct, wasn't it?

1563 A. I think if I had done then exactly what I just now did to you, to qualify what I meant by the word "approval"——

Mr. BROMLEY. The word was "control," Mr. Witness.

Mr. CRAIG. That is in the question, but the word "approved" is in the answer.

Mr. BROMLEY. Go ahead. I am sorry. The answer is "To the extent I approved Mr. Bennings' recommendations: yes."

A. I think that answer at that time should have been qualified as I have just now qualified my answer to your last question. Both Mr. Benning and myself understood that he did not have to abide by my recommendations or approval or whatever you want to call them. I named it "approval" in there.

Q. This question was put to you immediately after that answer: "Well, was Mr. Benning empowered to act without your approval?" And then you said "For organization within the plant?" And the questioner said "Yes," and you answered "Why, I would say probably he was not."

Do you recall that testimony?

A. Yes, sir.

Q. Was that correct?

A. No; I don't believe that was correct, as I answered it. I qualified it. I said "Probably" even then, because I probably was in doubt about it when I made the answer, but I don't
1564 think that answer is strictly correct, because I knew then as I know now that Mr. Benning was not bound by any recommendation that I made to him.

Q. Do I understand that the testimony which I read here before the Interstate Commerce Commission is not correct?

Mr. BROMLEY. I object to that as incompetent, because it is conclusional and repetitious. It has already been answered. Go ahead and answer it.

A. I think the last answer was incorrect. When I said "Probably he did not," I think that answer at least conveyed the wrong impression.

Mr. BROMLEY. I think you ought to show him the testimony, Mr. Craig, because he cannot possibly keep in mind how many answers there were and which answers there were.

Mr. CRAIG. The portion I read is found on Page 2465 of the transcript of the Interstate Commerce Commission matter which is Docket Ex parte No. 128, and started with the question "Well, did you control the rates of pay of the employees of the South Buffalo?" And it ends with your answer "Why, I would say probably he was not."

You may examine that——

A. I think if I had qualified this approval in the same
1565 way that I just qualified the word "approval" to you in this testimony, then there would not have been any question whether this answer was correct or not.

Q. You are referring to your first answer?

A. That is correct. If I had qualified this approval——

Q. That answer is——

A. "To the extent that I approved Mr. Benning's recommendations; yes."

Q. And do you want to qualify anything else?
A. The answer to this question here [indicating].
Q. Which answer is that?
A. "Why, I would say probably he was not."
Q. That is in answer to the question——
A. That he was empowered to act without my approval?
Q. Yes.
A. I think I answered that incorrectly.
Q. Now, did you confer with Mr. Benning or anyone else connected with the South Buffalo Railway in connection with personnel matters other than rates of pay?
A. What do you mean by personnel matters? Industrial relations?
Q. In connection with hiring people or discharging people.
A. I can't recall of an instance where I did. Personnel matters,
1566 such as you speak of, hiring or discharging, the South Buffalo Railway paid for part-time service in our industrial-relations department, and if he had any questions of that nature, he undoubtedly asked them of the Steel Company employee who was paid for furnishing that kind of information to the South Buffalo Railway. I might add this to that, that I think undoubtedly there were many times when Mr. Benning talked to me and told me that he was contemplating doing with respect to hiring some individual; and he might even have come to me and said, "You have a good man over in the steel plant whom I would like to hire and put in place of the man who is leaving me; do you think he is qualified?" I think there were plenty of discussions of that kind.
Q. Did he ever discuss with you matters relative to the hiring of some person not at that time employed by the Steel Company?
A. I wouldn't say that he didn't.
Q. You wouldn't say what?
A. I wouldn't say that he did not. I think it is probably likely that he did.
Q. And would he discuss with you the qualifications of such a person?
A. Yes.
Q. And ask your advice as to whether or not you thought that person would be a suitable employee of the South Buffalo?
1567 A. That is correct.
Q. Do you recall now that such occurrences did take place?
A. I can't remember any instance of it, but I certainly would not say that none had ever taken place, because I imagine they did take place.

Q. Without asking for specific cases, do you recall generally that that did take place?

A. I would say that it did.

Q. Mr. Entwisle, there are a number of communications addressed to you by Mr. Benning in which you are addressed as "General Manager, South Buffalo Railway Company."

A. Yes; I have seen them.

Q. Do you recall how those letters were answered if they were answered at all? Were they answered in writing, or were they answered otherwise?

A. Usually they were answered verbally, I think. Do you mean did I answer them assuming that I was General Manager of the South Buffalo?

Q. No; I am just asking you if they were answered.

A. If they were answered in writing they were answered on Bethlehem Steel Company's stationery, in which case my signature would have had below it, "General Manager." That was as General Manager of the Lackawanna Plant as shown by the letterhead, never as——

Q. That is your name would have the words "General Manager"?

1568 A. "General Manager," and never as General Manager of the South Buffalo Railway.

Q. Do you know if you have copies of any of those letters?

A. Yes; I know we have.

Q. You do have them?

A. Copies of the answers?

Q. Yes.

A. No; not unless they are in my file, which I think you have examined. I do not know of any. Generally speaking it was not necessary to answer in writing. The answers were so obvious usually that they could be answered "Yes" or "No."

Q. And that was done verbally?

A. Verbally.

Q. You spoke of our examining files, which we have done, and we at least have not found any written answers to those communications.

A. Then there evidently were none. I can't recall the answering of any of them in writing.

Q. But you did answer the communications if there were any questions therein?

A. Yes.

Q. Do you know David M. Petty?

A. Yes.

Q. How long have you known Mr. Petty?

A. I have known Mr. Petty since back in the twenties
1569 some time when I was at Steelton.

Q. And you left there in 1928, didn't you?

A. That is right.

Q. And in what connection did you know him at Steelton?

A. Mr. Petty was Superintendent of the electrical department of the Bethlehem plant.

Q. That is, he was an employee of the Bethlehem Steel Company?

A. That is correct.

Q. Did you come in contact with him in connection with your work and his work?

A. Only casually when I was in Steelton. Much more closely after I went to Bethlehem.

Q. What was the nature of the business contact at Steelton with him?

A. Largely a matter of getting his advice and opinion on electrical problems that we thought he was better qualified to answer than our own electrical engineer.

Q. You knew him at Bethlehem?

A. Yes.

Q. That is Bethlehem, Pennsylvania, of course?

A. That is correct.

Q. And what was his work there at that time?

A. He was still superintendent of the electrical depart-
1570 ment, but in addition to that he was what I think was called superintendent of service.

Q. And you had business contact with him there?

A. He and I were part of the same organization, reporting to the same General Manager.

Q. Well, did you have any individual contact with him in business matters?

A. Many.

Q. Along what line?

A. Getting work done by the service departments at the Saucon Division.

Q. Did that involve any transportation matters?

A. No.

Q. Well, can you tell me generally what it did involve?

A. For example, Mr. Petty had charge of the bricklayers. When we had brick work to do it was my job to contact Mr. Petty and see that the bricklayers were on hand to do the jobs as we had to have them done. He was in charge of the electrical department. We had a substation and an assistant electrical engineer at the Saucon Plant, and many of the things in connection with Mr.

Petty's work were common to both of us, and I saw Mr. Petty pretty nearly every day.

Q. Over how long a period, Mr. Entwisle?

A. Over the eight years that I was in Bethlehem.

Q. I am not sure whether I have this: At Bethlehem,
1571 when you were in contact with him almost every day, did you have occasion to discuss transportation problems with him?

A. I think yes, because I believe part of that time it was part of his duties to act as superintendent of transportation in the plant.

Mr. BRADLEY. You do not mean by that the South Buffalo Railway?

A. No; he did not have anything to do with the South Buffalo Railway.

Mr. CRAIG:

Q. This was at Bethlehem, Pennsylvania?

A. Yes.

Q. Not at Lackawana?

A. No; not at Lackawanna.

Q. Can you tell us how frequently the transportation problems were discussed between you and him?

A. I would think rather infrequently.

Q. Well, how infrequently or frequent?

A. Well, I wouldn't say never, because I do not suppose that would be correct, but there was very rarely an occasion to discuss them.

Q. Once a month?

A. Possibly. It may even have been less than that. There may have been some months when it was twice, or there
1572 may have been two or three months at a time when there was nothing.

Q. Of course, it would depend on when the problems arose, I suppose?

A. That is correct.

Q. Do you know Mr. Paul Tragesser?

A. Yes.

Q. How long have you known Mr. Tragesser?

A. I think that goes back into the twenties sometime.

Q. Where did you know him?

A. When I was at Steelton, sometime in the period between 1918 and 1928. I couldn't say when I first met him.

Q. In what capacity was he there?

A. He was in the traffic department of the Bethlehem Steel Company in Bethlehem.

Q. Would he come to Steelton on business?

A. I don't know whether I ever saw Paul in Steelton or not.

Q. Well, did you see him in Bethlehem?

A. Yes; I would see him in Bethlehem. Although the times when I saw him were usually just when I passed him in the office building. Any business I had with him probably was transacted more on the telephone than it was personally.

Q. What was the nature of the business you had with him while you were in Steelton and he was located in Bethle-
1573 hem with the Steel Company?

A. It would have to do only with railroad traffic. It might be a question like asking him to find out for us what a rate was from Bethlehem to some point, or asking for a routing on the cars that were to be shipped out of the plant.

Q. How frequently were those matters discussed with him?

A. Again I think it was only infrequently that I discussed them with him.

Q. Do I understand that when such problems did arise that you needed the help that you would communicate with him?

A. Either with him or with Mr. Crawford's office, the traffic department office. Sometimes Paul would answer the questions or possibly Mr. Crawford himself would answer them, but there certainly were conversations with respect to traffic matters that Mr. Tragesser and I had from time to time.

Q. Did you have business contact with him after you went to Bethlehem in 1928?

A. Yes; I am talking about that period. I don't recall——

Q. We have been talking about the time when you were at Steelton.

A. I am sorry. I was thinking more of the time in Bethle-
1574 hem than in Steelton. I suppose the same thing happened when I was in Steelton, but I think probably even less frequently than after I was in Bethlehem.

Q. But you had the same kind of business?

A. The same kind of business.

Q. At both Steelton and Bethlehem?

A. That is right.

Q. In the latter part of 1939 or the early part of 1940, you had word from Mr. Quincy Bent concerning what to do or not to do in connection with the South Buffalo Railway Company; didn't you?

A. Yes.

Q. Will you give us that conversation to the best of your recollection, the substance of it? Well, first, when did you get it, do you know?

A. I think in the latter part of 1939. I am not too definite on when that date was. You mean the substance of the conversation with Mr. Bent?

Q. Yes.

A. It was to quit offering the South Buffalo Railroad any advice or have anything to do with it other than I had to contact them in getting cars moved.

Q. Is that all?

A. That is all. That is the substance of the conversation. That is what you asked for.

Q. Well, do you recall any more of the details as to what
1575 was said?

A. I don't think there were any other details. That was the conversation in substance, and that ended it.

Q. That is all you remember of that conversation?

A. That is right.

Q. Did you ask him why the instructions were being given?

A. No; I don't believe I did.

Q. Did he offer any explanations as to why they were being given?

A. No.

Q. What, if anything, did you do pursuant to that conversation with Mr. Bent?

A. I instructed all of my own staff to do exactly the same thing, to lean over backwards, if necessary, to make certain that any contracts they had with the South Buffalo Railroad were only in connection with the necessary movement of traffic that had to go on, of course, all the time.

Q. From your standpoint did that involve a change in the method of operations between you; that is, the Steel Company, and the Railway Company.

Mr. BROMLEY. I object to that as incompetent because conclusional.

The WITNESS. Would you mind reading that question?

(Question read.)

1576 The WITNESS. The only change was——

Q. Pardon me, were there changes involved?

A. Do you mean in the method by which the railroad did their business or the method by which we ordered cars, or what not? There was no change in that.

Q. Were there any changes?

A. It was a change when we stopped offering advice to them. I would say that it was a change; yes. To that extent it was a change.

Q. Well, as a result of a change or changes which you have described, are you able to express an opinion as to whether or not the service which the Steel Company got from the South Buffalo was any different from what it had been prior to that time?

Mr. BROMLEY. I object to the form of the question as incompetent, because calling for a conclusion.

The WITNESS. Do you want me to attempt to answer it? The first thing I would have asked, Mr. Craig—let us assume, for instance, the instructions that I had issued to my own staff with respect to hands-off policy had occurred on December first, did I find any change on December second? Or do you mean a year after or two years after or three years after?

Q. Well, at any time.

1577 A. The reason I asked the question, Mr. Craig, is that almost immediately following that time war business came along and it just set the plant on its head as far as production requirements are concerned, and I don't believe it is fair to make a comparison between, say, 1939 and 1941, or even the latter part of 1940.

Q. Well, regardless of the reason for the moment, did you find a change in the matter of service rendered to the Steel Company by the Railway Company?

A. I still don't think it is a fair question. With respect to an operation that was exactly the same under all conditions, whether it was in a busy period or not a busy period; no, there was no change.

Q. In the hearing before the Interstate Commerce Commission to which reference has been made previously you testified on May 18, 1943. Beginning at page 1745 of the transcript the question was put to you "Have you found that the service which you get from South Buffalo is any less satisfactory since 1939 than it was prior to that time?"

"A. I would say it is less satisfactory, but I do not think it is quite fair to make a comparison between the two periods. At the present time we have been very much busier than we were prior to 1940. The war business has changed the character of our operations to a point where we are very much busier than we have

1578 been, to begin with, in total volume, and the change in the nature of our use of our product has been such that it has taken a proportionately larger amount of railroad service than we required in the period prior to 1940, and when you take all that into account, I think it is a little unfair to make a direct comparison between those two periods. We do have occasion to complain to the railroad as to the service they render to us. Lots of times it is not felt it is what we would like to see it, and we complain about it, but I will say this: I think that the officers of the South Buffalo Railway have exercised their best efforts in trying to do the kind of a job that we try to explain to them we need."

You recall that testimony, do you not?

A. Yes.

Q. And that is correct, is it not?

A. That is correct. Both that answer and the one I have just given you are correct.

Q. Did Mr. Bent ever call you after the conversation you have related concerning that which I think you referred to as the hands-off policy?

A. I don't recall that he has specifically called me on that subject. I would not say that the general subject has not been discussed since that time.

Q. Mr. Entwisle, do you know when the Bethlehem Steel
1579 Company purchased what is known as the Northern Operating Company property?

A. I wouldn't remember the date, but I remember the instance.

Q. Well, approximately when?

A. It was some time since I have come to Lackawanna; some time between 1936 and 1939, I think. It may have been in 1939. I don't remember.

Q. Are you acquainted with and do you recall the purpose of the Steel Company making that purchase?

A. Yes.

Q. What was that?

A. They wanted to build a new bar mill on the property adjoining that, and we had to have the property to build our plant on.

Q. Did you ever discuss the purchase of this property, or the prospective purchase with anyone connected with the South Buffalo Railway Company?

A. Yes; I discussed it with Mr. Benning.

Q. What was the substance of those communications or conferences?

A. Well, I found Mr. Benning apparently had had the subject up with the owning railroad, which I believe is the Nickel Plate Railroad, even prior to the question that was raised when
1580 we decided that that particular site was the place on which we had to put our new bar mill. At some time previous to that there had been a question come up with respect to the policy of putting a plant on another piece of property in which, as I recall it, Mr. Benning would have liked to have been in position to have owned the Northern Operating Company property, and I think he already had had up with the Nickel Plate Railroad the question of purchase.

Mr. BROMLEY. By whom?

The WITNESS. By the South Buffalo Railway, I think, because, as I recall his reasons for wanting to own it were purely from the standpoint of having more room for the South Buffalo in which to operate at a point well beyond the point where we finally

put the bar mill improvement. He evidently had been in negotiation with the railroad with respect to the purchase.

Q. To your knowledge had he been communicating with the owners of the Northern Operating Company property prior to the time that he knew that the Steel Company was interested in its purchase?

A. Yes, I am quite certain that was before we had any idea of locating the bar mill improvement on the particular piece of property that we finally selected.

1581 Q. Can you give me any more about the communications or conversations you had with Mr. Benning concerning the purchase of this property?

A. I think what I have said covers pretty closely everything that was discussed. To restate it briefly again, I found that Mr. Benning had discussed the possible purchase by the Railway Company of the property in order to give him what he wanted, provided a plant was put on a certain location south of our Seneca Plant, so that when the question finally came up that we were going to build a bar mill project on this other piece of property, he was already in position of having had some negotiations with the Nickel Plate Railroad looking for the purchase of the property, all of which I suppose helped us in our approach to the Nickel Plate to finally buy it.

Q. Helped you?

A. Helped us.

Q. In what way?

A. In that we found that apparently they were willing to sell it if somebody wanted to buy it. I think it probably shortened the over-all negotiations to have the information that Mr. Benning had already developed, for whatever purpose he had developed it.

1582 Q. After Mr. Benning ascertained that the Steel Company was interested in the purchase of the property, do you know whether or not the Railway Company ceased its negotiations for the purchase?

A. I don't know.

Q. Will you state whether or not you came across any further activity on the part of the South Buffalo Railway Company or any endeavor on its part to purchase that property?

A. Not that I know of.

Q. The owners of the property never mentioned it?

A. Not to me. Understand, I did not negotiate the purchase myself.

Q. I am just asking about what you know.

A. All I did was to make a recommendation that we wanted to purchase that property, and some part of the Steel Company or-

ganization in the Bethlehem plant actually made the purchase and transacted the business with the Nickel Plate Railroad. I did not have anything to do with that.

Q. Did you have any more conversations with Mr. Benning concerning the purchase of the property either by the South Buffalo or by the Steel Company after you apprised him that the Steel Company was interested in its purchase?

A. I don't recall any, and I can't recall any occasion for it.

Q. You don't recall any such conversation?

1583 A. No, I don't recall any.

Q. Mr. Entwisle, on occasion have you held the proxy for the South Buffalo Railroad Company stock owned by the Bethlehem Steel Corporation?

A. No.

Q. You have not?

A. No, not that I know of.

Q. Since Mr. Bent gave you instructions in what you referred to, I believe, as the hands-off policy, the instructions being given in the latter part of 1939, has there been any different procedure followed by the Steel Company when it has occasion to make complaints to the South Buffalo Railway Company in connection with the service rendered?

A. Yes, I think probably there have been. I think prior to 1940 complaints could and did originate with any one of the individual plants in the Lackawanna Plant. Since 1940 we have tried to make all of those clear through my office.

Q. When you say they originated with the—what did you say—with any of the plants?

A. With any of the plants within the Lackawanna Plant. Prior to 1939, for instance, if the superintendent of the structural repair shop or the superintendent of No. 1 Open Hearth had any

1584 complaint on South Buffalo service he used to take it up directly with the South Buffalo Railway.

Q. In what manner, writing or orally?

A. No, orally usually over the telephone. Since that time those complaints have been handled through my office almost exclusively as far as I know.

Q. How are they made now?

A. Verbally largely.

Q. Have you noticed any difference in the response to the complaints prior to 1940 and after 1940?

A. They did as they damned please before and they still do as they damn please. Excuse the words in the record. We complained before and we complain now on the kind of service they give us.

Q. What was their response? Were they more agile before or less agile in correcting the situation?

A. I don't think there has been any substantial change in that respect.

Q. About the same?

A. I think they probably have their problems that I don't know anything about.

Q. That is although the method of making the complaint is different now in that complaints are all run through your office——

A. I think we are much more careful how we make a complaint.

1585 Q. What changes have been made in that respect?

A. Well, we might previously have talked to the South Buffalo like you would to a brother, and now we talk to them like you talk to somebody that you have just been introduced to. It is a little more formal, but where we have a complaint we do not hesitate to make it. When we think we are entitled to service that we pay for, and the railroad does not perform it or even if they do not perform as quickly as we think they ought to perform it, we do not hesitate to call them and tell them that we don't think they are doing the kind of a job we think they ought to do.

Q. When you spoke to them before as if they were a brother, to carry out the figure, it was on the basis, was it, that you were all members of the same family?

A. No; I don't think it was on that basis. I wouldn't be surprised if the conversation may have sounded that way to some extent. The superintendents and yardmasters and assistant yardmasters are close to each other every day and know the specific problems, and I suppose the conversation was a little bit different than it is when it is finally passed through the General Manager's office.

Q. As far as substance is concerned, would you say it is the same now as it was prior to 1940?

A. Other than that it contains no advice what to do any
1586 more. I wouldn't say there wasn't plenty of advice offered to the South Buffalo as to what they ought to do previously. We don't offer advice any more. There is that difference.

Q. Are there any other differences?

A. I think probably prior to 1940 we may have transgressed the edges of the railway business that we had no business to, but I am quite certain we don't now.

Q. Can you give us any particulars of that trasgression in addition to what you have given?

A. I am trying to think of something that will develop the point that I am trying to make. I don't know whether I am being very successful in thinking of something or not. I would say this

could have happened prior to 1940 or prior to 1939, whenever the date was: The shipper in one of the various shipping departments had been pressed to get out a shipment of material, the customer was waiting for it; he was pressing us to get it out as fast as possible. The shipper would probably get hold of the yardmaster directly and tell him in no uncertain terms, by gosh, he had to go in there and get that car out because he had promised the customer it was going to be on the railroad by 10 o'clock that night. At the present time we wouldn't do that.

Q. The yardmaster was expected——

1587 A. At least the shipper expected him to listen to the request and in some way or other get a locomotive in there and put it out. At the present time instances of that kind are handled in an orderly routine manner, where the shipper issues the order and gives it to the yardmaster, and if it is a special shipment that requires special attention, then the shipper will ask my advice saying in effect "If it is proper, will you please tell the South Buffalo that you have a rush shipment you would like to get out?" And we pass that information along to the South Buffalo. Sometimes they pay attention to it and sometimes they don't.

Q. Prior to 1940 did you find that when the request was made in what I think you referred to as no uncertain terms, that it was carried out with alacrity?

A. Not with alacrity.

Q. With promptness?

A. I don't know that the final results were any different than they are now, to tell the truth. Maybe they were.

Q. You think the net result is about the same?

A. Having read that statement I made previously I still don't think that it is a fair comparison, because of the conditions. I am thinking in terms of what is going on and what has gone on for the last couple of years with respect to what our operations have been, and they are so different now from what they were in

1588 the period prior to 1939 that I don't think it is fair to make the comparison.

Q. That is you think if conditions prior to 1940 had been as they have been since then, that the situation might have been the same or about the same?

Mr. BROMLEY. I object to the form of that question as incompetent, because calling for a conclusion.

The WITNESS. I was going to give a qualified answer to it anyhow. I think that would depend on whether the South Buffalo Railroad has found in their organization the same deterioration of ambition to do something promptly that we have found in our own. If their whole organization has slowed up the way ours has,

I suppose the service would be worse even under the same conditions.

Q. Have you at any time considered or taken up the possibility of having the service which is presently rendered to the Steel Company by the South Buffalo Railway Company rendered by anybody else?

A. Have I ever considered it? You ask, have I ever taken such matter under consideration?

Mr. CRAIG. Read the question.

(Question read.)

The WITNESS. No.

1589 Q. The service has not gotten that bad, has it?

A. No.

Q. Do you know, Mr. Entwisle, how many miles of track, both standard and narrow gauge, that the Steel Company owns west of the Hamburg Turnpike?

A. Not exactly, no.

Q. Do you know approximately?

A. No; I don't even know approximately. I don't recall the figure. I have heard it many times, probably, but I don't recall.

Q. Do you know what additions have been made to the Steel Company properties, the physical properties, west of the Turnpike since the purchase by the Steel Company in 1922 of the Lackawanna Steel Company?

A. I know generally what they are. I don't think I could sit here and enumerate all of them from memory.

Q. And generally what are they?

A. Well, generally the changes that have been made since 1922 involve almost a complete replacement of all of the rolling mills. They involve a complete rebuilding and renovation of one of the open hearths. They include the building of a complete new open hearth. They include the rebuilding of three of the older blast furnaces. They include the building of an entirely new blast furnace that was built by the Defense Plant
1590 Corporation and later purchased by the Bethlehem Steel Company. They include the building of two new batteries of coke ovens. They include the rebuilding of three other batteries of coke ovens. If you are going back to 1922, it includes the building of five batteries of coke ovens, three of which have been rebuilt. It includes the building of a new byproduct plant at the coke ovens, and it includes the building of at least three rolling mills that were not replacements of old mills, and then their almost numberless expenditures of money for facilities such as a coke conveyor connecting the coke ovens with the blast furnaces, the building of a complete new coal-screening station, the extension of coal-storage facilities at the coke ovens, installation of

additional boiler capacity, the installation of additional electrical generating capacity, either replacements or added capacity in water pumping equipment, expenditures for the water lines, steam lines, the electric lines, and whatnot, for the distribution of those various commodities. That generally speaking is the general outline. This is west of the Hamburg Turnpike you are asking for only?

Q. Yes. Mr. Entwisle, Bethlehem does the routing of
1591 its shipments, does it not, which are to be transported over the line-haul carriers?

A. You mean the Bethlehem Steel Company or the Bethlehem office? Do you mean that the Bethlehem Steel Company does the routing, or do you mean somebody in the Bethlehem Traffic Department does it?

Q. Well, somebody connected with the Bethlehem Steel Company.

A. Someone connected with the Bethlehem Steel Company, as far as I know.

Q. That is, the South Buffalo has nothing to do with the routing of those shipments?

A. No; as far as I know they don't.

Q. And South Buffalo's compensation for taking your products from the Steel Company to the line-haul carrier is a matter between the line haul carrier and the South Buffalo, is it not? Perhaps I should say it is not a matter with which the Bethlehem Steel Company is concerned?

A. It is not anything that I am concerned with, and, as far as I know, no one in the Bethlehem Steel Company.

Q. Is it not true that your compensation from the Bethlehem Steel Company is determined in part under what has been referred to in this case as the incentive-compensation plan?

1592 A. That is correct.

Q. That is, you are compensated on a fixed amount plus——

A. Plus an incentive.

Q. And that incentive compensation is determined by the extent of profit which is made by the plant of which you are manager?

A. I suppose I have to answer that question, but we are usually very careful as to whom we tell what the basis of the incentive compensation is. Yes, it is a function of the profits that is the basis for my incentive compensation.

Q. That is, your incentive compensation is determined by the operations of the plant of which you are manager?

A. That is right.

Mr. CRAIG. Your witness.

Cross-examination by Mr. BROMLEY:

Q. At any time since you have been at Lackawanna have you considered it to be any part of your duties to see to it that the South Buffalo Railway Company did or did not make money?

A. To answer that question exactly the way you have asked it, I think the answer is "No."

Q. Do you mean by that that you want to qualify the
1593 answer, and if so, how?

A. You asked me whether it was my job to see that the South Buffalo Railroad made money. That involves a matter of what the South Buffalo Railroad's income was, and I had nothing whatever to do with their income.

Q. You indicated, as I understood you, that it was your understanding that the situation which existed between the Steel Company and the Railway Company during the period of time when Mr. Burns was general manager was substantially the same, or similar to that which existed when you were general manager prior to 1939. As a matter of fact, do you know anything about the relationship between the two companies prior to the time that you came here?

A. No; I do not.

Q. And if you left that impression in your answers to Mr. Craig, that was solely based upon your deduction of your relationship with Mr. Benning after you came here, was it not?

A. That is correct.

Q. In your testimony with regards to rates of pay what was the situation at the Steel Company's plant as to whether it had in its employ employees who performed the same type of work as was being performed by certain employees of the Railway Company?

1594 A. I don't think I understand your question, Mr. Bromley.

Q. I will withdraw it. Did the Steel Company, during the time that you have been here, employ employees of the same general class as the Railroad Company to some extent? For instance, does it employ engineers on locomotives?

A. Yes.

Q. Does it employ firemen?

A. Yes.

Q. Did it employ trainmen?

A. Not trainmen in the ordinary sense in which trainmen apparently is used on the railroad. We had switchmen, but we didn't—I suppose they perform the same duties that a trainman does. I don't know what the difference is between a trainman and a switchman, to tell you the truth.

Q. Then it is a fact, is it not, that the Steel Company had some employees that performed the same kind of duties as employees of the railroads, and all you meant by your testimony was that you wanted to see to it that the rates of pay paid to those similar employees did not differ?

A. That is correct.

Q. But you had no authority and no right to fix the rates of pay that the South Buffalo should pay its employees, 1595 did you?

A. No; I did not.

Q. In the answer which was read to you by Mr. Craig from page 1746 of your May 1943 Interstate Commerce Commission testimony, there appears this sentence: "I think that the officers of the South Buffalo Railway have exercised their best efforts in trying to do the kind of a job that we try to explain to them we need." Did you mean by that answer that you expected or demanded from the Railway Company any special or extraordinary services to which you would not have been entitled from any Railway Company?

A. No.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. Mr. Entwisle, I think you said that while you didn't know the situation that existed prior to the time that you came here as to the relationship between the Steel Company and the Railway Company, you deduced what the situation was?

A. That is correct.

Q. From what did you make that deduction?

A. Just from the way I found the operations being 1596 carried on.

Q. The way you found things being carried on was that there was a degree of supervision exercised by the General Manager of the Steel Company or others connected with the Steel Company over the Railway Company?

A. To the extent that I have described it in the previous questions.

Q. That is, your opinion was not just based on, as you saw it, pure imagination on your part?

A. No.

Q. It was based on what you observed in the operations; isn't that true?

A. That is right.

Mr. CRAIG. That is all.

Re-cross-examination by Mr. BROMLEY:

Q. You never observed anything so far as the operations were concerned during the time that Mr. Burns was General Manager, did you?

A. No; I had no opportunity for that. Let me qualify that, Mr. Bromley, because actually for the first six months that I was Assistant General Manager and acting in Mr. Burns' absence, he was still the General Manager of the plant, although he was
1597 not inside of the plant during that period.

Mr. BROMLEY. That is all.

By Mr. CRAIG:

Q. The situation we are discussing existed when you came here as Assistant General Manager, didn't it?

A. That is right.

Q. And continued during that period of about six months when you were Assistant General Manager, and then continued in the same way after you became General Manager?

A. That is right.

Mr. CRAIG. That is all.

Mr. BROMLEY. That is all.

1508 *Plaintiff's Exhibit 150*

JAMES D. DEWITT called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. CRAIG:

Q. Mr. DeWitt, what is your address?

A. 87 Southside Parkway, Buffalo, New York.

Q. What is your connection with the Bethlehem Steel Company?

A. Supervisor of employment.

Q. Where is your office?

A. In the main office building at Lackawanna.

Q. How long have you held that position?

A. Since March 1935.

Q. Have you done any work for the South Buffalo Railway Company?

A. We process men at the present time through the employment office to the extent of taking their picture for identification purposes.

Q. Is that all at the present time?

1599 A. And our Medical Department which is in the employment division gives these men their physical examination.

Q. And then reports are made to the South Buffalo?

A. No formal medical reports; no.

Q. What happens in connection with those examinations?

A. A man comes into our employment office and he brings an envelope with him addressed to the Medical Examiner. The examination is made——

Q. Addressed by whom to the Medical Examiner?

A. From the South Buffalo Railway Company office. An examination is made. The envelope contains their employment record, on which the Medical Examiner puts the height, the weight, and the color of the hair and eyes for quick recognition. This is also put on an employee's identification card which the man has in his possession, and this is inserted after his physical in our camera and a picture taken, and the man is given his records and returns to the South Buffalo Railway Company office.

Q. Do you know whether that record then is returned to the South Buffalo Railway Company?

A. The man returns all the records excepting the Medical Record with him after he has his picture taken.

Q. To the South Buffalo?

A. To the South Buffalo employment office.

Q. Do you do anything else?

1600 A. No, sir; we don't.

Q. In the past haven't you done more than that in connection with South Buffalo hiring?

A. Prior to the beginning of 1939 we would receive a requisition for workmen from our General Manager's office. If that requisition called for common labor, we would process the man through a physical examination, through the records, and then refer him to the foreman of the track department for his final acceptance. If the requisition called for a man that denoted a particular skill, he first had to be interviewed by the foreman in charge of the particular department of the South Buffalo Railway.

Q. This requisition came from whom?

A. I received it from the General Manager's office.

Q. The General Manager of what?

A. The Bethlehem Steel Company.

Q. For people to be employed by the South Buffalo Railway Company?

A. The works requisition for a man would have been made out by the South Buffalo Railway Company and would pass through the General Manager's office prior to the beginning of 1939. That was the procedure.

Q. I am having a little difficulty with that. What would come from the South Buffalo Railway Company to start this process?

1601 A. A form, 2714, I believe it is, a requisition for workmen.

Q. And that came from whom?

A. From the General Superintendent of the South Buffalo Railway.

Q. And went to whom?

A. The General Manager of the Bethlehem Steel Company.

Q. And then from the General Manager of the Bethlehem Steel Company——

A. It was forwarded to the employment office.

Q. That is to your office?

A. That is right, sir.

Q. I am going to ask you again, what happened after it got to you?

A. If the requisition called for track labor, which was about the only labor requisitioned, the man would be given a physical examination, processed through the records and referred to the foreman of the track division for final acceptance.

Mr. BROMLEY. What track division? Of what company?

The WITNESS. Of the South Buffalo Railway Company.

By Mr. CRAIG:

Q. And were there requisitions for other types of labor sent through that channel?

A. There would be other types of semiskilled help.

1602 Q. What, for instance?

A. For an engine man, for a boilermaker, machinist, roundhouse hostlers, trainman, which would be switchman. In the car shops there would be car repair men.

Q. Any others that you think of?

A. No, not just offhand. And track laborers.

Q. Did you make up records of your own on these men that were referred to the South Buffalo foreman for final interview?

A. Yes.

Q. And what did you do with those records of those individuals?

A. At that time those records were retained in my office.

Q. That is in the Bethlehem Steel Company office?

A. Yes.

Q. Can you tell us over what period of time this procedure which you have described was followed?

A. Well, it was in effect from 1935, when I went into that department until the first part of 1939.

Q. Wasn't there a time that you received compensation from the South Buffalo Railway Company for the work you did for it?

A. I always received a pay check from the Bethlehem Steel Company; never from the South Buffalo.

Q. You weren't on the South Buffalo payroll?

1603 A. Not to my knowledge.

Q. Do you know whether or not the South Buffalo reimbursed the Bethlehem Steel Company for the work which you did?

A. No; I have no way of knowing that.

Q. During this period that you describe from 1935, until the beginning of 1939, what percentage of the total work you did was done for or in connection with South Buffalo Railway Company personnel matters?

A. Well, I don't know just how many men we would hire a day, for instance, if that would be the question. I would say it would probably be a very small percentage.

Q. Well, can you give us an estimate?

A. Possibly three or four percent for a month's period or hiring.

Q. The remainder of your work, being 96 or 97 percent, was that all for the Bethlehem Steel Company?

A. Yes, sir.

Q. Did you receive any directions concerning a change in the matter of handling South Buffalo work, to be effective at the beginning of 1939?

A. Yes; I was instructed——

Q. By whom?

A. By my superior, Mr. Chauncey Baker, management representative at that time, that in the future I was to accept requisitions for workmen direct from the South Buffalo

1604 Railway Company, and that all men, including laborers, were to be first interviewed by a foreman of the division interested.

Q. The division——

A. The division of the South Buffalo Railway Company.

Q. That is the man would be interviewed first by the South Buffalo man, that is the head of the division, and then referred to you?

A. That is correct, sir.

Q. Then you would take the pictures and do the work?

A. The physical examination, and make out the formal employment papers.

Q. And then that information as I understand it goes back to the South Buffalo Railway Company?

A. Not at that time, sir. Those cards at that time were still retained in my office.

Q. I am talking about after 1939?

A. Yes.

Q. They were still retained by you?

A. That is right, sir. They were until September of 1941.

Q. Then what happened?

A. Then all employment records and all correspondence having anything to do with the South Buffalo was turned over to the South Buffalo Railway Company.

Q. Who ordered that?

1605 A. Mr. Baker.

Q. What did he say when he gave his orders?

A. Well, they had built a new building during that year, and that I was to turn over all their records to them.

Q. Up to that time you had kept all the records?

A. That is right.

Mr. CRAIG. Your witness.

Cross-examination by Mr. BROMLEY:

Q. Did you at any time have anything to do with fixing the rates of pay which these men whom you say you processed for the South Buffalo were to be paid by the South Buffalo?

A. No, sir.

Q. Was it your understanding that the South Buffalo was entirely free to refuse to employ any men that you interviewed and processed and sent over to them?

A. Surely.

Q. That was their business, was it?

A. They were doing the hiring of the particular man.

Q. That is the South Buffalo was doing the hiring?

A. The South Buffalo Railway Company; that is right.

Q. This photographing that you have described, was that

1606 something more than merely taking a picture of a man's face or the upper part of his body with an ordinary camera, and if so, what was it?

A. We have a small identification card, about 3 by 5 in size. It has the man's name, his Social Security number, his height, weight, the color of his hair and color of his eyes, and his signature thereon. There is a small corner blank in the upper right-hand corner. This card fits into a dual camera that we have. There is a picture of the card taken and also a picture of the man which is superimposed on the photograph of this particular card. He carries that for identification purposes.

Q. Is that special photographic equipment?

A. Oh, yes, indeed.

Q. And is there on the identification card a fingerprint also?

A. Yes, I neglected to say that there is a print of his right thumb.

Q. And that is photographed in this special equipment also, is it?

A. Yes.

Q. You have spoken of the employee's identification card. That card at all times was a South Buffalo card, wasn't it?

A. Yes, it is their own form, and that is returned with the man after we use it to take the picture of it.

1607 Q. You said, I believe, that even at the present time the Medical Examiner makes no report to the South Buffalo; is that correct?

A. Not to my knowledge. Of course, the Examiner reports direct to our Medical Department, not to anyone in the employment office.

Q. Isn't the purpose of the examination to see whether the man is in fit condition to work?

A. Yes, and where a man has some handicap the Medical Examiner immediately contacts the South Buffalo employment office by telephone and so reports.

Q. Does he likewise report to the South Buffalo when he finds the man fit for duty?

A. No; the employment record card has a place at the bottom for a rating. The Medical Examiner rates the man on the findings of the examination by marking on this card the passing rating B or C, if it is something that must be repaired, or D if it is physically unfit, and that information is returned to the South Buffalo by the applicant himself.

Q. Then all you meant by your answer to Mr. Craig was that the details of the man's physical condition as disclosed by him to the doctor are kept in the doctor's possession and not disclosed to the South Buffalo or anybody else; is that right?

1608 A. That is correct. The doctor's examination records are a confidential record. The rating would indicate whether he was fit to hire or not. There is no detail given.

Q. The reason that the full details of his examination are not given to the South Buffalo is because it is considered to be confidential information between the man and the doctor; is that it?

A. Yes; exactly.

Q. There is no other reason?

A. No; none at all.

Q. The doctor then always does certify to the South Buffalo Railway Company the man's condition, whether fit or unfit, and if fit whether he is in excellent, good, or fair condition?

A. That is right.

Q. So that the South Buffalo Railway Company has at all times received a report in this summary report from the doctor?

A. Immediately as soon as the man returns to them.

Q. Prior to 1939, is it the fact that the men who were tendered the South Buffalo for employment were interviewed in the first instance by your department?

A. Only the labor.

Q. Only the labor?

A. That is all.

1600 Q. All other classes of employees were at all times since you have been there interviewed first by the South Buffalo officers or supervisors?

A. Yes.

Q. And the change that was made in 1939 was that after the early part of 1939 all prospective employees were interviewed in the first place by some representative of South Buffalo?

A. Yes.

Q. Was it your understanding that at any time prior to the early part of 1939 the South Buffalo had to take the men whom you sent over to them?

A. No indeed. In some very rare cases men would be returned. The foremen might not like a man's attitude or feel that he was too frail to do heavy work and before he started he would be returned to us.

Q. And that has been true at all times since 1935; that is to say at all times the South Buffalo has had the say whether it would hire the men whom you processed for them; is that correct?

A. Yes, sir.

Q. That has been true at all times?

A. Yes, sir.

Q. What can you say as to whether or not you knew that the South Buffalo did or did not make independent examina-

1610 tions of its own of any of these men that were hired, whether they were processed by you or not?

A. Examinations physically or as to their ability as a workman to fill a particular job?

Q. The latter.

A. We always felt that the foreman on the job would be the one to determine a man's ability if he had anything that required a certain skill.

Q. Isn't it true that at all the times of which you speak from 1935 on men were interviewed by South Buffalo supervisors regardless of your interview?

A. Surely.

Q. There was no requirement or practice that they would not interview them just because you did, was there?

A. Not to my knowledge; no, sir.

Q. And when in answer to Mr. Craig's questions you said that these men processed by you would, for instance, be referred to the foreman of the track department and interviewed by the foreman of a particular department, you meant in each instance the track

department or the particular department of the South Buffalo Railway Company, did you not?

A. Yes, sir.

Q. No superintendent or supervisor or foreman of the Bethlehem Steel Company ever interviewed these men, did he?

1611 A. No, sir.

Q. Now, at all times, the records which you prepared, and some of the time which you kept, showed these men to be employees of the South Buffalo Railway Company, didn't they?

A. Yes, sir.

Q. And they were records belonging to South Buffalo?

A. That is correct.

Q. Isn't it the fact that prior to September 1941, at which time you say you turned the records over to South Buffalo in its own office building, that the records were kept separate and apart by you?

A. Yes; they were segregated from the Steel Company's records.

Q. So that all you did was to perform the functions which any ordinary employment agency would perform, wouldn't you say?

Mr. CRAIG. I object to that.

The WITNESS. Yes, sir.

Mr. BROMLEY. That is all.

Redirect examination by Mr. CRAIG:

Q. Mr. DeWitt, in those instances where you interviewed prospective employees for the South Buffalo Railway

1612 Company and then sent those men over to the South Buffalo, were you of the opinion that they were fit persons to be employed by the South Buffalo Railway Company?

A. Well, we would try to place a man where the need was great, hoping that he would fit in, of course.

Q. Was it your best judgment that he would fit in?

A. Mine or the interviewer who talked to him at the time. They are human, of course, and will err.

Q. Were there some occasions when you did not send an applicant to the South Buffalo man when, in your opinion, you thought he would not be a suitable employee for the South Buffalo?

A. Not unless he had an evident handicap or something of that kind.

Q. Did you find such persons?

A. Yes; we find some men that will come to you and tell you that they only have one eye, or something of that kind in the interview, and, of course, even though they had been accepted by South Buffalo Railway Company for employment, the Medical Examiner would have rejected them.

Q. You didn't send those men over?

A. No.

Q. The ones whom you did send over did I understand
1613 you to say that on rare occasions one would be sent back?

A. Yes; on very rare occasions, but it has happened that they would return a man.

Q. Can you estimate the percentage of applicants whom you sent over who were accepted by South Buffalo as employees?

A. The ones returned, of course, were a very small number.

Q. One per cent?

A. Yes; possibly even less than that, but there were rare instances of it.

Q. You spoke about South Buffalo having its own office I think in 1941 when you turned the personnel records over to South Buffalo?

A. Yes; I believe that was the year.

Q. Where had their offices been prior to that time?

A. As I recall they were near No. 3 gate.

Q. Where is that?

A. That is near the intersection of Kane Street. It was an old wooden building that was there that they used for an office.

Q. Was that a Bethlehem building?

A. I don't know, sir.

Q. You are referring to their personnel office and all their offices now?

A. Well, all of their offices. It is in one building,
1614 as I recall.

Mr. CRAIG. That is all.

Mr. BROMLEY. That is all.

(Depositions closed.)

1615 *Plaintiff's Exhibit 151*

No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff. I. C. C. No. 62. Cancelling I. C. C. No. 57. P. S. C.—N. Y.—No. 97. Cancelling P. S. C.—N. Y.—No. 88.

Received Interstate Commerce Commission. 10510. Feb. 24, 1940. Section of Tariffs.

SOUTH BUFFALO RAILWAY COMPANY

LOCAL AND PROPORTIONAL FREIGHT TARIFF OF SWITCHING CHARGES

On Traffic interchanged between the Connecting Railroads of this Company at Buffalo, N. Y., and Lackawanna, N. Y., and Public Team Tracks or Private Sidings located on or connected with the tracks of this Company.

Classification:—Governed, except as otherwise provided herein, by the Official Classification (A. H. Greenly, Agent), I. C. C.—O. C. No. 57, P. S. C.—N. Y. No. 57, supplements thereto and reissues thereof.

Demurrage:—Cars handled subject to National Car Demurrage Rules and Charges, I. C. C. No. 3353, P. S. C.—N. Y.—No. 211, supplements thereto and reissues thereof, issued by B. T. Jones, Agent.

Issued February 26, 1940. Effective March 28, 1940.

Issued by Paul A. Trageser, Vice President, Lackawanna, New York.

1616 On Traffic interchanged between the connecting Railroads of this Company, at Buffalo, N. Y., and Lackawanna, N. Y., and public team tracks, or private sidings, located on or connected with the tracks of this Company, the following rates will be charged, viz.:

	When moving to or from points described in group 1 below		When moving to or from points not included in group 1 below
	In connection with line haul	Not in connection with line haul	
Ashes, Furnace Cinder, Carload Rubbish (Waste Material), Carload, per car	$3.47	$3.96	$3.47
Grain, Grain Products, or By-Products, Carload, per net ton	1.18	.18	1.17
On all other commodities (Except as shown in P. S. C.—N. Y.—No. 96, or re-issues thereof), per net ton		.18	
Per ton, net or gross as rated, governed by the same minimum weights, rules and regulations as apply to the through rate	.18		.17
Minimum per car	1.74	1.98	1.74
Mixed Lots:			
Minimum for any one consignment delivered on consignee's siding, per car	1.98	1.98	1.98
New Cars in transit from builder to owner, per car	3.85	4.40	3.85

[1] Maximum $4.95 per car.

TERRITORIAL DESCRIPTION

Group 1.—Points in Central Freight Association Territory. (See Note 1.)

Points in Trunk Line Association Territory. (See Note 1.)

Including all points on Norfolk and Western Railway (except South of Roanoke, Va., to Winston-Salem, N. C., and South of Lynchburg, Va., to Durham, N. C.), Big Sandy and Cumberland Railway, Chesapeake Western Railway, Marion & Rye Valley Railway, Tug River & Kentucky Railroad, Virginia-Southern Railroad and Williamson & Pond Creek Railroad.

Points in New England Freight Association Territory. (See Note 1.)

Points in Canadian Association Territory. (See Note. 1.)

Also,

Points in Wisconsin located on and South of the Chicago, Milwaukee & St. Paul Railway, Milwaukee to Madison the Chicago and Northwestern Railway, Madison to Dodgeville and on and east of the Illinois Central Railroad, Dodgeville to the Illinois State Line upon which joint through rates are applied.

Also,

Points outside of the Territories above named on which the through rate is, as made, the full combination to and from Rate Breaking Point (such Rate Breaking Point being located in one of the Territories above named), but not a through rate so published.

NOTE 1.—For Territorial Descriptions see Agent, B. T. Jones' Territorial Directory No. 3-G, I. C. C. No. 3319, P. S. C.—N. Y.—No. 208 supplements thereto and reissues thereof.

1617

Plaintiff's Exhibit 152

SOUTH BUFFALO RAILWAY COMPANY

SHIPPER'S ORDER FOR LOCAL MOVEMENTS ONLY

No. ..... N. Y. ..... 194..

From .....

To .....

Shipper's Load, Count and Weight

Initials	Car No.	Commodity	Weight

If charges are to be prepaid write or stamp here "To be Prepaid" .....

It is expressly understood and agreed by the undersigned that this order is subject to conditions of Uniform Bill of Lading as set forth in Consolidated Classification No. 18, Supplements thereto and successive Reissues thereof.

Shipper .....
Per (Full Name) .....

NOTE.—Original and one copy must be presented with and follow car to destination. After delivery is effected both copies will be forwarded by Yardmaster to Superintendent's Office.

J. F. CRAIG,
General Agent,
South Buffalo Railway Company.

To be filled by General Agent

Pro. Number	Rate per Car	Freight Charges

Charge Account No. .....

1618 *Plaintiffs Exhibit 153*

SOUTH BUFFALO RAILWAY COMPANY

DAILY REPORT OF SWITCHING

ENGINE No: ..... 194..

	Car						
	Initials	Numbers	Contents	Final dest.	Time placed	From	To
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							
21							
22							
23							
24							
25							

.....Conductor

Switch Foremen must report on this form all cars handled by them and forward to Yardmaster's Office at end of each trip.

1619 *Plaintiff's Exhibit 154*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of November A. D., 1938

Ex Parte No. 128

Investigation of South Buffalo Railway Company

The provisions of the Interstate Commerce Act being under consideration, and the Commission desiring to obtain full and complete information as to the South Buffalo Railway Company concerning its status as a carrier; and whether: Its relations and arrangements with any controlling corporation and others, including transport agencies; its accounting, operating, tariff publishing, and other practices; its services of any kind performed; and its compensation for such services, or imbursements or disbursements, in any form for any purpose, are lawful and consistent with the economical and efficient management of any or all respondents named in this order in respect of the matters above stated pertaining to the South Buffalo Railway Company, with a view to determining whether and to what extent there may exist violations of said act, and, in proper case, of making such findings of fact and orders, or taking such action, in respect of any such violation as may be deemed appropriate:

It is ordered, That the Commission on its own motion and without formal pleading, enter upon a proceeding of inquiry and investigation into and concerning the matters stated in the preceding paragraph.

1620 It is further ordered, That The Baltimore and Ohio Railroad Company, The Buffalo Creek Railroad Company (Erie Railroad Company and Lehigh Valley Railroad Company, Lessees), Canadian National Railways, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company (C. E. Denney and John A. Hadden, Trustees), Grand Trunk Railway System [Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers comprising the following carriers: Canadian National Railway Company, The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee), and The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee)], International Railway Company, Lehigh Valley Railroad Company, The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee), The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, South Buffalo Railway Company, Wabash Railway Company (Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers), and West Shore Railroad (The New York Central Railroad Company, Lessee), be, and they are hereby, made re-

spondents to this proceeding, and that a copy of this order be served on each of said respondents.

And it is further ordered, That this proceeding be assigned for hearing at such times and places as the Commission may hereafter direct.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

1621 *Plaintiff's Exhibit 155*

INTERSTATE COMMERCE COMMISSION

WASHINGTON

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached (consisting of ten typewritten sheets and two photostat sheets) contain true and correct extracts from the schedules therein more particularly described, said schedules having been filed with the said Interstate Commerce Commission on dates specified in said papers, and the said extracts therefrom having been in force as indicated in said papers.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 11th day of January A. D. 1946.

[SEAL] W. P. BARTEL,

Secretary of the Interstate Commerce Commission.

1622 Extracts from Association of American Railroads Tariff Bureau Freight Tariff No. 4–R, B. T. Jones, Agent, I. C. C. No. 3072, said schedule having been filed on October 15, 1937, and the said extracts therefrom having been in force throughout the period October 1, 1938, to October 31, 1938, both dates inclusive.

Title Page attached hereto.

** ** **

Page 15:

** ** **

PARTICIPATING CARRIERS**

Under the following Powers of Attorney (except as noted) to B. T. Jones, Agent.

The following carriers are parties to the Demurrage or Storage Rules and Charges, as shown below:

Carriers	I. C. C. FX1 No.	
	Section 1 (Demurrage)	**
**	**	**
South Buffalo Railway Company **	25** **	**
** **		**

1633 Ariz. C. C. No. 39 Cancels Ariz. C. C. No. 37.
Ark. R. C. No. 33 Cancels Ark. R. C. No. 31.
Cal. R. C. No. 39 Cancels Cal. R. C. No. 37.
Can. R. C. No. 1528 Cancels Can. R. C. No. 1470.
P. U. C. Colo. No. 40 Cancels P. U. C. Colo. No. 38.
Conn. P. U. C. No. 3 Cancels Conn. P. U. C. No. 1.
P. U. C. Idaho No. 39 Cancels P. U. C. Idaho No. 37.
Ill. C. C. No. 397 Cancels Ill. C. C. No. 379.
Ind. R. C. No. D-594 Cancels Ind. R. C. No. D-575.
K. R. C. No. 25 Cancels K. R. C. No. 8.
P. S. C. Md. No. 48 Cancels P. S. C. Md. No. 46.
Mass D. P. U. No. 45 Cancels Mass. D. P. U. No. 43.
Maine P. U. C. No. 47 Cancels Maine P. U. C. No. 45.
Mich. P. U. C. No. 549 Cancels Mich. P. U. C. No. 531.
Minn. R. C. No. 40 Cancels Minn. R. C. No. 38.
P. S. C. Mo. No. 161 Cancels P. S. C. Mo. No. 158.
Mont. R. C. No. 40 Cancels Mont. R. C. No. 38.
P. S. C. Nev. No. 38 Cancels P. S. C. Nev. No. 36.
New Hampshire P. S. C. No. 46 Cancels New Hampshire P. S. C. No. 44.
P. U. C. N. J. No. 4 Cancels P. U. C. N. J. No. 1.
S. C. C. New Mex. No. 39 Cancels S. C. C. New Mex. No. 37.
P. S. C. N. Y. No. 194 Cancels P. S. C. N. Y. No. 187.
No. Dak. R. C. No. 7 Cancels No. Dak. R. C. No. 5.
T. C. N. Y. No. 34 Cancels T. C. N. Y. No. 32.
Ohio P. U. C. No. 1727 Cancels Ohio P. U. C. No. 1665.
Ore. P. S. C. No. 39 Cancels Ore. P. S. C. No. 37.
Pa. P. U. C. No. 227 Cancels Pa. P. U. C. No. 216.
R. I. P. U. C. No. 44 Cancels R. I. P. U. C. No. 42.
Texas R. C. No. 39 Cancels Texas R. C. No. 37.
P. S. C. Utah No. 39 Cancels P. S. C. Utah No. 37.
Vt. P. S. C. No. 45 Cancels Vt. P. S. C. No. 43.
V. C. C. No. 40 Cancels V. C. C. No. 37.

Wash. D. P. W. No. 38 Cancels Wash. D. P. W. No. 36.
P. S. C. W. Va. No. 212 Cancels P. S. C. W. Va. No. 202.
P. S. C. Wyo. No. 38 Cancels P. S. C. Wyo. No. 36.

Freight Tariff No. 4-R

Cancels Freight Tariff No. 4-Q

(For Individual Carriers' Tariff Numbers, see pages 2 to 4, incl.)

ASSOCIATION OF AMERICAN RAILROADS

TARIFF BUREAU

B. T. JONES, Agent

Cancelled by I. C. C. No. 3250. Effective 4/10/1939.
Naming Car Demurrage Rules and Charges

Storage Rules and Charges Applying at All Points on Railroads Parties Hereto (Except as otherwise provided herein)

Issued October 15, 1937. Effective November 26, 1937

Issued by B. T. Jones, Agent, 608 So. Dearborn St., Chicago, Ill.

Page 20:

**

Section No. 1

General Application of Demurrage Rules and Charges

Item No.	Application
1	(a) The National Car Demurrage Rules and Charges, published herein, apply on Interstate and Intrastate traffic at all points on the railroads listed on pages 4 to 17, inclusive, under column headed Section 1 (Demurrage), except as otherwise specifically provided herein**.
**	**

**

Page 48:

**

Section No. 1**

Demurrage Rules and Charges**

Item No.	Rule No.	Subject	Rule
			**
815	4	Notification **	Section C.—Delivery of cars upon other than public delivery tracks or upon industrial interchange tracks ** or written notice sent or given to consignee or party entitled to receive same, of readiness to so deliver, will constitute notification to consignee. (See Rule 5, Section A., Paragraph 1, page 49**.) Section D.—In all cases where any part of the contents of a car has been removed by the consignee prior to the sending or giving of required notice, such removal shall be considered as notice of arrival.
**			**

**

1425 Page 49:

** ** **

Section No. 1**

Demurrage Rules and Charges**

Item No.	Rule No.	Subject	Rule
**	**	**	**
820	5	Placing cars for unloading.	NOTE.—Under this rule the time of movement between hold point and destination, and any other time for which the railroad is responsible will not be computed against the consignee. Section A—1. When delivery of a car consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at the nearest available hold point, and written notice that the car is held and that this railroad is unable to deliver will be sent or given to the consignee. This will be considered constructive placement. (See Rule 3, Sections D **) 2. On a car to be delivered to a switching line for final delivery and which consignee located on switching line is unable to receive and which for that reason the switching line is unable to receive from this railroad, notice will be sent or given the switching line showing point of shipment, car initials and number, contents and consignee and, if transferred in transit, the initials and number of the original car. 3. When this railroad is the switching line and, under conditions set forth in Paragraph 1, is unable to receive cars from a connecting line at destination for delivery within switching limits, upon receipt of notice from connecting line, it will notify the consignee and put such cars under constructive placement. (See Rule 4, Section C, page 48.)

** ** **

1425 Page 50:

** ** **

Section No. 1 **

Demurrage Rules and Charges**

Item No.	Rule No.	Subject	Rule
825	6	Cars for loading.	Section A.—Cars for loading will be considered placed when such cars are actually placed or held on orders of the consignor. In the latter case the agent must send or give the consignor written notice of all cars which he has been unable to place because of condition of the other-than-public-delivery track or because of other conditions attributable to the consignor. This will be considered constructive placement. (See Rule 3, Sections A, D**). Section B.—When empty cars placed on orders are not used in transportation service, demurrage will be charged from actual or construction placement until released, with no free time allowance. NOTE.—In the application of this Section a demurrage day consists of a twenty-four hour period computed from the hour of actual or constructive placement of the car.** Section C.—Private cars which have been loaded on the tracks of their owners, received from such tracks and held by this railroad for forwarding directions, are subject to demurrage charges from the first 7:00 a. m. after they are received until proper forwarding directions are furnished, with no free time allowance and without notice.

** ** **

1627 Extracts from Supplement No. 11 to Association of American Railroads Tariff Bureau Freight Tariff No. 4-R, B. T. Jones, Agent, I. C. C. No. 3072, said schedule having been filed on August 26, 1938, and the said extracts therefrom having been in force throughout the period October 1, 1938, to October 31, 1938, both dates inclusive.

Title Page attached hereto.

** ** **

Page 6

** ** **

Section No. 1

General Exceptions to Application of Demurrage rules and charges

Item No.	Exception
**	The following cars are not subject to Demurrage Rules and Charges, published in Section No. 1, pages 43 to 54 of tariff, or as same may be amended:
5-A	Cars leased for intra or inter plant service or for the storage of commodities, while held on tracks owned or leased by the lessee of the car, provided the use thereof is in no way connected with any transportation service for which a tariff charge is assessed, except switching charges.

** ** **

1628 Supplement No. 11

Cancels Supplements Nos. 7 and 10

I. C. C. No. 3072

to

Ariz. C. C. No. 39.
Ark. R. C. No. 33.
Cal. R. C. No. 39.
Can. T. C. No. 1528.
P. U. C. Colo. No. 40.
P. U. C. Idaho No. 39.
Ill. C. C. No. 397.
Ind. R. C. No. D-594.
K. R. C. No. 25.
Mich. P. U. C. No. 549.
Minn. R. C. No. 40.

P. S. C. Mo. No. 161.
Mont. R. C. No. 40.
P. S. C. Nev. No. 38.
S. C. C. New Mex. No. 39.
No. Dak. R. C. No. 7.
Ore. P. S. C. No. 39.
Pa. P. U. C. No. 227.
P. S. C. Utah No. 39.
V. C. C. No. 40.
Wash. D. P. S. No. 38.
P. S. C. W. Va. No. 212.
P. S. C. Wyo. No. 38.

Supplements Nos. 6 and 11 contain all changes from the original tariff

Supplement No. 11

Cancels Supplements Nos. 7 and 10

to

Conn. P. U. C. No. 3.
P. S. C. Md. No. 48.
Mass. D. P. U. No. 45.
Maine P. U. C. No. 47.
New Hampshire P. S. C. No. 46.
P. U. C. N. J. No. 4.
D. P. U. R. I. No. 44.
Vt. P. S. C. No. 45.

Supplements Nos. 6, 6-A, and 11 contain all changes from the original tariff applicable on Connecticut, Delaware, Maryland, Massachusetts, Maine, New Hampshire, New Jersey, Rhode Island and Vermont Intrastate traffic.

Supplement No. 12

Cancels Supplements Nos. 8 and 11

to

P. S. C. N. Y. No. 194.
T. C. N. Y. No. 34.
Ohio P. U. C. No. 1727.
Texas R. C. No. 39.

Supplements Nos. 6, 7 and 12 contain all changes from the original tariff applicable on New York, Ohio and Texas Intrastate traffic.

ASSOCIATION OF AMERICAN RAILROADS

TARIFF BUREAU

B. T. Jones, Agent

Supplement No. 14

Cancels Supplements Nos. 10 and 13

to

Freight Tariff No. 4–R

Supplements Nos. 6, 6–A, 7, 8, 9 and 14 contain all changes from original tariff

Naming Car Demurrage Rules and Charges.

Storage Rules and Charges

Applying at

All Points on Railroads Parties Hereto
(Except as otherwise provided in tariff, as amended)

Issued August 25, 1938. Effective October 1, 1938, except as otherwise provided therein.

Departure from the terms of Rule 9 (c) of Tariff Circular No. 20 is authorized under permission of the Interstate Commerce Commission, No. 167170 of March 12, 1938, amended.

The tariff hereby amended will be reissued not later than March 27, 1939.

Issued by B. T. Jones, Agent, 608 So. Dearborn St., Chicago, Ill.

1929 Page 13:

** ** **

Section No. 1 **

Demurrage Rules and Charges **

Item No.	Rule No.	Subject	Rule
800-D **	1	Cars Subject to Rules; also Exemptions Therefrom. **	(91) Section A.—Cars of either railroad or private ownership, held for or by consignors or consignees for loading, unloading, forwarding directions or for any other purpose (including cars held for loading company material unless the loading is done by the railroad for which the material is intended and on its tracks ** or private sidings connecting therewith), are subject to these demurrage rules, except as provided in Section B. ** ** ** Section B.—The following cars are not subject to these demurrage rules: ** ** ** 4. (a) Private cars on private tracks when the ownership of the car and track is the same. NOTE 1.—For the purpose of this exemption from demurrage: A private Car is a car having other than railroad ownership. **

(91). Will not apply on intrastate traffic in Nebraska.

** ** **

1930 Page 14:

** ** **

Section No. 1 **

Demurrage Rules and Charges **

Item No.	Rule No.	Subject	Rule
800-D **	1	Cars Subject to Rules, also Exemptions Therefrom. **	Section B**—A Private Track is a track outside of carrier's right of way, yard and terminals, and of which the carrier does not own either rails, ties, roadbed or right of way; or a track or portion of a track owned or operated by this railroad, and devoted to the purpose of its user through a written lease or written agreement, in which case, the written lease or written agreement will be considered as equivalent to ownership. When the same private track or portion thereof is used jointly by two or more parties with the written consent of this railroad, it will be considered the private track of each such joint user. NOTE 2.—Private cars while held under constructive placement for delivery upon the tracks of their owners, are subject to demurrage charges after expiration of forty-eight (48) hours' free time. (See Rules 5** of tariff.) (b) Empty private cars stored on railroad or private tracks, including such cars sent by the owner to a shipper for loading, provided the cars have not been placed or tendered for loading on the orders of a shipper.** **
805-D **	2	Free Time Allowed. **	Section A.-1.—Forty-eight hours (two days) free time will be allowed for loading or unloading all commodities. (See Rule 2, Section B, Paragraph 4, page 45 of tariff, as amended.) "Loading" includes the furnishing of forwarding directions on out-bound cars. (See Rule 6, Section C, page 50 of tariff.) ** ** ** NOTE.—If a consignee wishes his car held at any break-up yard or a hold yard before notification and placement, such car will be subject to demurrage. That is to say, the time held in the break up yard will be included within 48 hours' of free time. If he wishes to exempt his car from the imposition of demurrage, he must, either by general orders given to the carrier or by specific orders as to incoming freight, notify the carrier of the track upon which he wishes his freight placed, in which event he will have the full 48 hours' free time from the time when the placement is

Item No.	Rule No.	Subject	Rule
1631			made upon the track designed. This "Note" will apply". 2. When the same car is both unloaded and reloaded, such transaction will be treated as independent of the other; except that, when loading is begun before unloading is completed, the free time for loading shall not begin to run until the first 7 a. m. after unloading is completed. This will also apply to industries performing their own switching service, in which case the industry must notify the carrier date and time car was unloaded. 3. When a car placed for loading or unloading, whether or not partly loaded or unloaded at point where so placed is moved by railroad or private power to another point within the confines of the same industry or the same public delivery yard to load or unload, forty-eight (48) hours' free time will be allowed for the entire transaction, except that when the railroad makes a charge for such movement, the time incident thereto shall not be computed against the car. **
805-D	2	Free time allowed.	

** ** **

1632—Page 15:

** ** **

Section No. 1 **

Demurrage Rules and Charges **

Item No.	Rule No.	Subject	Rule
			SECTION B.** ** ** ** 4. Except as otherwise provided in Rule 2, Section A, paragraph 3, page 44 of tariff, as amended, when cars are held to complete loading or to partly unload. Such cars shall be released when the partial loading or unloading operations has been completed and this railroad advised that car is ready for reforwarding. NOTE.—When a car held for unloading is partly unloaded and partly unloaded and partly reloaded, 48 hours' free time will be allowed for the entire transaction.
805-D	2	Free time allowed.	
810-A	3	Computing time.	NOTE.—In computing time, Sundays and legal holidays (National, State and Municipal), but not half-holidays, will be excluded**. When a legal holiday falls on Sunday the following Monday will be excluded. SECTION A-1.—On cars for loading on other than public delivery tracks time will be computed from the first 7:00 a. m. after actual or constructive placement, and without notice of actual placement. (See Rule 2, Section A, Paragraph 1, page 44 of tariff, as amended, and Rule 6—Cars for loading, page 50 of tariff.) ** ** ** SECTION B-1.—On cars held for orders (other than orders for actual placement of cars subject to Sections D and E of this rule), and on cars requiring surrender of bill of lading or payment of lawful charges, whether such cars have been placed in position to unload or not, time will be computed from the first 7:00 a. m. after the day on which notice of arrival is sent or given to the consignee or party entitled to receive same. (See Rule 4—Notification, pages 48 and 49 of tariff.) *NOTE.—The time between receipt of order, surrender of bill of lading or payment of lawful charges and placement of car (not to include any time prior to beginning of free time nor time attributable to the act or neglect of consignor or consignee) will be deducted from the total detention to the car. 2.**

** ** **

1633 Page 16:

Section No. 1

Demurrage Rules and Charges

Item No.	Rule No.	Subject	Rule
			SECTION B-1.—Concluded. (c) When an order releasing a car is sent to this railroad by U. S. mail, the date of mailing will be determined by the postmark. When such order or other document releasing a car is sent by U. S. mail and is not received by the addressee, the car shall be considered released as of the date it should have been delivered, provided proof is furnished by the claimant that the order was deposited in the U. S. mail, properly stamped and addressed on the date claimed.
810-A.	3	Computing time.	SECTION D.—Except as otherwise provided in Section B, Paragraph 1, of this Rule, on cars to be delivered on other-than-public-delivery tracks, time will be computed from the first 7:00 a. m. after actual or constructive placement on such tracks. Time computed from actual placement on cars placed at exactly 7:00 a. m. will begin at the same 7:00 a. m.; actual placement to be determined by the precise time the engine cuts loose. (See Rule 4, Section C, page 48 of tariff, and Rules 5 and 8, pages 49 and 50 of tariff.) NOTE 1.—"Actual Placement" is made when a car is placed in an accessible position for loading or unloading or at a point previously designated by the consignor or consignee. If such placing is prevented from any cause attributable to consignor or consignee and car is placed on the private or other-than-public-delivery track serving the consignor or consignee, it shall be considered constructively placed without notice. NOTE 2.—Any Railroad track or portion thereof assigned for individual use will be treated as "other-than-public-delivery track."

1634 *Defendants' Exhibit D-1*

Rates and charges published in this tariff are subject to the provisions of Tariff of Increased Rates and Charges X-148 Agent W. S. Curlett's ICC A-742, supplements thereto or successive issues thereof. See Note Below.

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff unless otherwise specifically authorized by the Commission. ICC No. 69. Cancels ICC No. 67.

SOUTH BUFFALO RAILWAY COMPANY

LOCAL FREIGHT TARIFF OF TERMINAL CHARGES

Issued October 2, 1945. Effective November 1, 1945.

NOTE: The operation of the provisions referring to this note is suspended until January 1, 1946, and will become operative on January 1, 1946.

Issued by Paul A. Trageser, Vice President, Bethlehem, Pa.

1635 TERMINAL CHARGES

On interstate traffic interchanged with railroads connecting with this Company at Buffalo, N. Y., and Lackawanna, N. Y., for delivery at Material Storage Yards adjacent to Bethlehem Steel Company Open Hearth Plants Nos. 1, 2, or 3 Trestle serving Bethlehem Steel Company's Blast Furnace Plants, the following charges, in addition to the charges published in ICC No. 62, will be made:

	Per car
▲For sorting and assembling cars on tracks of this Company in its South Yard or South Yard Extension and movement to Material Storage Yard adjacent to Bethlehem Steel Company Open Hearth Plant No. 1	$1.50
▲For sorting and assembling cars on tracks of this Company in its South Yard or South Yard Extension and movement to Material Storage Yard adjacent to Bethlehem Steel Company Open Hearth Plant No. 2	1.50
▲For sorting and assembling cars immediately adjacent to Material Storage Yard of Bethlehem Steel Company at Open Hearth Plant No. 3 and movement to tracks in aMterial Storage Yard	1.00
▲For sorting and assembling cars on tracks of this Company in its yards at foot of trestle serving Blast Furnace Plants and movement from such tracks to points of unloading on the trestle	1.00

▲Denotes change in wording which results in neither increase nor reduction in charges.

1636 *Defendants' Exhibit D-2*

No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff. P. S. C.—N. Y.—No. 98. Cancelling P. S. C.—N. Y.—No. 83.

SOUTH BUFFALO RAILWAY COMPANY

COMMODITY TARIFF NO. 6

(Cancelling Commodity Tariff No. 5.) On Sand, Gravel, Rock, Crushed Stone and Slag, and on Anfline Slag for treatment at Sintering Works, Carload, interchanged between the Connecting Railroads of this Company, at Buffalo, N. Y. and Lackawanna, N. Y., and public team tracks or private sidings located on or connected with the tracks of this Company, the charge will be: Per Ton of 2,000 Pounds, governed by the same minimum weights, rules and regulations as apply to the through rate, 14 Cents.

RULES GOVERNING TARIFF

The Railroad reserves the right to weigh or reweigh shipments in order to determine their weight and the proper charges collectible thereon. The weight so ascertained will be the weight used in arriving at the charges to be assessed against the property.

Rates in this tariff do not apply on Interstate Shipments.

Classification: Governed, except as otherwise provided herein, by the Official Classification, (A. H. Greenly), Agent, P. S. C.—N. Y. No. 57, supplements thereto and reissues thereof.

Demurrage: Cars handled subject to National Car Demurrage Rules and Charges, P. S. C.—N. Y.—No. 211, supplements thereto and reissues thereof, issued by B. T. Jones, Agent.

Issued February 26, 1940. Effective March 28, 1940.

Issued by Paul A. Trageser, Vice President, Lackawanna, New York.

1637 *Defendants' Exhibit D 3*

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-833	154-A	Ill. C. C. A-2, Ind. R. C. A-2, P. S. C.-Md. A-53, P. U. C.-N. J. A-29, P. S. C.-N. Y. A-146, Pa. P. U. C. A-121, Vt. P. S. C. A-26, Va. C. C. A-86, P. S. C.-W. Va. A-82.
I. N. Doe	532	82-A	Conn. P. U. C. 13, Maine P. U. C. 47, M. D. P. U. 63, N. H. P. S. C. 40, P. S. C.-N. Y. 61, R. I. P. U. A. 36, Vt. P. S. C. 41.
B. T. Jones	4002	632	Ill. C. C. 542, Ind. R. C. D-750, K. R. C. 93, Mich. P. S. C. 684, P. S. C.-N. Y. 272, Ohio 2180, Pa. P. U. C. 318, P. S. C.-W. Va. 291.
R. G. Raasch	600		Ill. C. C. 560, Ind. R. C. 154, P. S. C. Mo. 69.

(For cancellations, see page 2 herein.)

W. S. Curlett, I. N. Doe, B. T. Jones, and R. G. Raasch, Agents

Local Freight Tariff of Rules Governing Receipt and Delivery of Cars of Freight (Except Coal at Mines, Breakers and Washeries, Iron Ore at Mines, Beehive Coke at Ovens, and Traffic at the Dock where such Traffic is Interchanged with Water Carriers), on, to and/or from Private Tracks and Industrial Tracks served by carriers shown on pages 2 to 9 herein.

Issued September 28, 1945. Effective November 1, 1945.

B. T. Jones, Agent, 608 South Dearborn Street, Chicago 5, Ill.

R. G. Raasch, Agent, 236 Union Station Building, 516 W. Jackson Blvd., Chicago 6, Ill.

I. N. Doe, Agent, Room 524, South Station, Boston 10, Mass.

Issued by W. S. Curlett, Agent, 143 Liberty Street, New York 6, N. Y.

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-630	154	Ill. C. C. A-1, Ind. R. C. A-[illegible], S. C.-Md. A-32, P. U. C.-N. J. A-28, P. S. C.-N. Y. A-144, Pa. P. U. C. A-120, Vt. P. S. C. A-25, Va. C. C. A-65, P. S. C.-W. Va. A-81.
I. N. Doe	531	52	Conn. P. U. C. 12, Maine P. U. C. 46, M. D. P. U. 52, N. H. P. S. C. 39, P. S. C.-N. Y. 60, R. I. P. U. A. 35, Vt. P. S. C. 40.
B. T. Jones	3902		Ill. C. C. 541, Ind. R. C. D-748, K. R. C. 92, Mich. P. S. C. 683, P. S. C.-N. Y. 271, Ohio 2148, Pa. P. U. C. 317, P. S. C.-W. Va. 290.
R. G. Rassch	594		Ill. C. C. 297, Ind. R. C. 153, P. S. C. Mo. 48.

LIST OF CARRIERS

Name of carrier	Powers of attorney and concurrences issued to— W. S. Curlett, Agent: I. C. C. FX1 No. (except as noted)	W. S. Curlett, Agent: Ill. FX1 No.	W. S. Curlett, Agent: Ind. FI No.	W. S. Curlett, Agent: P. S. C.-Md. 1 No.	W. S. Curlett, Agent: P. S. C.-N. Y. FI No.	W. S. Curlett, Agent: Pa. P. U. C. FI No.	B. T. Jones, Agent: I. C. C. FX1 No.	B. T. Jones, Agent: Ill. FX1 No.	B. T. Jones, Agent: Ind. FI No.	B. T. Jones, Agent: Mich. FM-1 No.	B. T. Jones, Agent: P. S. C.-N. Y. FI No.	B. T. Jones, Agent: Pa. P. U. C. FI No.	R. G. Rassch, Agent: I. C. C. FX1 No.	R. G. Rassch, Agent: Ill. FX1 No.	R. G. Rassch, Agent: Ind. FI No.	I. N. Doe, Agent: I. C. C. FX1 No.	I. N. Doe, Agent: Maine P. U. C. MEX1 No.	I. N. Doe, Agent: M. D. P. U. MX1 No.	I. N. Doe, Agent: N. H. P. S. C. FI No.	I. N. Doe, Agent: P. S. C.-N. Y. FI No.	I. N. Doe, Agent: R. I. P. U. A. FX1 No.	I. N. Doe, Agent: Vt. P. S. C. VX1 No.
Akron & Barberton Belt Railroad Company, The	FX7, No. 1																					
Akron, Canton & Youngstown Railroad Company, The							109															
Aliquippa and Southern Railroad Company	FX9, No. 1					6																
Alton and Southern Railroad	FX7, No. 12																					
Alton Railroad Company, The (Henry A. Gardner, Trustee.)							30	22														
Ann Arbor Railroad Company, The							116			41												
Arcade and Attica Railroad Corporation	75				30																	
Arcostook Valley Railroad Company																27	10					
Baltimore and Annapolis Railroad Company, The	FX7, No. 9			8																		
Baltimore and Eastern Railroad Company	35			18																		

Baltimore and Ohio Railroad Company, The	180			30	24	36																	
Baltimore and Ohio Chicago Terminal Railroad Company, The													77	27	26								
Barre and Chelsea Railroad Company																23							1
Belfast & Moosehead Lake Railroad Company																29	13						
Belt Railway Company of Chicago, The													68	23									
Bessemer and Lake Erie Railroad Company							70																
Boston and Maine Railroad																84	12	10	6	36			3
Boyne City Railroad Company							6			5													
Buffalo Creek Railroad Company (Erie Railroad Company and Lehigh Valley Railroad Company, Lessees.)	FX7, No. 1				1																		
1639 Canadian National Railways (Lines West Fort William, Ont., Armstrong, Ont., and East thereof)							E60																
[1] Canadian Pacific Railway Company (Lines West Fort William, Fort William, Ont., and East thereof)																E15							
Canton Railroad Company	FX7, No. 11			13	1																		
Castleman River Railroad Company, The	FX7, No. 2																						
Central Indiana Railway Company							67		23														
Central Railroad Company of New Jersey, The (Shelton Pitney and Walter P. Gardner, Trustees)	93					86																	
Central Vermont Railway, Inc.																21		7					4
Chestnut Ridge Railway Company	77					35																	
Chicago and Calumet River Railroad Company	FX7, No. 21																						
Chicago & Illinois Western Railroad	79	46A																					
Chicago & Western Indiana Railroad Company													31	20									
Chicago, Aurora and Elgin Railroad Company (Arthur L. Schwartz, Trustee)							80	72															
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee)													{CJ 35	CJ 16}									
Chicago North Shore and Milwaukee Railroad Company (John B. Gallagher and Edward J. Quinn, Trustees)							86																6
Chicago River and Indiana Railroad Company, The							12	11															
Chicago Short Line Railway Company													72	32									
Chicago, South Shore and South Bend Railroad							58	26	26														
Chicago, West Pullman & Southern Railroad Company													83	30									
Conemaugh & Black Lick Railroad Company	FX8, No. 1					19																	
Cornwall Railroad Company	91					40																	
Cumberland and Pennsylvania Railroad Company	63			31																			
Curtis Bay Railroad Company	FX9, No. 1			1																			

[1] Will only apply at points on Canadian Pacific Ry. in the States of Maine and Vermont.

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																					
	W. S. Curlett, Agent						B. T. Joner, Agent						R. G. Raasch, Agent			I. N. Doe, Agent						
	I. C. C. FX1 No. (except as noted)	Ill. FX1 No.	Ind. FI No.	P. S. C.-Md. F Md. 1 No.	P. S. C. N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C. N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C. N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Raritan River Rail Road Company	56																					
Reading Company	42					26																
1644 River Terminal Railway Company, The	14																					
Rosslyn Connecting Railroad Company	16																					
Rutland Railroad Company (William E. Navin and Wallace M. Fay, Trustees)																A1				A2		A2
St. Johnsbury & Lake Champlain Railroad Company, The (John E. Willis, Trustee)																1						1
St. Louis & Belleville Electric Railway Company													26	24								
St. Louis and Ohio River Railroad	48																					
South Buffalo Railway Company	FX8, No. 2				17																	
Springfield Suburban Railroad Company, The	FX7, No. 1																					
Springfield Terminal Railway Company																19						2
Staten Island Rapid Transit Railway Company, The	61				33																	
Steelton & Highspire Railroad Company	FX8, No. 1					20																
Suncook Valley Railroad																16			2			
Toledo, Angola & Western Railway, The	FX7, No. 5																					
Toledo, Peoria & Western Railroad (Holly Stover, Federal Manager)							60	26														
Toledo Terminal Railroad Company, The							40															
Toronto, Hamilton and Buffalo Railway Company, The							FX8, No. 40															
Trenton-Princeton Traction Company	28																					
Union Freight Railroad Company (Boston, Mass.)																	30		9			
Union Railroad Company							40					6										
Unity Railways Company	26																					

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																					
	W. S. Curlett, Agent						B. T. Jones, Agent					R. C. Raasch, Agent					I. N. Doe, Agent					
	I. C. C. FX1 No. (except as noted)	Ill. FX1 No.	Ind. FI No.	P. S. C. Md. F Md. 1 No.	P. S. C. N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C. N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. F1 No.	P. S. C. N. Y. F1 No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Cuyahoga Valley Railway Company, The							20															
1640 Delaware and Hudson Railroad Corporation, The	20				19	17																
Delaware, Lackawanna and Western Railroad Company, The	77				66	60																
Delray Connecting Railroad Company	FX7, No. 1																					
Detroit and Mackinac Railway Company							68			18												
Detroit and Toledo Shore Line Railroad Company, The							96			20												
Detroit and Western Railroad Co.							5			1												
Detroit Terminal Railroad Company	FX7, No. 1																					
Detroit, Toledo and Ironton Railroad Company							28			14												
Donora Southern Railroad Company							8					3										
East Broad Top Railroad and Coal Company	20					24																
East Jersey Railroad and Terminal Company	111																					
East Washington Railway Company	15																					
Elgin, Joliet and Eastern Railway Company													119	29	27							
Erie Railroad Company (Lines Buffalo, Salamanca, N. Y., and East)	132				78	60																
Erie Railroad Company (Line Buffalo, Salamanca, N. Y., and West)							2				2											
Etna & Montrose Railroad Company							11					8										
Fairport, Painesville and Eastern Railroad Company, The							23															
Federal Valley Railroad Company, The							27															
Fore River Railroad Corporation																26		2				
Grafton and Upton Railroad Company																74		4				

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LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																											
	W. S. Corlett, Agent						B. T. Jones, Agent						R. G. Rauch, Agent			I. N. Dee, Agent											
	I. C. C. FX1 No. (except as noted)	III. FX1 No.	Ind. FI No.	P. S. C. Md. & Md. 1 No.	P. S. C. N. Y. FI No.	P. U. C. FI No.	I. C. C. FX1 No.	III. FX1 No.	Ind. FI No.	Mich. No.	P. S. C. N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	III. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. O. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C. N. Y. FI No.	R. I. P. U. A. FX1 No.	V. P. S. C. VAX1 No.						
Manistique and Lake Superior Railroad Company							45			10																		
Manufacturers' Junction Railway Company													26	17														
1649 Marcellus and Otisco Company, Inc., The	13				8																							
Maryland and Pennsylvania Railroad Company	77			27		26																						
Massena Terminal Railroad Company, The	(FX1, No. 1																											
McKeesport Connecting Railroad Co.							7					9																
Middle Creek Railroad Company	(FX1, No. 1																											
Middletown and Unionville Railroad Company (Louis F. Zieres, Trustee)	101				43																							
Mississippi Central Railroad Company	89																											
Monongahela Connecting Railroad Company, The	(FX2, No. 1					6																						
Monongahela Railway Company, The	63					37																						
Morristown & Erie Railroad Company	29																											
Moshassuck Valley Railroad Company																75					13							
Mount Hope Mineral Railroad Company	29																											
Muskegon Railway and Navigation Company	(FX7, No. 1																											
Narragansett Pier Railroad Company, The																60					16							
Newburgh and South Shore Railway Company, The							10																					
New Haven & Dunbar Railroad Company	(FX7, No. 1				2																							
New Jersey and New York Railroad Company, The (Peter Duryee, Trustee)	N-44				N-26																							
New Jersey, Indiana & Illinois Railroad Company							65		23																			
New York and Long Branch Railroad Company, The	84						4	0	3	3	3	3						3										
New York Central Railroad Company, The— Boston and Albany District																												
Chicago, Indiana & Eastern District																												

Cleveland, Cincinnati, Chicago & St. Louis District.																					
Eastern District.																					
Michigan Central District.																					
Western District.																					
West Shore District.																					
New York, Chicago and St. Louis Railroad Company, The						A25	A13	A12		A16	A13										
New York, New Haven and Hartford Railroad Company, The (Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees)															96		24		45	22	
1643 New York, Ontario and Western Railway Company (Raymond L. Gibhardt and Ferdinand J. Sieghardt, Trustees)	81			46	40																
New York, Susquehanna and Western Railroad Company (Henry K. Norton, Trustee)	B-1																				
Northampton and Bath Railroad Company	151				36																
Norwood & St. Lawrence Railroad Company	67			28																	
Ohio & Morenci Railroad Company, The						1															
Ohio Public Service Company, The	29																				
Owasco River Railway, The						9				9											
Patapsco & Back Rivers Railroad Company	FX8, No. 1		18																		
Pennsylvania and Atlantic Railroad Company (South of Hightstown, N. J., to Pemberton, N. J., Inc.) (The Union Transportation Company, Lessee)	38																				
Pennsylvania Railroad Company, The	70		15	20	18																
Pennsylvania-Reading Seashore Lines	26																				
Peoria and Pekin Union Railway Company						35	14														
Pere Marquette Railway Company						101		24	20												
Philadelphia, Bethlehem and New England Railroad Company	FX8, No. 1				23																
Pittsburgh, Allegheny & McKees Rocks Railroad Company						9					10										
Pittsburg & Shawmut Railroad Company, The	57				30																
Pittsburgh and Lake Erie Railroad Company, The	99				36																
Pittsburgh and Ohio Valley Railway Company	FX7, No. 2				[illegible]																
Pittsburgh & West Virginia Railway Company, The	61				31																
Pittsburgh, Chartiers & Youghiogheny Railway Company	97				40																
Pittsburg, Shawmut & Northern Railroad Company, The (John D. Dickson, Receiver)	106			63	55																
Portland Terminal Company															28	14					
Pullman Railroad Company	FX7, No. 6																				
Rahway Valley Company (Rahway Valley Company, Lessee)	59																				

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Upper Merion and Plymouth Railroad Company	{FX7 No. 1}					1																
Wabash Railroad Company [3]							285	62	47	39	10											
Washington and Old Dominion Railroad	93																					
Waynesburg & Washington Railroad							28					13										
Western Maryland Railway Company	90			28		20																
1645 Wharton and Northern Railroad Company	45																					
Wheeling and Lake Erie Railway Company, The							40															
Winfield Railroad Company, The							28					17										
Wyandotte Southern Railroad Company							6			7												
Wyandotte Terminal Railroad Company							A7			A6												
Yazoo and Mississippi Valley Railroad Company	181																					
York Utilities Company																15	6					
Youngstown & Northern Railroad Company, The							7															

[3] Will only apply at points on Wabash R. R. in the States of Illinois, Indiana, Michigan, New York, and Ohio.

1646 Rule I. Except as otherwise provided in Rule III and except as otherwise provided in other tariffs, cars of freight moving at carload rates including switching rates and cars of less carload or any quantity freight subject to rules governing the handling of ferry or trap cars as published in tariffs lawfully on file with the Interstate Commerce Commission and State Commissions, will be delivered on and removed from privately owned side tracks or industrial tracks near and connecting with the carrier's tracks without any additional charge, provided there are no conditions which make it unsafe for the carrier's locomotives to operate over such tracks, or that prevent the carrier from receiving or delivering cars at its ordinary operating convenience. (See Note 2.)

Rule II. Except as otherwise provided in Rule II, cars covered by Rule I will be received and delivered at loading and unloading locations on tracks designated by the industry within the industrial plant site without any additional charge when that service can be ordinarily performed in continuous movement at the carrier's ordinary operating convenience, within the meaning of these terms as defined in Notes 1 and 2, provided the locomotives in general use for switching in the vicinity of the plant site can safely operate over the tracks within the plant site.

Rule III. When receipt or delivery of a car or cars as provided in Rules I and II cannot be accomplished in continuous movement at the carrier's ordinary operating convenience because of interruption, interference or any other condition caused by the shipper or consignee, the carrier will arrange for receipt or delivery under the following provisions:

(a) If it appears that the delay will be of a temporary nature the locomotive will be held at the nearest available location and the service completed when conditions permit. For delay to the locomotive when so held, a charge of $1.00 for each five minutes or fraction thereof in excess of 30 minutes will be assessed, which charge will be in addition to the published rate or rates.

Charges will be assessed in accordance with the next preceding paragraph when delays encountered during a locomotive trick or shift aggregate more than 30 minutes.

(b) If, after a reasonable period of delay, the obstruction or condition preventing completion of service has not been removed or eliminated the carrier may, at its option, withdraw its locomotive and place the car or cars on a hold or other available track or tracks within, or without, the industry plant site. Charges for the delay encountered shall be computed in accordance with paragraph (a). Subsequent movement by carrier locomotive of the car or cars from the hold or other track or tracks to actual point of delivery will be subject to a charge of $3.47 per car.

(c) For the purpose of applying the provisions of paragraphs (a) and (b) time shall commence to run from the minute the conductor determines that the shipper or consignee is unable to accept service.

DEFINITION OF TERMS USED HEREIN

Note 1. "Continuous movement" means a movement between the carrier's tracks and the loading or unloading locations, a hold track or tracks, or other place where cars are received or delivered without any delay or any suspension or break in time, or continuity of the movement, due to any circumstances or condition for which the industry is directly responsible.

Note 2. "Ordinary operating convenience" means the time selected by the carrier when it is most advantageous to the carrier, in relation to its coordinated and harmonious switching activities in a particular switching zone, when the terminal services are performed by switching locomotives, or at the time the train arrives at the plant site when the terminal services are performed by road-haul locomotives. Ordinarily it contemplates only one switch a day except when additional switches are made by the carrier in its own or the public interest, as distinguished from the industry's interest, to secure the prompt release of equipment or facilities, or when necessitated by the volume of traffic. Movements to, from, or within the plant site at other times at the request of the industry or to meet the requirements of industrial operations are not at the carrier's ordinary operating convenience.

1647 SUPPLEMENT NO. 1 TO

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-[illegible]	134-A	Ill. C. C. A-2, Ind. R. C. A-2, P. S. C.-Md. A-[illegible], P. U. C.-N. J. A-[illegible], P. S. C.-N. Y. A-[illegible], Pa. P. U. C. A-[illegible], Vt. P. S. C. A-[illegible], Va. C. C. A-[illegible], P. S. C.-W. Va. A-[illegible].
I. N. Doe	[illegible]	[illegible]-A	Conn. P. U. C. 13, Maine P. U. C. 47, M. D. P. U. [illegible], N. H. P. S. C. [illegible], P. S. C.-N. Y. [illegible], R. I. P. U. A. [illegible], Vt. P. S. C. 41.
B. T. Jones	[illegible]	[illegible]	Ill. C. C. [illegible], Ind. R. C. D-[illegible], K. R. C. [illegible], Mich. P. S. C. [illegible], P. S. C.-N. Y. [illegible], Ohio [illegible], Pa. P. U. C. [illegible], P. S. C.-W. Va. [illegible].
R. G. Raasch	[illegible]	.....	Ill. C. C. [illegible], Ind. R. C. 134, P. S. C. Mo. [illegible].

W. S. Curlett, I. N. Doe, B. T. Jones, and R. G. Raasch, Agents

Local Freight Tariff of Rules Governing Receipt and Delivery of Cars of Freight (Except Coal at Mines, Breakers and Washeries, Iron Ore at Mines, Beehive Coke at Ovens, and Traffic at the Dock where such Traffic Is Interchanged with Water Carriers) on, to and/or from Private Tracks and Industrial Tracks served by carriers shown on pages 2 to 9 of tariff.

Issued October 22, 1945. Effective November 1, 1945 (Except as Noted).

Authority to publish on one (1) day's notice granted by permission of the Interstate Commerce Commission No. 26705 of October 19, 1945, and under authority of:

Connecticut Public Utilities Commission, Authority SN-632 of October 22, 1945.

Illinois Commerce Commission Special Permission No. R-13044 of October 23, 1945.

Public Service Commission of Indiana, Special Permission No. TB-4724 of October 22, 1945.

Kentucky Railroad Commission, Short Notice No. 727 of October 22, 1945.

Maine Public Utilities Commission, Special Permission R. R. No. 2820 of October 22, 1945.

Public Service Commission of Maryland, Order No. 41489 of October 19, 1945.

Massachusetts Department of Public Utilities Special Permission No. 7003-EM of October 22, 1945.

Michigan Public Service Commission, Special Permission No. 1550, amended of October 22, 1945.

Public Service Commission of Missouri, Authority No. 8373 of October 24, 1945.

New Hampshire Public Service Commission Order No. 4774 of October 24, 1945.

Board of Public Utility Commissioners, State of New Jersey, Permission dated October 18, 1945.

Public Service Commission, State of New York, Special Permission Order No. 14755 of October 22, 1945.

The Public Utilities Commission of Ohio, Special Permission No. 9234 of October 19, 1945, amended.

Effective upon less than statutory notice by Special Permission of the Pennsylvania Public Utility Commission No. 21668 of October, 23, 1945.

Rhode Island Public Utilities Administrator Order No. 5634 of October 22, 1945.

Vermont Public Service Commission Special Order No. 404 of October 23, 1945.

Public Service Commission of West Virginia, Informal Order No. 3763 of October 22, 1945.

B. T. Jones, Agent, 608 South Dearborn Street, Chicago 5, Ill.

R. G. Raasch, Agent, 236 Union Station Building, 516 W. Jackson Blvd., Chicago 6, Ill.

I. N. Doe, Agent, Room 524, South Station, Boston 10, Mass.

Issued by W. S. Curlett, Agent, 143 Liberty Street, New York 6, N. Y.

1648 POSTPONEMENT NOTICE

The effective date of tariffs to which this is a supplement is hereby postponed from November 1, 1945 until January 1, 1946.

Effective January 1, 1946. Cancel the following from page 2 of tariff:

CANCELLATIONS

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-820	184	Ill. C. C. A-1, Ind. R. C. A-1, P. S. C.-Md. A-22, P. U. C.-N. J. A-25, P. S. C.-N. Y. A-144, Pa. P. U. C. A-130, Vt. P. S. C. A-25, Va. C. C. A-46, P. S. C.-W. Va. A-61.
I. N. Doe	631	82	Conn. P. U. C. 12, Maine P. U. C. 65, M. D. P. U. 22, N. H. P. S. C. 39, P. S. C.-N. Y. 80, R. I. P. U. A. 35, Vt. P. S. C. 60.
B. T. Jones	2092		Ill. C. C. 141, Ind. R. C. D-248, K. R. C. 62, Mich. P. S. C. 262, P. S. C.-N. Y. 271, Ohio 2148, Pa. P. U. C. 317, P. S. C.-W. Va. 280.
R. G. Raasch	804		Ill. C. C. 267, Ind. R. C. 153, P. S. C. Mo. 88.

1649 *Defendants' Exhibit D-4*

Rates and charges published in this tariff are subject to the provisions of Tariff of Increased Rates and Charges X-148, Agent W. S. Curlett's P. S. C. N. Y. No. A-132, supplements thereto or successive issues thereof. See Note Below.

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff unless otherwise specifically authorized by the Commission. P. S. C. N. Y. No. 106. Cancels—P. S. C.—N. Y.—No. 104.

South Buffalo Railway Company

TARIFF OF CHARGES FOR LOCAL MOVEMENTS

Classification: Governed, except as otherwise provided herein, by the Official Classification (A. H. Greenly, Agent), P. S. C.—N. Y.—No. 60, supplements thereto and reissues thereof.

Demurrage: Cars handled subject to B. T. Jones' Demurrage Tariff No. 4-Y P. S. C.—N. Y.—No. 267, supplements thereto and reissues thereof.

Issued March 17, 1945. Effective April 16, 1945.

Note: The operation of the provisions referring to this Note is suspended until January 1, 1946, and will become operative on January 1, 1946.

Issued by Paul A. Trageser, First Vice President, Bethlehem, Pa.

1650 TARIFF OF CHARGES FOR LOCAL MOVEMENTS

The territory served by the South Buffalo Railway is divided into three districts, as follows:

District No. 1: From point of connection with Buffalo Creek Railroad to North Hamburg Turnpike Bridge.

District No. 2: From North Hamburg Turnpike Bridge to South Hamburg Turnpike Bridge, including Woodlawn Branch.

District No. 3: From South Hamburg Turnpike Bridge to point of connection with Lehigh Valley R. R., including Blasdell and Shenandoah Branches.

Item I—Except as otherwise provided herein, charges in dollars per loaded car (see note 1) for Intra-Terminal and Intra-Plant movements (see note 2) between districts or between points in the same district are shown in the following table:

To district	From district— No. 1		No. 2		No. 3	
	Privately owned cars	Railroad owned cars	Privately owned cars	Railroad owned cars	Privately owned cars	Railroad owned cars
No. 1	$4.40	$6.60	$5.50	$7.70	$6.60	$8.80
No. 2	5.50	7.70	4.40	6.60	5.50	7.70
No. 3	6.60	8.80	5.50	7.70	4.40	6.60

Note 1: (a) Charges shown above will also apply on movement of empty cars for repairs, rebuilding, dismantling or wrecking, to repair car shops located on South Buffalo Railway; no charge will be made for the return movement.

(b) For empty cars placed for loading on sidings of industries or shippers or on other tracks on orders and not loaded for revenue movement, charges as shown above will be assessed for the complete service performed in placing and removal of the car.

Note 2: Intra-plant—A switching movement from one location within a plant to another location within the same plant.

Intra-terminal—A switching movement (other than intra-plant) from one track served by a carrier to another track served by the same carrier within the switching limits of one station or industrial switching district.

Item II (Formerly Item III).

Charges for transporting STEEL WORKS REFUSE in cars owned, maintained, loaded and unloaded by shipper from Designated Industry Interchange Tracks to Dumping Grounds along the line of this Company herein specified, will be as follows:

Commodity	From—	To—	Charges
Hot Slag in Iron Ladles.	Republic Steel Corp.	Dumping Ground at or near Marilla Street, Buffalo, New York.	$2.75 per ladle, minimum $27.50 per trip.
Cold Slag and other Steel Works Refuse.	Republic Steel Corp.	Dumping Ground at or near Marilla Street, Buffalo, New York.	$2.75 per car, minimum $41.25 per trip.

An extra charge at the rate of ♦ $16.00 per hour will be made for time in excess of thirty minutes consumed in dumping, fractional half hours to be charged for as full half hours.

Item III (Formerly Item IV).

For use of tracks of this Company by Locomotive Cranes, Power Shovels, and Power Derricks under their own power (which use will be permitted only when such equipment is in charge of competent crews, and on permission granted by, and arrangements made with, the General Superintendent, as to the time and place of such use), a charge of $5.00 per day or fraction thereof will be made. (See Note 3.)

1651 Item IV (Formerly Item VI).

For rental of locomotives with crews upon definite prearrangement with General Superintendent, as to time, place and service to be performed, ♦ $16.00 per hour.

Item V (Formerly Item VII).

For any movement between points on South Buffalo Railway of

(a) Locomotives, Locomotive Tenders, Locomotives and Tenders, Locomotive Cranes, Power Shovels, Power Derricks, on their own wheels, dead. (See Note 4), $15.00.

(b) Locomotives, Locomotives and Tenders, on their own wheels, under their own power. (See Note 3), $9.00.

(A) Item VI—Molten Slag.

For movement of molten slag loaded in cars owned, maintained, loaded and unloaded by shipper between Blast Furnace Plants of Bethlehem Steel Company and dumping grounds along Lake Erie, ♦ $6.60 per car.

(A) Item VII—Special Locomotive Services.

For use of locomotives not required in connection with performing service under items named above, such as stand-by (with or without supplying steam or air for dumping), rerailing of cars or other equipment and other services not specifically covered above, a charge at the rate of ♦ $16.00 per hour will be made.

Note 3: Pilotage, cost of crew, fuel and other supplies, if furnished, to be additional.
Note 4: Rates do not include cost of fuel, water or supplies, if furnished to such equipment.
♦ Denotes Increase.
(A) Denotes Addition.
▲ Denotes Change in wording which results in neither increase nor reduction in charges.

1652 *Defendants' Exhibit D-5*

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff. I. C. C. No. 63. Cancels I. C. C. No. 60. P. S. C.—N. Y. No. 99. Cancels P. S. C.—N. Y. No. 94.

SOUTH BUFFALO RAILWAY COMPANY

LOCAL FREIGHT TARIFF OF WEIGHING CHARGES AT ALL POINTS ON SOUTH BUFFALO RAILWAY

For weighing or reweighing cars on scales located on the line of or reached by this Company the following charges for such service will be assessed by this Company each time car is weighed (See Note).

Empty cars	$ .55 per car
Loaded cars	1.10 per car

NOTE: When weights of loaded cars so obtained are used for the assessment of freight charges, no charge will be made for the weighing service.

Issued February 26, 1940. Effective March 28, 1940.
Issued by Paul A. Trageser, Vice President, Lackawanna, N. Y.

1653 *Defendants' Exhibit D-6*

Rates and charges published in this tariff are subject to the provisions of tariff of Increased Rates and Charges X-148 Agent W. S. Curlett's P. S. C. N. Y. No. A-122, supplements thereto or successive issues thereof. See Note Below.

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff unless otherwise specifically authorized by the Commission. P. S. C. N. Y. No. 107.

SOUTH BUFFALO RAILWAY COMPANY

LOCAL FREIGHT TARIFF OF TERMINAL CHARGES

Issued October 2, 1945. Effective November 1, 1945.
NOTE: The operation of the provisions referring to this note is suspended until January 1, 1946, and will become operative on January 1, 1946.
Issued by Paul A. Trageser, Vice President, Bethlehem, Pa.

1654 TERMINAL CHARGES

On intrastate traffic interchanged with railroads connecting with this Company at Buffalo, N. Y., and Lackawanna, N. Y., and on traffic originating at points located on or connected with the tracks of this Company, for delivery at Material Storage Yards adjacent to Bethlehem Steel Company Open Hearth Plants Nos. 1, 2 or 3 or Trestle serving Bethlehem Steel Company's Blast Furnace Plants, the following charges will be made:

	Per car
For sorting and assembling cars on tracks of this Company in its South Yard or South Yard Extension and movement to Material Storage Yard adjacent to Bethlehem Steel Company Open Hearth Plant No. 1	♦$1.50
For sorting and assembling cars on tracks of this Company in its South Yard or South Yard Extension and movement to Material Storage Yard adjacent to Bethlehem Steel Company Open Hearth Plant No. 2	♦$1.50
For sorting and assembling cars immediately adjacent to Material Storage Yard of Bethlehem Steel Company at Open Hearth Plant No. 3 and movement to tracks in Material Storage Yard	♦$1.00
For sorting and assembling cars on tracks of this Company in its yards at foot of trestle serving Blast Furnace Plants and movement from such tracks to points of unloading on the trestle	♦$1.00

♦ Denotes increase.

1655 *Defendants' exhibit D-7*

Special Supplement to I. C. C. Nos. Shown Below. Special Supplement to P. S. C.—N. Y. Nos. Shown Below.

SPECIAL SUPPLEMENT TO TARIFFS ISSUED BY SOUTH BUFFALO RAILWAY COMPANY

Supplement No. 6 to	I. C. C. No. 62	P. S. C.—N. Y. No. 97.
Supplement No. 6 to		P. S. C.—N. Y. No. 98.
Supplement No. 6 to	I. C. C. No. 63	P. S. C.—N. Y. No. 99.
Supplement No. 1 to	I. C. C. No. 64	
Supplement No. 1 to		P. S. C.—N. Y. No. 108.
Supplement No. 1 to		P. S. C.—N. Y. No. 107.

Postponement of Increase in Rates and Charges

Wherever in tariffs supplemented hereby, or in prior supplements, provisions are made for the application of Tariff of Increased Rates and Charges, No. X-148, Agent W. S. Curlett I. C. C. No. A-742, P. S. C.—N. Y. No. A-122 effective December 31, 1945, the effective date of such provision is hereby postponed until a date six months after the legal termination of the war.

The form of this publication is authorized by Special Permission of the Interstate Commerce Commission, No. 15585, as amended

November 6 and 8, 1945, and under Rule 9 (n) of Public Service Commission, State of New York, Circular No. 104.

Issued December 10, 1945. Effective December 31, 1945.

Issued in compliance with Order of the Interstate Commerce Commission in Docket Ex Parte No. 148, dated October 30, 1945.

Issued on one (1) day's notice under Special Permission of the Interstate Commerce Commission, No. 15585, as amended November 6 and 8, 1945, and under Rule 9 (n) of Public Service Commission, State of New York, Circular No. 104.

Issued by Paul A. Trageser, Vice President, Bethlehem, Pa.

1656 *Defendants' Exhibit D-8*

No Supplement to this Index will be issued. I. C. C. No. 70 Cancels I. C. C. No. 68. P. S. C.—N. Y. No. 108 Cancels P. S. C.—N. Y. No. 105.

South Buffalo Railway Company

TARIFF DIRECTORY AND INDEX OF FREIGHT TARIFFS AND CLASSIFICATION ISSUES FROM OR TO STATIONS ON SOUTH BUFFALO RAILWAY COMPANY

This Index Contains Lists of Tariff Publications in effect January 15, 1946. Issued January 15, 1946.

Issued by Paul A. Trageser, Vice President, Bethlehem, Pa.

1657 First Section—List of Tariffs as to which South Buffalo Railway Company is an initial carrier

I. C. C. No.	P. S. C. N. Y. No.	Issued by—	Road No.	Applying on—	Applying from—	To—
62	97	S. B. Ry..	Freight Tariff.	Carload Traffic and less than Carload Traffic.	Public Team Tracks and Private Sidings located on or connected with the tracks of this Co.	Junction Points with all connecting lines at Buffalo, N. Y., and Lackawanna, N. Y.
	98	S. B. Ry..	Commodity Tariff No. 8.	*Sand, Gravel, Rock, Crushed Stone and Slag and Aniline Slag, Carload.	.....Do.....	Do.
	108	S. B. Ry..	Local Tariff.	*Carload Traffic and less than Carload Traffic.	Public Team Tracks or Private Sidings located on or connected with the tracks of this Company.	Public Team Tracks or Private Sidings located on or connected with the tracks of this Company.

*Rates in this tariff do not apply to interstate shipments.

MISCELLANEOUS SCHEDULES

I. C. C. No.	P. S. C. N. Y. No.	Issuing carrier	Description
92		E. H. Dulaney, Agent	Southern Classification No. 89.
29		R. C. Fyfe, Agent	Western Classification No. 71.
O. C. 60	O. C. 60	A. H. Greenly, Agent	Official Classification No. 60.
R. E. R. 278	R. E. R. 278.	M. A. Zanobia, Agent	Railway Equipment Register.
2963	267	B. T. Jones, Agent	National Car Demurrage Rules and Charges.
4	3	W. S. Topping, Agent	Transportation of Explosives and Other Dangerous Articles by Freight.
3784	254	B. T. Jones, Agent	Territorial Directory No. 3-H.
A-35	A-35	A. P. Leland, Agent	List of Open and Prepay Stations in United States, Canada, and Mexico.
A-823	A-140	W. S. Curlett, Agent	Rules Governing Receipt and Delivery of cars on, to, and/or from Private Tracks and Industrial Tracks.
62	69	S. B. Ry	Charges for Weighing or Reweighing Loaded and Empty Cars on South Buffalo Railway.
70	108	S. B. Ry	Tariff Directory and Index.

1638 Second Section—List of Tariffs under which South Buffalo Railway Company is a delivering carrier

I. C. C. No.	P. S. C. N. Y. No.	Issued by—	Road No.	Applying on—	Applying from—	To—
				CLASS AND COMMODITY TARIFFS		
62	97	S. B. Ry.	Freight Tariff	Carload Traffic and less than Carload Traffic.	Junction Points with all connecting lines at Buffalo, N. Y., and Lackawanna, N. Y.	Public Team Tracks and Private Sidings located on or connected with the tracks of this Company.
69		S. B. Ry.	Terminal Charges	For sorting and assembling carload traffic.	Tracks adjacent to Material Storage Yards of Bethlehem Steel Company and Blast Furnace Trestle.	Material Storage Yards and Blast Furnace Trestle of that Company.
	96	S. B. Ry.	Commodity Tariff No. 6.	*Sand, Gravel, Rock, Crushed Stone and Slag and Analine Slag, Carload.	Junction Points with all connecting lines at Buffalo, N. Y., and Lackawanna, N. Y.	Public Team Tracks and Private Sidings located on or connected with the tracks of this Company.
	106	S. B. Ry.	Local Tariff	*Carload Traffic and less than Carload Traffic.	Public Team Tracks or Private Sidings located on or connected with the Tracks of this Company.	Public Team Tracks or Private Sidings located on or connected with the Tracks of this Company.
	107	S. B. Ry.	Terminal Charges	*For sorting and assembling carload traffic.	Tracks adjacent to Material Storage Yards of Bethlehem Steel Company and Blast Furnace Trestle.	Material Storage Yards and Blast Furnace Trestle of that Company.
4378	783	N. Y. C. & St. L. R. R.	GFD-600 B	Billing Bases and Billing Instructions.	N. Y. C. & St. L. Points	Lackawanna, N. Y.

Third Section—Complete list of the Numbers of South Buffalo Railway Company Tariffs, I. C. C. and P. S. C.-N. Y. Series, arranged in numerical order. All tariffs shown in this Index are on file at the Company's station and offices at Lackawanna, Erie County, N. Y.

I. C. C. No.	P. S. C.-N.Y. No.	Page No.	I. C. C. No.	P. S. C.-N.Y. No.	Page No.
62	97	2	69		2
	*98	2		*107	2
63	99	2	70	108	3
	*106	2			

*Rates in this tariff do not apply to interstate shipments.

1659–1661 ACKNOWLEDGEMENT OF SERVICE

BUFFALO, NEW YORK,
Sept. 24, 1946.

Receipt is acknowledged of 3 copies of Findings of Fact and Conclusions of Law requested by United States of America, plaintiff herein.

KENEFICK, COOKE, MITCHELL,
BASS & LETCHWORTH,
LYMAN M. BASS
Attorneys for Defendants.

1662 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law requested by United States of America, plaintiff herein

Now comes United States of America, by its counsel, and respectfully requests that the court make and enter the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure, the Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This action was brought by the United States of America, by its attorneys acting under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission under the authority of the Act of Congress known as the Interstate Commerce Act, approved February 4, 1887 (24 Stat. 379), as amended by Section 3 of the Act of Congress, approved March 2, 1889 (25 Stat. 855), United States Code, Title 49, Section 12, paragraph 1.

2. This court has jurisdiction over the subject matter of this action and over the parties thereto.

1663 3. The defendant South Buffalo Railway Company (hereafter called "South Buffalo") is a corporation duly organized under the Railroad Laws of the State of New York on April 25, 1899. South Buffalo is and for many years has been a common carrier by railroad in interstate commerce operating within Erie County, New York.

4. The defendant Bethlehem Steel Company (hereafter called the "Steel Company") is a corporation duly organized and existing under the laws of the State of Pennsylvania. The Steel Company owns and operates and for many years it and its corporate predecessors have owned and operated steel and manufacturing plants located, among other places, at Buffalo, Lackawanna, and Hamburg, New York, and have engaged in manufacturing, fabricating, shipping, and selling iron and steel and the products thereof.

5. The defendant Bethlehem Steel Corporation (hereafter called the "Holding Company") is a corporation duly organized and existing under the laws of the State of Delaware. The Holding Company owns and holds the stock of approximately 57 corporations.

6. The Holding Company owns full and unrestricted title to all issued and outstanding capital stock of the Steel Company except directors' qualifying shares. All the directors of the Steel Company are also directors of the Holding Company. The Steel Company and the Holding Company have in common their respective presidents, secretary-treasurers, vice presidents in charge of legal and financial matters, and comptrollers.

7. The Holding Company owns full and unrestricted title to all authorized, issued, and outstanding capital shares of South Buffalo.

8. South Buffalo has authorized and outstanding capital stock of 5,000 shares of the par value of $100 per share, 4,991 of which were originally issued to Lackawanna Iron & Steel Company and on July 3, 1902, were transferred to Lackawanna Steel Company. Nine shares were issued as directors' qualifying shares.

1664 9. On October 10, 1922, the Lackawanna Steel Company contracted to sell these 4,991 shares of the stock of South Buffalo to the Bethlehem Steel Company of New York, Inc., and on the same date, Lackawanna Steel Company conveyed its steel manufacturing plant and other properties at Lackawanna, New York, to the Bethlehem Steel Company of New York, Inc. The name of the Bethlehem Steel Company of New York, Inc., was changed on or about October 21, 1922, to Bethlehem Iron and Steel Corporation and the 4,991 shares aforesaid of the stock of

the South Buffalo were transferred of record to that company on June 4, 1923.

10. The steel manufacturing plant and other properties at Lackawanna, New York, conveyed on October 10, 1922, to the Bethlehem Steel Company of New York, Inc., were on July 12, 1935, in their then existing condition duly conveyed by it under the name of Bethlehem Iron and Steel Corporation to the Steel Company.

11. On December 31, 1936, the 4,991 shares of the stock of South Buffalo were transferred on the stock transfer records of South Buffalo to the Holding Company. These shares at all times since June 4, 1923, have been owned and voted by the Holding Company or by the Bethlehem Iron and Steel Corporation. On January 3, 1940, the nine shares of the stock of South Buffalo previously used as directors' qualifying shares were also transferred to the Holding Company.

12. On October 10, 1922, Bethlehem Steel Company of New York, Inc., sold to South Buffalo approximately 75 miles of track located west of the Hamburg Turnpike in Lackawanna, New York, together with other property, and leased to South Buffalo for a period of 99 years the land and the road bed under said track and the land under the other property conveyed. On October 10, 1923, Bethlehem Iron and Steel Corporation leased to South Buffalo additional land and the road bed thereon west of the Hamburg Turnpike for the period of 98 years.

1665 13. West of the Hamburg Turnpike in Lackawanna, New York, the Steel Company owns 1,027 acres of land with a frontage of 1,215.7 feet on the Turnpike on which are located a manufacturing plant or plants owned by the Steel Company. In this area are approximately 58 miles of broad gage track and approximately 13 miles of narrow gage track owned by the Steel Company and approximately 58 miles of broad gage track owned by South Buffalo. The tracks of South Buffalo and the Steel Company within this area are interconnected at a large number of points. South Buffalo operates its locomotives over the broad gage track of both the Steel Company and South Buffalo in connection with business of the Steel Company.

14. South Buffalo is operated as a common carrier by railroad in interstate commerce and owns approximately 87 miles of track, all in Erie County, New York, of which approximately six miles is main line track. It has direct physical connections with five railroad trunk-line systems and one switching railroad, direct connections with two railroad trunk-line systems and indirect connections with five railroad trunk-line systems. All of the trunk-line systems are operated in interstate commerce.

15. South Buffalo's services include the transportation in interstate commerce of articles and commodities manufactured and produced by the Steel Company at its plants located in Buffalo, Lackawanna, and Hamburg, New York, and of raw materials, ingredients, and fuels used by the Steel Company at its plants in the manufacture and production of the said articles and commodities. South Buffalo's services also include the transportation in interstate commerce of the products of about 27 independent corporations or other independent business enterprises served by South Buffalo. The Steel manufacturing plants of the Steel Company at Buffalo, Lackawanna, and Hamburg, New York, are served by South Buffalo as the sole terminal connection of such plants with trunk-line railroad systems.

16. For the five-year period ending December 31, 1945, approximately 70% of South Buffalo's revenues were received from the Steel Company.

17. The Holding Company owns all the capital stock of six railroad companies in addition to the capital stock of South
1666 Buffalo. Each of these railroads is located in the vicinity of steel manufacturing plants of the Steel Company at places other than Buffalo, Lackawanna, and Hamburg, New York. In each instance there is a direct physical connection between the plant properties of the Steel Company and the respective railroads. South Buffalo and the other six railroad companies have common offices at Bethlehem, Pennsylvania, in a building owned by one of the railroad companies. Rent of these offices and expenses for telephone, telegraph, office supplies, heat, and light are apportioned among the seven railroad companies. For at least 10 years prior to about July 1940, South Buffalo and the other six railroad companies had their offices in a building at Bethlehem, Pennsylvania, owned by the Steel Company in which were also located the general offices of the Steel Company.

18. South Buffalo and the other six railroad companies have in common their general agent and the following officers: president, vice president, auditor, purchasing agent, and secretary-treasurer. The general agent and all of these officers have their offices at Bethlehem, Pennsylvania. South Buffalo also has an office at Lackawanna, New York, where are located its general superintendent (who is also a vice president) and its assistant secretary-treasurer. Prior to 1940 part of South Buffalo's offices at Lackawanna were located in the office building of the Steel Company.

19. From on or about October 10, 1922, to about December 1939, the Holding Company and the Steel Company so completely dominated South Buffalo as to obliterate independence of its management. In the belief that the larger organization and higher-salaried personnel of the Steel Company provided better man-

agerial talent than could be economically supplied for South Buffalo independently, the Holding Company required officials of South Buffalo to apply to officials of the Steel Company for guidance, advice and decisions which the former were required to follow. Among other matters, South Buffalo officials requested and accepted advice from Steel Company officials in respect of South Buffalo's operations in relation to the business of the Steel Company, in respect of South Buffalo's service to other shippers, and in respect of such of South Buffalo's internal affairs as personnel and wage policies, engineering problems, purchases of
1667 equipment and construction of additions and extensions. The leading Steel Company official at Lackawanna was recognized in fact and in name as "Manager, South Buffalo Railway Company."

20. Some time prior to July 19, 1938, and following the decision of the United States Supreme Court in United States v. Elgin, Joliet, and Eastern Railway Company, 298 U. S. 492, decided May 25, 1936, the general counsel of the Holding Company called the decision to the attention of the vice president of the Holding Company in charge of legal and financial matters. Thereafter, this vice president discussed the relationship then existing among South Buffalo, the Steel Company and the Holding Company with directors and the president of the Holding Company and directors and officers of the Steel Company who decided that there should be a reorganization of South Buffalo management.

21. During the period of years prior to July 19, 1938, five of nine members of the Board of Directors of South Buffalo were employees of the Steel Company, and four members were employees of South Buffalo, on or about July 19, 1938, the five members of the Board of Directors, who were employees of the Steel Company, resigned and their places were filled by South Buffalo employees.

22. At a meeting of the Board of Directors of South Buffalo, held on or about December 5, 1939, the then president of South Buffalo was required by the Holding Company to resign. The Holding Company made known to the directors of South Buffalo that it wanted elected as president an employee of the Steel Company who had been selected by the Holding Company for the position because of his experience and familiarity with the problems of the Steel Company gained during a 30-year period of employment with the Steel Company and who was so selected irrespective of his lack of experience and familiarity with problems of common carrier railroad transportation. At such meeting the employee of the Steel Company so selected by the Holding Company was elected president of South Buffalo and has served continuously since that time. The same person was elected president

of each of the other six railroad affiliates of the Holding Company. The compensation of the person so selected for his duties as president of the seven railroad affiliates, including South Buffalo, was previously fixed by the president of the Holding Company at approximately two and one-half times the compensation paid his predecessor as president of such railroad affiliates.

1668 23. At the meeting of the Board of Directors, held on or about December 5, 1939, at least six directors were required by the Holding Company to resign effective at the close of the meeting. In their places were elected five businessmen who resided in or near Buffalo, New York, and who had no connection with any of the defendants, and the newly elected president of South Buffalo. The five outside directors were interviewed and solicited by counsel for the Holding Company. They took office in January 1940 and were not informed of any of the facts which had transpired in South Buffalo's affairs prior to that time. Only one of these five directors had had any experience in any capacity with railroad management or operation. Since January 1940 the Board of Directors at all times has consisted of five outside directors and four officers of South Buffalo.

24. Upon completion of the reorganization of South Buffalo the following of South Buffalo's executive officers and chief operating officials were former Steel Company employees: president, a vice president, secretary-treasurer, auditor, purchasing agent, and chief engineer. When the person who had been general superintendent and a vice president of South Buffalo ceased to be such, a former Steel Company employee was chosen to fill his place beginning February 1, 1941. Since that time the general superintendent of South Buffalo has been a former Steel Company employee. At present all of South Buffalo's executive officers, except the assistant secretary-treasurer, are former employees of the Steel Company.

25. At meetings of the Board of Directors of South Buffalo either the president or a vice president, both former Steel Company employees elected to their respective positions in December 1939, presides, presents to the board matters to be passed on, and expresses views as to why various proposals should be adopted. Each of the five directors, not a South Buffalo officer, relies upon the opinions of the presiding officer. None of such directors was ever informed that the South Buffalo officers who preside are former employees of the Steel Company. In all instances except one, since January 1940, the Board of Directors has approved unanimously the recommendations of the presiding officer.

26. The effect of the reorganization of South Buffalo's management brought about by the Holding Company was to place the conduct of South Buffalo's business and affairs in men with prior

associations with the Steel Company extending up to 30
1669 years in the case of the president. The reorganization was designed to make it appear that South Buffalo had been made independent of control by or influence of the Steel Company or the Holding Company. However, such control and influence and the virtual unification of the three defendants have continued to the present.

27. The relationship among South Buffalo, Steel Company, and the Holding Company, and the location of South Buffalo's trackage in the vicinity of the Steel Company's plants at Buffalo, Lackawanna, and Hamburg, New York, are such that there exist motive and inducement for South Buffalo to integrate its operations with those of the Steel Company, to function as a department in the Steel Company and to discharge its business affairs with the Steel Company as a part of the Steel Company rather than as a separate and distinct organization.

28. South Buffalo's problems in the conduct of its business have never been considered exclusively in the light of its duties as a common carrier, but have been continuously considered in the light of its common interest with the Holding Company and the Steel Company and in the light of the wishes and desires of the Steel Company. The relationship developed between South Buffalo and the Steel Company prior to December 1939 was such that officials of South Buffalo were required to seek, and did seek, guidance, advice, and orders from officials of the Steel Company which they were required to follow. Both before and since that date the management of South Buffalo has been reposed in personnel with long prior records of employment by the Steel Company.

29. Business dealings between South Buffalo and the Steel Company are conducted in a manner customary between departments of the same organization having a recognized common interest, and are unlike those customary between independent corporations dealing at arm's length.

30. The approximately 57 corporations including the Steel Company and South Buffalo, the capital stock of which respectively is owned by the Holding Company, are operated as one cohesive organization for the manufacture of iron and steel and the products thereof. This organization is dominated and controlled by the Holding Company. The Steel Company and the Holding Company are not interested in the operations of South Buffalo as an independent railroad company but only
1670 as a unit in the larger organization.

31. The ownership by the Holding Company of the stock of South Buffalo has been and is used to dominate and control the operations and the affairs of South Buffalo, to destroy its

independence and freedom of action in the management of its affairs as a common carrier and to bring it within the control, management, and direction of the Holding Company and the Steel Company. Thereby South Buffalo has been made a mere instrumentality, branch, or department of the Steel Company and the Holding Company and practically the Steel Company's agent in the Steel Company's operations at Buffalo, Lackawanna, and Hamburg, New York.

32. The affairs of South Buffalo, the Holding Company, and the Steel Company have been and are, in fact, so intermingled and the identity and community of interest among them is such that in substance and reality they are one and the same organization at Buffalo, Lackawanna, and Hamburg, New York, consisting on the one hand of a steel-producing branch, and on the other of a transporting common carrier branch, both wholly owned and dominated by the Holding Company.

CONCLUSIONS OF LAW

1. Within the meaning of the Commodities Clause of the Interstate Commerce Act, 39 Stat. 584, U. S. Code, Title 49, sec. 1, paragraph (8), South Buffalo is a railroad company.

2. The Commodities Clause applies to South Buffalo with respect to its transporting in the course of interstate commerce articles and commodities other than timber and the manufactured products thereof and except such articles or commodities as may be necessary or intended for its use in the conduct of its business as a common carrier.

3. Within the meaning of the Commodities Clause, South Buffalo is not a corporation separate and distinct from, and independent of, the Holding Company and the Steel Company, but in their operations at Buffalo, Lackawanna, and Hamburg, New York, South Buffalo and the Steel Company are branches and departments of the same organization.

4. Within the meaning of the Commodities Clause, South Buffalo has an interest in the steel products and other articles and commodities manufactured and produced by the Steel Company and in the raw materials, ingredients, and fuels consigned to the Steel Company which it has transported and now transports in interstate commerce.

1671 5. Within the meaning of the Commodities Clause, the steel products and other articles and commodities manufactured and produced by the Steel Company and transported by South Buffalo in interstate commerce are owned, manufactured, produced, and transported by and under the direction of the same authority.

6. South Buffalo should be perpetually enjoined and restrained from transporting in interstate commerce any article or commodity (other than timber and the manufactured products thereof) manufactured, mined, or produced by it, the Steel Company, the Holding Company, or any wholly owned subsidiary of the Holding Company or under their authority or the authority of any of them or any such article or commodity which South Buffalo, the Steel Company, the Holding Company, or any such subsidiary may own in whole or in part or in which they, respectively, may have an interest, direct or indirect, except such articles or commodities as may be necessary and intended for the use of South Buffalo in the conduct of its business as a common carrier. South Buffalo, the Steel Company, the Holding Company, and any wholly owned subsidiary of any of them should be perpetually enjoined and restrained from continuing to perform any and all acts in violation of the Commodities Clause.

Respectfully submitted.

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United States Attorney for the Western District of New York.

1673 In United States District Court, Western District of New York

* * * * *

Civil 1464

UNITED STATES OF AMERICA, PLAINTIFF, *v.* SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY, AND BETHLEHEM STEEL CORPORATION, DEFENDANTS

* * * * *

Appearances: Wendell Berge, Assistant Attorney General; James E. Kilday, David S. Craig, Robert W. Strange, Robert G. Seaks; Special Assistants to the Attorney General; George L. Grobe, U. S. Attorney for the Western District of New York; for the Plaintiff. Kenefick, Cooke, Mitchell, Bass & Letchworth; Buffalo, N. Y., by Lyman M. Bass of Counsel; Cravath, Swaine and Moore, New York City; and William R. Robison, George M.

Billings, Frank M. McGarry, Hoyt A. Moore and Bruce Bromley; for Defendants.

Opinion

Nov. 7, 1946

KNIGHT, District Judge:

1674 This is a suit brought by the United States against the South Buffalo Railway Company (at times hereinafter called South Buffalo), Bethlehem Steel Company (at times hereinafter called Steel Company), and Bethlehem Steel Corporation (at times hereinafter called Holding Company) to enjoin them from violating the so-called Commodities Clause of the Interstate Commerce Act, 34 Stat. 584, 49 U. S. C. A. § 1 (8).

This Court has jurisdiction over the subject matter of this suit and the parties.

The Bethlehem Steel Corporation is a Holding Company organized under the laws of the State of Delaware, owning all or substantially all of the stock of 57 subsidiary corporations operating in various states and outside the United States. These latter are companies mining ore, producing materials used in the manufacture of steel, steamship companies, which transport iron ore from mines to subsidiary steel plants, engage in coastwise shipping principally of products produced by one or more of such subsidiaries, corporations engaged in the manufacture of steel and steel products, and railroad companies.

The South Buffalo Railway Company was incorporated in 1889 and, of its shares of capital stock of 5000, 4,991 were issued to Lackawanna Iron & Steel Company. In 1903 these shares were transferred to the Lackawanna Steel Company. The remaining nine shares were held as directors qualifying shares. On October 10, 1922, Lackawanna Steel Company conveyed its steel
1675 manufacturing plant and other properties at Lackawanna, New York, and contracted to sell its stock in South Buffalo to the Bethlehem Steel Company of New York, Inc. In 1922 the name of Bethlehem Steel Company of New York, Inc., was changed to Bethlehem Iron and Steel Corporation, and the 4,991 shares of stock aforesaid were transferred in 1923 to that company. In 1935 the steel-manufacturing plant and other properties at Lackawanna, New York, which had been conveyed to Bethlehem Steel Company of New York, Inc., were conveyed to Bethlehem Steel Company, defendant of that name herein, and in the following year the stock of South Buffalo which had been transferred from Lackawanna Steel Company to Bethlehem Steel Company of New York, Inc., was transferred on the books of South Buffalo to Bethlehem Steel Corporation, defendant herein, organized

under the laws of the State of Delaware. The Bethlehem Steel Corporation since 1940 has owned all of the stock of South Buffalo. When Bethlehem Steel Company of New York, Inc., acquired the stock aforesaid of South Buffalo, in 1922, it sold to South Buffalo 75 miles of track located West of what is termed the Hamburg Turnpike and certain other property, and also leased to it the roadbed under such track and land and other property for 99 years, and the following year leased to it certain additional land and roadbed for 98 years.

The Steel Company owns 1,027 acres of land along the Hamburg Turnpike in Lackawanna, New York, and on this are located the manufacturing properties of the Company. An intricate system of tracks is supplied and necessitated to serve the needs of the Steel Company. South Buffalo owns and operates 6 miles of main line track and 81 miles of other track. Of this 81 miles, about 58 miles, with 71 miles of broad- and narrow-gauge track owned by the Steel Company, make up the total trackage serving the plant. The balance of the main track of the South Buffalo serves other properties of the Steel Company and some 27 other nearby industries. These various tracks within the plant are interconnected and South Buffalo and the Steel Company operates over them. The railroad has some 35 locomotives, steam and Diesels. It
1676 owns no freight cars except a few which are used for its own work. It has direct physical connection with five line-haul carriers and direct and indirect connection with seven others. South Buffalo is one of seven railroads which is a subsidiary of the Bethlehem Steel Corporation. Each of these railroads serves a plant of the Steel Company. South Buffalo is the only railroad which has served the Steel Company's Lackawanna plant since its acquisition, and approximately 70 per cent of its revenues come from the Steel Company. It delivers to the aforesaid line-haul companies materials and products both from the Steel Company and these various industries destined for delivery outside the State of New York and receives over these line-haul carriers materials and products for the Steel Company and these various industries.

The Commodities Clause of the Interstate Commerce Act, Section 1 (8), so far as material here, reads:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, * * * to any other State, * * * any article or commodity, * * * manufactured, mined, or produced by it, or under its authority, * * * or in which it may have any interest, direct or indirect, * * *."

The purpose of the Commodity Clause was "to divorce the business of transporting commodities in interstate commerce from

their manufacture, * * * and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce." United States v. Delaware & Hudson Co., 213 U. S. 366, 29 S. Ct. 527, 534, 53 L. Ed. 836; See also United States v. Delaware, Lackawanna & Western R. Co., 238 U. S. 516, 35 S. Ct. 873, 59 L. Ed. 1438; United States v. Elgin, Joliet & Eastern Ry. Co., 298 U. S. 492, 56 S. Ct. 841, 80 L. Ed. 1300. The abuses which the Clause sought to prevent grew out of the common ownership of railroads and coal mines in the Eastern States and the resulting power of discrimination in various ways and thereby suppress competition.

The defendants assert that the Commodities Clause has no application to these defendants; that neither of the parties defendant is a "railroad" within the contemplation of the Clause; that neither transports commodities from one State to another
1677 and that, if the three defendants are to be regarded as a single corporate entity, such entity would bring them within the exact language of the "Shippers Allowance Clause." Sec. 15 (13) of the Act, 49 U. S. C. A. § 15 (13). The merits of these contentions may well be first considered, as a decision upholding any of them would require a dismissal and obviate the necessity of considering the mass of evidence relating to the violation of the Clause.

The claim that the Commodities Clause was inapplicable was raised and presented at considerable length in the briefs in United States v. Elgin, supra. The Supreme Court made no reference to this contention, and it is a fair conclusion that the court saw no merit in it. However, all of the grounds now urged were not presented there.

Defendants term the South Buffalo an "industrially owned switching railroad" whether owned by the industry or a separate company and therefore say the Commodities Clause does not apply. Of course, there are many railroads which are so classified, but this railroad is more than such—more than a terminal facility. Its line of road extends inside and outside the Steel Company plant to the length hereinbefore stated; it serves numerous other industries; transports materials in interstate commerce; files tariffs; has connections with various line-haul carriers outside the steel plant; does certain work for the Steel Company outside of transportation; it owns railroad bed and track outside the plant and leases land within; has numerous locomotives; has its own office building, and other essential equipment.

Defendants cite United States v. Terminal Railroad Ass'n, 224 U. S. 383, 32 S. Ct. 507, 56 L. Ed. 810, and State ex inf. Attorney General v. Terminal R. Ass'n of St. Louis, 182 Mo. 284, 81 S. W. 395. Neither involved consideration of the Commodities Clause and neither is determinative of what type of railroad South Buf-

falo is. The former said there was an "essential difference between terminal systems properly so described and railroad transportation companies." (224 U. S. 383, 32 S. Ct. 512.) There is a wide difference between the terminal system there considered from the system here. Omaha Street Ry. v. Interstate Commerce Commission, 230 U. S. 324, 33 S. Ct. 890, 57 L. Ed. 1501,
1678 46 L. R. A., N. S. 385, held that the Interstate Commerce Act, as then existing, did not apply to a streetcar company operating a railroad across state lines, and with the conclusion there well may be agreement. In United States v. Delaware & Hudson, supra, most of the business of the company's railroad was the transportation of coal from mines owned by the company. The company contended that its railroad was not a railroad within the purview of the Clause, but a coal company. The court there said: "The contention * * * is without merit. The facts stated * * * leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce." This was the first case in the Supreme Court construing the Commodities Clause, and no later one holds to the contrary. The size of the railroad and the extent of its business are not determinative that it is an "industrial switching road." Such construction would subvert the purpose of the Commodities Clause with respect to discrimination.

The Commodities Clause applies irrespective of the fact that the South Buffalo does not cross the state line. Property is in interstate commerce from its delivery to the carrier for shipment into another state till delivered to the consignee. "Transportation," as the word is used in different provisions of the Interstate Commerce Act, refers to transportation in interstate commerce.

Section 1 (1) of the Interstate Commerce Act provides that, the Act "shall apply to common carriers engaged in—The transportation of passengers or property wholly by railroad, * * * from one State * * * to another State * * *." Regarding this section, in United States v. Union Stock Yard etc. Co., 226 U. S. 286, 33 S. Ct. 83, 88, 57 L. Ed. 226, the Court said: "That the service is performed wholly in one state can make no difference if it is part of interstate carriage."

The language in the Commodities Clause, insofar as it relates to transportation, is the same as that in Section 1 of the Elkins Act, Section 41 (3) 49 U. S. C. A., formerly Section 2 of the Hepburn Act, and this, in part, fixes the liability of a carrier
1679 transporting property from one state to another where a rebate or off-set against the regular charge is given. The courts apply this statute where property is transported to and consigned to another state, and even if the line of the guilty railroad does not extend beyond the state of origin. Powell v.

United States, 4 Cir., 112 F. 2d 764. The Carmack Amendment, Section 20 (11), 49 U. S. C. A., as originally enacted, provided that a common carrier receiving property "for transportation from a point in one State * * * to a point in another State * * * shall issue a receipt * * * and shall be liable * * *." This section has been construed to render a carrier liable whose lines lay entirely within one state but which had accepted property for transportation to another state. Missouri, Kansas & Texas Ry. Co. of Texas v. Plano Milling Co., Tex. Com. App., 231 S. W. 100, certiorari denied, 258 U. S. 624, 42 S. Ct. 317, 66 L. Ed. 797.

The Shippers Allowance Clause, Section 15 (13), of the Interstate Commerce Law has no application to a common carrier. Under its provisions allowances are made to the shipper for services furnished in connection with transportation by the shipper through its plant facilities. These services are typified by switching service, pick-up delivery, elevator service, and other sorts which are part of the transportation itself. The Interstate Commerce Commission and the courts have many times considered the type of service contemplated by the Shippers Allowance Clause. The numerous cases cited by the defendants in this connection illustrate this.

South Buffalo is not a facility of the Steel Company. It is a separate corporation. It operates over its own tracks within and outside of the Steel Plant. It serves not only the Steel Company but numerous other industries. The distinction between the status of this railroad and the facility of the shipper is plain. The theory of merger into one entity of the three defendant companies as "owner of property" on the assumption of domination and control of these companies by the Steel Company, as advanced by the defendants, is chimerical. The corporate distinction between the two companies is no way dissolved, and this is
1680 not changed though the physical and operational aspects in a case may seem to be commingled. The Allowance and Commodities Clauses apply to different conditions. They are consistent the one with the other. In re Allowance to Kanawha, etc., Ry., 41 I. C. C. 53. The facts in Manufacturers Ry. Co. v. St. Louis, etc., R. Co., 28 I. C. C. 93, are comparable here, and the Commission there stated: "Assuming the newly made carrier to be under the law a common carrier in all respects such as it represents itself to be, it is evident allowances under Section 15 of the act can no longer be made to the owning industry as for services rendered by the shipper, as the railway is no longer a part of or in law connected with the latter which is 'the owner of the property transported,' to whom alone * * * allowances may be made * * *."

On the question of the application of the Commodities Clause, United States v. Baltimore & Ohio R. Co., 231 U. S. 274, 34 S. Ct. 75, 58 L. Ed. 218, and other cases are cited by defendants. In the Baltimore case principally relied on, the Supreme Court expressly states that it did not consider the question of the violation of the Commodities Clause because it was not raised before or considered by the Commission. Further, the partnership operating the terminals was not a party to the suit.

The American Short Line Railroad Association, appearing as Amicus Curiae, has raised the points urged by defendants to which we have referred and has also submitted an extensive brief on the history of the Commodities Clause. This history does not demonstrate the intent of the Congress to limit the prohibitions of the Commodities Clause to railroads which cross state lines.

Neither the ownership by the Holding Company of all the shares of stock in both the railroad and the steel company nor the power of control incident thereto is sufficient standing alone to sustain the violation charged herein. United States v. Elgin, supra. But "domination may spring as readily from subtle or unexercised power as from arbitrary impostion of com-
1681 mand." North Am. Co. v. Securities Exchange Com'n, 66 S. Ct. 785, 790. The question here is what control the Holding Company did exercise and whether it amounts to such domination as makes one subsidiary a mere agent of another. As such agent the railroad would have an "indirect" interest in the commodities of the Steel Company which it transports. United States v. Reading Co., 253 U. S. 26, 60, 61, 40 S. Ct. 425, 64 L. Ed. 760; United States v. Elgin, supra; United States v. Lehigh Valley R. Co., 220 U. S. 257, 31 S. Ct. 387, 55 L. Ed. 458. Whether such domination has been exercised to the extent that brings the transportation in interstate commerce within the condemnation of the Clause is a question of fact to be determined on all of the evidence presented.

It is important to compare some of the facts found in the Elgin case as a basis for the application of the law with those found here, and we believe it is helpful to show these in juxtaposition.

United States v. Elgin etc.	United States v. South Buffalo et al.
Holding Corporation owned all stock of subsidiary.	Holding Corporation owned all stock of subsidiary.
Holding Corporation controlled election of directors.	Same power of control.
Interlocking directorate for many years.	No interlocking directorate.

4 directors or officers of Holding Corporation directors of subsidiary.	No officer or director of Holding Corporation or Steel Company ever an officer or director of South Buffalo.
Many contracts undertaken by Holding Corporation before approval by subsidiary.	No comparable facts.
Holding Corporation approved declaration of dividends.	Evidence does not show that the Holding Corporation approved. Government suggests only that approval is to be inferred.
All major projects were approved by Holding Corporation and all capital account expenditures over $5,000 required Holding Corporation approval. ¾ of all capital expenditures approved at times.	No approval required by the Holding Corporation.
All purchases of land required Holding Corporation's approval.	No such requirement.
1682 Holding Corporation designated bank depositories and controlled much of the cash funds of subsidiaries and designated certain banks as depositories or subsidiary.	No comparable facts. No funds commingled with the Holding Corporation funds or the steel Company funds.
Reports of all expenditures and where made were required to be submitted quarterly by subsidiary.	No comparable requirement until 1943.
Holding Corporation had a clearance account by which monthly settlements were made of accounts existing between subsidiaries.	No comparable situation.
All purchases of land had to have Holding Corporation approval.	No comparable requirement.
All projects involving agreements of major importance were submitted to Holding Corporation.	No such requirement.
Budget estimates submitted by subsidiary to Holding Corporation.	Nothing comparable here.

Holding Corporation had a bonus plan, pension plan, stock-purchase plan.	Holding Corporation has pension plan, relief plan and so-called incentive plan. Incentive plan is for executives and officers of the subsidiaries and the Holding Corporation and was authorized by the Act of Incorporation of the Holding Corporation.
The Elgin leased Lake Shore Ry. and made a trackage agreement with the Chicago & Ill. Ry. with the active participation of the Holding Corporation with the President of Elgin.	A comparable situation in some respects appears as respects the lease of Northern Operating Co. by the Steel Co. to the subsidiary.
Holding Corporation and subsidiary had office in the same building.	South Buffalo and Holding Corporation did until 1940.
Same attorneys for subsidiaries and Holding Corporation.	Same attorneys.

It is to be noted that all of the foregoing activities of the Steel Corporation did not continue during all of the time in question in that suit.

The comparison which we have shown is not complete, and there are various other practices both between Elgin and the Steel Company, and between South Buffalo and the Steel Company and the Holding Corporation shown in the record in both cases. We will consider others of the major matters between South Buf-
1683 falo, the Steel Company and the Holding Corporation which are urged by the government as showing Holding Company domination. It is unnecessary to detail all of such.

We deem it advisable to consider separately the evidence as it relates to situations existing prior to 1940 and those subsequent to that date. This is because of a reorganization of South Buffalo effective in 1940.

The government asserts that immediately on the acquisition of South Buffalo in 1922 Bethlehem interests began the radical rearrangement of the properties between South Buffalo and Bethlehem and a change in the set-up of the South Buffalo organization with the intermingling of the steel and railroad operations. We do not find these to be the facts though Bethlehem interests were placed in a position to control. The record discloses that prior to 1922 the South Buffalo operated tracks West of the Hamburg Turnpike under a lease from Lackawanna Steel Company. (See

Industrial Railways case, 29 I. C. C. 212, decided in 1914. How long it was so operated does not appear. However, we do know it was not in effect in 1920. The maps in evidence show the same general line-up of the railroad within the plant before and after 1922; the officers of South Buffalo, following Bethlehem's acquisition of its stock, continued as such. Only two of these had been associated with any Bethlehem Company prior to their connection with South Buffalo. The President, Vice President, and General Superintendent and Secretary and Treasurer continued in such positions for years following the acquisition. Formerly the railway and Lackawanna Steel Company had officers in common. This was not so after Bethlehem's acquisition. Under Lackawanna management the majority of directors were employees of the Lackawanna Steel Company and during a period of years prior to July 1938, directors who were employees of the Steel Company were in the majority. The form of operation as between the railroad and the Steel Company has long been common in large manufacturing plants. It has proved to have been beneficial financially for South Buffalo. Under the provisions
1684 of these leases South Buffalo could not relocate its tracks or construct additional structures without the Steel Company's approval. The minutes of meetings of South Buffalo's Board and stockholders do not record any action by either party relative to these leases or to the sale. This seems unusual. The record discloses a "journal voucher" of South Buffalo, dated January 16, 1923, approved for entry both by the auditor of South Buffalo and the Comptroller of Bethlehem Steel Corporation. This purports "to place at original value road and equipment purchases as per Indenture of Sale dated October 10, 1922." The last-mentioned date is the date when Bethlehem acquired both Lackawanna plant and the stock of South Buffalo. There are also other minor provisions in these leases to which criticism has been directed. We do not believe that the record discloses any material change in policy, practice, or procedure by the Bethlehem Company or the Bethlehem Corporation toward South Buffalo following the execution of these leases. Indeed, standing alone far less domination or control appears than was shown in the Elgin case.

A considerable part of the record in this case is made up of Exhibits of letters between officials of South Buffalo and Bethlehem Steel and records from the files of these companies. A considerable number of these letters purport to have been directed by officers of South Buffalo to officials of Bethlehem Steel but addressed as officials of South Buffalo. Numerous ones purport to have been signed by officers of the Steel Company over their names as officers of South Buffalo. These and other Exhibits purport to ask, advise, or seek authority from officials of Steel Com-

pany, and some purport to have been written by officers of the Steel Company giving directions with regard to certain operations, purchases, and other concerns of South Buffalo. These communications cover a period of time commencing with 1923 and continuing until 1939. These Exhibits number altogether something a little upwards of 100. There is a considerable number of these which on their face do not tend to show control or are shown by their connection to relate to conduct or acts entirely
1685 consistent with independent operations. It is not necessary to refer in detail to this correspondence or file records. It is sufficient to refer to them somewhat generally in order to show their character.

Most of these communications from South Buffalo were directed to Gross, General Traffic Manager of Steel Company, as General Traffic Manager of South Buffalo; to Burns, General Manager of Steel Company, as General Manager of South Buffalo; and to Entwisle, General Manager of Steel Company, as General Manager of South Buffalo. Many of these communications were written by or to Benning, Vice President and General Manager of South Buffalo, commencing as early as 1924 and continue through to as late as 1938. There are no less than 27 of these written by the Vice President of South Buffalo.

These communications and file records, among other things, relate or refer to transportation costs, repair of cars, extension of railroad lines, sale of property, purchase of equipment, rates of pay for South Buffalo personnel, track constructions, construction of buildings, and other matters concerning the management and operation of the railroad.

Gross denies any knowledge of numerous letters purported to have been signed by him. But these were received in evidence by stipulation, subject only to the right to an objection as to their relevancy or materiality.

In 1926 Seneca Iron & Steel Company, an industrial plant on the line of South Buffalo, requested of the railroad a reduction in switching charges. A letter from South Buffalo to Gross, "General Traffic Manager," of the Steel Company, at Bethlehem, Pennsylvania, asked whether the request should be granted. A reply came on South Buffalo stationery, purporting to be signed by Gross, styling himself "General Traffic Manager," and stating that it should not be granted. Defendants admit that this "may represented an isolated deviation from sound corporate practice."

In 1931, on numerous occasions, the Vice President and General Manager of South Buffalo wrote Gross, addressing him
1686 as "General Traffic Manager" of South Buffalo, regarding the encroachment of the Thawing House of the Sintering Company on land of South Buffalo and regarding the purchase of

a plant locomotive or the use of one in connection with the Sintering Company and repeatedly requested the advice of Gross.

Prior to 1941, South Buffalo had trackage rights over a strip of an old railroad line lying East of the Hamburg Turnpike. The trackage was then owned by the Northern Operating Company, subsidiary of the Nickel Plate Land Owning Company. South Buffalo used this as a connecting link between its main line and its tracks at the so-called Seneca and Kalman plants which were purchased by the Steel Company in 1931–1932.

The Steel Company initiated action looking to the purchase of the strip. This was then primarily taken for the benefit of South Buffalo. There are in the record several letters purporting to have been written by Gross as "Vice President" to Burns as "General Manager." Both held such position with the Steel Company at that time. They are written on South Buffalo stationery. Gross has denied all knowledge of these letters. One K. A. Kemmerer, until some time in 1932 when he became President of all subsidiary railroads, was an employee of the Steel Company. The letters purport to have been dictated by "K. A. K." The initials evidently refer to Kemmerer. There is also a letter purporting to have been written by Gross on South Buffalo stationery, directed to James, Chief Engineer, and Burns, General Manager. James was Chief Engineer of the Steel Company. Kemmerer is now deceased. Whether Gross signed or authorized the signing of his name to the letters is of importance because he was an Executive officer of the Steel Company. The evidence justifies the conclusion that the Steel Company officials were knowing to the contemplated purchase of the land. In 1937, Benning, Vice President and General Manager of South Buffalo, brought up with the Steel Company the proposal that South Buffalo buy the strip, as is
1687 shown by letters from him to Entwisle, then General Manager of the Steel Company. Nothing came of this. In 1941 the Steel Company bought the strip and later made a trackage agreement with South Buffalo for the use of it. One cannot escape the conclusion that Gross either signed these or authorized the signing by Kemmerer.

In 1936, the Holding Company made two contributions to the capital of South Buffalo. One was to make up a deficit of $211,616, as shown on the books of the parent corporation at the end of 1935 and one of $1,900,000 was to enable SouthBuffalo to reduce an indebtedness in excess of $2,000,000 to the parent company. As to the deficit of $211,616, this contribution was made in order that a surtax might be avoided. The net earnings for 1936 as shown on the accounts of the railway amounted to $500,792. Under New York law the railroad could not declare or pay any dividend which impaired its capital. Under the Federal statutes,

a surtax upon undistributed net income was imposed. To avoid the risk of a surcharge and the violation of the state law, the Holding Company contributed to the capital of the railroad, $211,616, the amount of the 1935 deficit. The contribution of $1,900,000 to the capital was made to avoid payment of the penalty surtax provided for by the Federal Revenue Act of 1936, § 14, 26 U. S. C. A. Int. Rev. Acts, Page 823. There appeared to be only two methods by which such penalty tax could be avoided, by the railroad acquiring cash, or its equivalent, by means other than borrowing. For various reasons the issue of additional stock seemed inadvisable, and finally it was decided that the debt of the railroad to the amount of $1,900,000 should be discharged by contribution to capital. The fact of the contributions is not criticized. It is asserted and the proofs show that all the matters relative to the initiation and the naming of the contributions were carried out by the Holding Company. The railroad does not appear to have been consulted or to have had any part in them. The resolution adopted by the railroad on July 10, 1936, pointed to by the
1688 defendants, relates entirely to an interest arrangement of April 1936. The Holding Company had a right, as creditor and sole stockholder, to initiate the contribution proceedings and to lay down terms, but in ignoring the railroad in them it indicates the exercise of the power of control over railroad.

The unity of Bethlehem is claimed to be demonstrated in maintenance of an incentive compensation fund and its benefit relief plan. The former is compulsory under the Holding Company's Certificate of Incorporation. (Article Tenth.) Payments under it are made only to executives of the Holding Company and its subsidiaries. The relief plan is operated solely by the employees themselves. As indicated, the Elgin case discloses a like plan. Further there is the aforesaid pension plan. We see nothing out of the usual in any of these plans and nothing indicating control over this subsidiary.

With reference to the employees' benefit plans, requiring filing of detailed reports with the Holding Company and common counsel and occupancy of adjacent offices by South Buffalo and the Steel Company, the Government says: "These matters, heavily relied on by the Government in the Elgin case, have not been stressed in this case." Filing of detailed reports was first required in 1943. After 1940, South Buffalo had its separate office building.

At one time the Supervisor for employment for the Steel Company performed services in engaging employees for South Buffalo; South Buffalo's Chief Engineer was on the Steel Company pay roll; no demurrage charge was made by South Buffalo for the Steel Company cars when standing on South Buffalo tracks. The

extent of liability for demurrage, however, does not appear. The attempt has not been made to show all the evidence bearing on the relations of the parties defendant. It is sufficiently established that prior to December 5, 1939, South Buffalo for many years had transported articles and commodities manufac-
1689 tured and produced by the Steel Company and raw materials consigned to the Steel Company, in all of which South Buffalo had an interest in violation of the Commodities Clause. That interest results by reason of the control and the domination of the Holding Company and the Steel Company of the affairs of South Buffalo and the commingling of the identity and community of interest between the three. Much of the evidence bearing on the question of control comes from the many written communications and records of the parties extending over a period of many years. Other evidence, however, comes from other transactions, which considered alone might have little weight, but which coupled with these communications are of material weight.

The Elgin case was decided in 1936. This led to making certain changes in the South Buffalo organization. In 1938 five directors of the railroad, who were Steel Company employees, resigned, and in their places employees of South Buffalo were elected. The total directorate consists of nine South Buffalo employees. On December 5, 1939, further changes were made. The Holding Corporation arranged and carried out this reorganization. It had the legal right to do this. It requested and received the resignation of all but two of the directors of South Buffalo and of its President, and in their places seven persons, none of whom theretofore had been directors of the railway, were elected directors and of the seven, five were not and had never been connected with it. At all times since the date last-mentioned, the majority of the Board have been outside directors. The government states that there is "very little tangible evidence of domination * * * subsequent to the reorganization." If proofs of acts of the defendants subsequent to 1939 must be considered in connection with acts prior to that date in determining the question of liability, it is clear that a case of domination by the Holding Company is established. However, it is believed the evidence supports the conclusion that the reorganization as perfected in 1939 was entered into in good faith and that the period intervening that date and the date of the commencement of this action should
1690 be considered separate and apart from the transactions and activities preceding that date. Referring to the Elgin case, the government says "a material part of the instances stressed by the Government had taken place years ago, * * *." That is largely so here.

Mainly, the tangible evidence of domination since 1940, as claimed by the government, is purchase of the Northern Operating Company and the execution of a lease to South Buffalo in or about 1941, the sale of certain dock property owned by South Buffalo in 1940, the violation of the coal freeze order in or about 1943, operations by South Buffalo in connection with the movement of material between different points within the plant, the method of billing of movement of cars, requirement for daily itemized statements of the operation of the railroad and certain other facts of minor significance and detail.

Bethlehem Steel had purchased the land adjacent to the Northern Operating Company right-of-way. Whether it should construct a railroad across this adjacent land or buy Northern Operating Company's right-of-way was a question under consideration. The Steel Company had a direct interest since it was concerned with access to its Seneca and Kalman plants. In giving South Buffalo a lease over this strip it was doing only what had been done under comparable situations within its plant.

South Buffalo owned the so-called Dock Property on the Union Canal. This canal extends from Lake Erie East across Hamburg Turnpike. South Buffalo had owned this for some years, and it has been for some years the subject of a license from the South Buffalo to the Steel Company. The Government's brief says: "The Dock Property was not a profitable investment for South Buffalo. It was a dead horse or a white elephant." The project of developing an Ex-Lake business had failed. In 1940 South Buffalo sold this property to the Steel Company for $391,000, the price at which South Buffalo carried it on its books. There is no other evidence of the value of the property. It was promptly sold following the reorganization. Nothing in this sale shows domination by the Steel Company.

1691 The Interstate Commerce Commission in 1943 issued what is known as the "Coal Freeze Order." It continued in effect about three days. It directed that no railroad should deliver any coal on its lines to consignees without a certificate of the War Production Board showing that it had less than ten days' supply of coal on hand. This order did not forbid delivery of coal from the line-haul railroads to South Buffalo. South Buffalo serves two heavy consumers of coal, and this constitutes a large part of its in-bound traffic. It accumulated a considerable number of cars of coal at this time, and this created some congestion. South Buffalo received no certificate permitting delivery of coal to any consumer during this period. The Railroad reported daily to the Interstate Commerce Commission the amount of coal it had. There is nothing to show any connection in this matter with the Steel Company or the Holding Company.

Considerable evidence has been given relative to the operations of the railroad in connection with the transfer of materials within the Steel plant. These operations were at the blast furnaces, the open hearths, and the slag dump. The principal raw materials used in blast furnaces are ore, limestone, and coke. These materials are mostly moved by the Steel Company from storage or from ships. The railroad handles to the blast furnaces a small amount of ore and turnings. Pig iron and slag are produced by the blast furnaces. This pig iron is moved by the railroad to the open-hearth furnaces. The Steel Company moves the ingots from the open-hearth furnaces to the soaking pits. The railroad moves the slag to the dump.

The Steel Company had a posted Schedule indicating the times the blast furnaces were supposed to cast and the destination to which the metal was to be moved. It is claimed that on observations made of the operations of the plant, in numerous instances, it appeared the schedule was not closely followed and that the variance demonstrated coordination between the require-
1692 ments of the Steel Company and the service by South Buffalo. Considering the natur of the work and its volume, we believe nothing abnormal has been shown. The Steel Company benefited by operating on the schedule and naturally would attempt so to do. The railroad unadvised of probable delays had to stand by on occasions. In a sense it coordinated its efforts to those of the Steel Company, but this is not shown to have been purposely done. In the instances of delays of locomotive at the slag dump, they are fully explained and justified by the work of the locomotive required there.

The government further urges that all this kind of a switching service should be furnished by Steel Company itself and not by a separate company. Whether it should or should not, the legality of this type of service has been many times sustained by the courts. The service is compensated under tariff charges, and it is not included in the line-haul rate.

When South Buffalo's General Superintendent learned of some unnecessary delays in the operations of its locomotives, he promptly took steps to stop them. The evidence discloses some of the particular instances where movements out of the ordinary occurred. Most of them are of no significance. Such is one where Steel Company employees pulled a car from the South Buffalo track to the Steel Company track for unloading.

The government stresses South Buffalo's method of rendering its bills to the steel company for switching service. No purpose of favoritism to the Steel Company is seen in this. In substance all this amounts to is that, when some shipment is not included in the shipper's order, South Buffalo makes out a paper showing

the movement of the omitted shipment, this together with the shipper's order to the car department and a daily bill is rendered the Steel Company. The method employed may seem a little loose as regards the Steel Company, because there was no regular shipper's order for shipment omitted from the shipper's order. Ultimately the Steel Company is in a position to check all shipments. The facts do not evidence coordination or an integrated organization.

1693 Attention has been drawn to the personnel of the Board of Directors of South Buffalo and specially to those members of the Board of Directors who had never been connected with Bethlehem's interests prior to 1940. It is claimed that the activities and the inactivities of the Board demonstrate that they have in numerous matters been influenced by the Holding Company and that this shows domination. The outside directors are all of them men of business experience and most of them have been or were connected with business interests of considerable importance and volume. The ability of each member of the Board is clearly demonstrated. The Board met regularly and as is the case usually in the work of any Board of Directors, it considered and acted on all matters presented by its officers. Necessarily they depended to a large extent upon the recommendations of these officials who had direct and immediate charge of operation. Each of these outside directors testified that at no time had he any understanding with the Steel Company or the Holding Company or any of their officers or representatives as to what action should be taken by them. So far as this record discloses, each of the directors has performed his duties in the sole interest of the railroad. There is some evidence that certain of these directors were not acquainted with certain of the railroad officials, but considering the volume of the work with which the Board was concerned and the number of officials employed, this fact merits little consideration.

There is testimony from various shippers on the line of South Buffalo relating to the kind of service rendered by the railroad to them. This has been offered to show that South Buffalo did render service for them similar to that given the Steel Company and to rebut the claim of favoritism. We believe this testimony is of little material value. The situations as between South Buffalo and these shippers is not comparable with that between South Buffalo and the Steel Company. In the cases of these shippers, South Buffalo owns no tracks within these plant industries. It generally delivers and returns cars, either from an inter-

1694 change within the industry plant, or else from the plant industry property line. These industries as a rule do their own switching over their own tracks. None of these has switching service such as that furnished by South Buffalo. It does ap-

pear in particular numerous instances that South Buffalo has been called upon by the shippers to perform some particular types of switching service. In the instance of the Republic Steel Corporation, the railroad moves the slag from the open-hearth to dumping ground, dumps it and returns the empty car to Republic. The so-called blast furnace slag is moved from the Republic plant to the Buffalo Slag Company. The railroad in certain of these industries does spot cars on trestles over bins or hoppers, much as it does in the instance of Steel Company. At times it spots cars at points designated by the industry within the industry plant, and performs certain other special switching movements. But, as we have stated, it is hardly comparable with the Steel Plant and South Buffalo set-up.

It is further claimed by the defendants that the evidence of the industry representatives is material to show that the services rendered to these shippers was satisfactory. This, again, we say we do not think is material. The fact remains, however, that South Buffalo was within its legal rights in the maintenance of its switching facilities within the Steel Company plant.

It is true that there are other transactions between South Buffalo and the Steel Company in addition to those to which we have referred which it is claimed, when connected with those to which we have referred, show the influence of the Steel Company and the Holding Company upon South Buffalo. Assuming these are sufficiently proved, they do not affect the conclusion at which we arrive.

It is undoubtedly true that the Holding Company at all times has been in a position to control South Buffalo. That would be the usual power of a Holding Company owning all of the stock of a subsidiary. The Holding Company is a legal organi-
1695 zation. It is entitled to the rights accorded any other organization or any individual. The burden rests on the Government to show that this power to control has been exercised. That burden has not been met insofar as relates to matters arising since the reorganization. The Government has extended itself to show occurrence which for the most part ordinarily would be found between two companies comparable to the railroad and steel companies.

The purpose of an injunction is to prevent the occurrence of threatened acts in violation of law. The alleged threat here sought to be prevented is the domination and control by the Holding Company over South Buffalo. Since 1940 there is not sufficient evidence to show that the Holding Company has dominated nor that it now so threatens. In the absence of proof of threatened domination the court cannot enjoin. There is nothing to enjoin. When, and if, the situation is changed, the Government has its

remedy. Whether the Elgin case decision is good law, insofar as concerns the period subsequent to 1940, this case presents much less proof to sustain injunctive relief.

Both the government and the defendants have submitted proposed Findings of Fact and Conclusions of Law. It is incumbent upon the Court to make Findings of Fact and Conclusions of Law. Because of the fact that this decision divides the periods of the activities of South Buffalo in connection with the Steel Company and the Holding Company, it seems advisable to the Court that new Findings be submitted, and perhaps this may be done with the cooperation of both the plaintiff and the defendants.

JOHN KNIGHT,
United States District Judge.

NOVEMBER 7, 1946.

1696 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law

Jan. 29, 1947

KNIGHT, District Judge:

Findings of fact

1. This action was brought by the United States of America, by its attorneys acting under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission, under the authority of the Act of Congress known as the Interstate Commerce Act (to enjoin the alleged violation of section 1, paragraph 8 of the Act, the so-called Commodities Clause), approved February 4, 1887 (24 Stat. 379), as amended by Section 3 of the Act of Congress, approved March 2, 1889 (25 Stat. 855), United States Code, Title 49, Section 12, paragraph 1.

2. This court has jurisdiction over the subject matter of this action and over the parties thereto.

3. The defendant South Buffalo Railway Company (hereafter called "South Buffalo") is a corporation duly organized under the Railroad Laws of the State of New York on April 25, 1899.

1697 South Buffalo is and for many years has been a railroad operating within Erie County, New York, and engaged in performing terminal switching service and the transportation by rail of shipments of materials consigned to and delivered from points in this state to points outside this state and from points outside this state to points within this state.

4. The defendant Bethlehem Steel Company (hereafter called the "Steel Company") is a corporation duly organized and existing under the laws of the State of Pennsylvania. The steel company owns and operates and for many years it and its corporate predecessors have owned and operated steel and manufacturing plants located, among other places, at Buffalo, Lackawanna, and Hamburg, New York, and have engaged in manufacturing, fabricating, shipping, and selling iron and steel and the products thereof.

5. The defendant Bethlehem Steel Corporation (hereafter called the "Holding Company") is a corporation duly organized and existing under the laws of the State of Delaware. The Holding Company owns and holds all or substantially all the stock of approximately 57 corporations.

6. The Holding Company owns full and unrestricted title to all issued and outstanding capital stock of the Steel Company except directors' qualifying shares. All the directors of the Steel Company are also directors of the Holding Company. The Steel Company and the Holding Company have in common their respective presidents, secretary-treasurers, vice presidents in charge of legal and financial matters, and comptrollers.

7. The Holding Company owns full and unrestricted title to all authorized, issued and outstanding capital shares of South Buffalo.

8. South Buffalo has authorized and outstanding capital stock of 8,000 shares of the par value of $100 per share, 4,991 of which were originally issued to Lackawanna Iron & Steel Company and on July 3, 1902, were transferred to Lackawanna Steel Company. Nine shares were issued as directors' qualifying shares.

9. On October 10, 1922, the Lackawanna Steel Company contracted to sell these 4,991 shares of the stock of South Buffalo to the Bethlehem Steel Company of New York, Inc., and on the same date, Lackawanna Steel Company conveyed its steel manufacturing plant and other properties at Lackawanna, New York, to the Bethlehem Steel Company of New York, Inc. The name of the Bethlehem Steel Company of New York, Inc., was changed on or about October 21, 1922, to Bethlehem Iron and Steel Corporation and the 4,991 shares aforesaid of the stock of the
1698 South Buffalo were transferred of record to that company on June 4, 1923.

10. The steel manufacturing plant and other properties at Lackawanna, New York, conveyed on October 10, 1922, to the Bethlehem Steel Company of New York, Inc., were on July 12, 1935, in their then existing condition duly conveyed by it under the name of Bethlehem Iron and Steel Corporation to the steel company.

11. On December 31, 1936, the 4,991 shares of the stock of South Buffalo were transferred on the stock transfer records of South Buffalo to the Holding Comany. These shares at all times since June 4, 1923, have been owned and voted by the Holding Company or by the Bethlehem Iron and Steel Corporation. On January 3, 1940, the nine shares of the stock of South Buffalo previously used as directors' qualifying shares were also transferred to the Holding Company.

12. On October 10, 1922, Bethlehem Steel Company of New York, Inc., sold to South Buffalo approximately 75 miles of track located west of the Hamburg Turnpike in Lackawanna, New York, together with other property, and leased to South Buffalo for a period of 99 years the land and the road bed under said track and the land under the other property conveyed. On October 10, 1923, Bethlehem Iron and Steel Corporation leased to South Buffalo additional land and the road bed thereon west of the Hamburg Turnpike for the period of 98 years.

13. West of the Hamburg Turnpike in Lackawanna, New York, the Steel Company owns 1,027 acres of land with a frontage of 12,157 feet on the Turnpike on which are located a manufacturing plant or plants owned by the Steel Compay. In this area are approximately 58 miles of broad gage track and approximately 13 miles of narrow gage track owned by the Steel Company and approximately 58 miles of broad gage track owned by South Buffalo. The tracks of South Buffalo and the Steel Company within this area are interconnected at a large number of points. South Buffalo operates its locomotives over the broad gage track of both the Steel Company and South Buffalo in connection with business of the Steel Company.

14. South Buffalo is operated as a railroad and owns approximately 87 miles of track, all in Erie County, New York, of which approximately six miles are main line track. It has direct physical connections with five railroad trunk-line systems and one switching railroad, direct connections with two railroad
1699 trunk line systems and indirect connections with five railroad trunk-line systems. All of the trunk-line systems are operated in interstate commerce.

15. South Buffalo's services include the transportation in interstate commerce of articles and commodities manufactured and produced by the Steel Company at its plants located in Buffalo, Lackawanna, and Hamburg, New York, and of raw materials, ingredients, and fuels used by the Steel Company at its plants in the manufacture and production of the said articles and commodities. South Buffalo's services also include the transportation by its railroad of the products of about 27 independent corporations or other independent business enterprises served by South Buffalo.

South Buffalo owns and operates some 35 locomotives, steam and Diesel, and owns a few freight cars used for its own work. The steel-manufacturing plants of the Steel Company at Buffalo, Lackawanna, and Hamburg, New York, are served by South Buffalo as the sole terminal connection of such plants with trunk-line railroad systems.

16. For the five-year period ending December 31, 1945, approximately 70% of South Buffalo's revenues were received from the Steel Company.

17. The Holding Company owns all the capital stock of six railroad companies in addition to the capital stock of South Buffalo. Each of these railroads is located in the vicinity of steel-manufacturing plants of the Steel Company at places other than Buffalo, Lackawanna, and Hamburg, New York. In each instance there is a direct physical connection between the plant properties of the Steel Company and the respective railroads. Prior to 1940, the South Buffalo rented from the Steel Company a part of the office space then occupied by the South Buffalo at Lackawanna, and also rented from the Steel Company the office space then occupied by the South Buffalo at Bethlehem, Pennsylvania, where the South Buffalo's general offices were located. Since 1940, all of the South Buffalo's offices at Lackawanna are located in its own building on the east side of the Hamburg Turnpike, and since 1940, the South Buffalo and the six other railroad subsidiaries of the Holding Company have had their general offices in one building at Bethlehem, Pennsylvania, which is owned by one of such subsidiary railroads.

18. South Buffalo and the other six railroad companies have in common their general agent and the following officers; president, vice president, auditor, purchasing agent, and secretary-treasurer.

19. Among the Holding Company's wholly owned subsidiaries are those engaged in producing basic raw materials, such as iron ore and coal, in various states of this Country and in South America, and those engaged in transporting raw materials and finished products in oceangoing commerce and in inland waters. Production by the subsidiaries ranges from ingots and slabs of raw steel to finished products, such as ships and railway cars. The activities of the subsidiaries are primarily undertaken for the ultimate purpose of the production of steel and steel products, chiefly by the Steel Company, and the sale thereof.

20. Under the Holding Company's system of management various activities of manufacturing were divided between a group of individuals usually carrying the title of vice president or president of various companies. McMath, director of Bethlehem Steel Corporation and vice president of Bethlehem Steel Company, was in charge of financial and legal matters; Bent, in charge of opera-

tions of Bethlehem Steel Company; Homer, in charge of shipbuilding activities; Gross, in charge of traffic problems, and Mackall in charge of sale activities. Kemmerer was president of all of the railroad companies, and there were other officials in charge of still other activities.

21. Article Tenth of the Amended Certificate of Incorporation of the Holding Company provided for a special incentive compensation to individuals collectively referred to as the "executives of the Corporation." This plan for incentive compensation included the Holding Company's officers, heads of departments having general control of matters affecting it and its subsidiary companies as a whole, and to any of its directors who are in the employ or in the employ of one or more of its subsidiary companies. This plan did not include officers or executives of any subsidiary. But by such Certificate of Incorporation, the Board of Directors of the Holding Company was given power in its discretion to approve a plan for incentive compensation to the officers and employees of a subsidiary. The South Buffalo had its own incentive-compensation plan approved by the Holding Company under which its officers and executives were entitled to receive a portion of its income as incentive compensation. Neither plan evidences domination by the Holding Company.

22. The Holding Company has a relief plan which is available to the employees of all its subsidiaries. This is operated by the employees of the subsidiaries through elected repre-
1701 sentatives and is entirely voluntary. The Holding Company also has set up a voluntary pension plan available to its employees or the employees of any subsidiary company. Neither of these plans evidences domination by the Holding Company.

23. The Steel Company has been largely financed by loans through the Holding Company, and to a considerable extent the other subsidiary companies have sought funds from the Holding Company.

24. The Holding Company is primarily interested in the financial operations of the various subsidiaries including South Buffalo rather than in their declaration of dividends. Consolidated financial reports reflecting the position of the Bethlehem organization are periodically issued, based upon reports furnished as frequently as once a month by its subsidiaries. The practice of issuing such consolidated reports commenced about 1905. The Holding Company carries upon its books in addition to its investments in the stock of its subsidiaries the "excess of the net value of subsidiaries consolidated as shown on their books over the amount of the investments in and advances to such subsidiaries."

These activities were within the scope of the powers of the usual holding company.

25. The Holding Company made two contributions to South Buffalo, one in October and one in November 1936, in the respective amounts of $211,616 and $1,900,000. These contributions were decided on by the Holding Company without prior consultation with South Buffalo. One was to make up a deficit of $211,616, as shown on the books of the parent corporation at the end of 1935, and one was of $1,900,000 to the capital of South Buffalo to enable it to reduce an indebtedness in excess of $2,000,000 to the parent company. The contribution to make up said deficit was made in order that a tax on current undistributed earnings might be avoided. South Buffalo was advised of the purpose and the proposal. South Buffalo's Journal Entry on this matter was approved by the Holding Company. This contribution was made, though the earnings in 1936 apparently were enough to clear the deficit as shown on South Buffalo's books. The contribution of $1,900,000 to the capital was made to avoid payment of the penalty surtax provided for by the Federal Revenue Act of 1936. One proposed plan by which the penalty surtax could be avoided was by the issuance of additional stock by South Buffalo. However, it was finally decided that the debt of the railroad to the
1702 amount of $1,900,000 should be discharged by contribution to capital. South Buffalo took no part in any action leading to this contribution or the decisions thereon, though it does appear that an officer of the defendant was advised of the general purpose of the Holding Company with respect to this contribution.

26. From on or about October 10, 1923, to about December 1939, the Holding Company and the Steel Company in numerous ways and on numerous occasions so dominated South Buffalo as to effect a commingling of the identity and community of interest among South Buffalo, the Holding Company, and the Steel Company. Among the ways in which such domination was exercised during that period are these: The Holding Company required officials of South Buffalo in certain instances to apply to officials of the Steel Company for guidance, advice, and decisions in respect of South Buffalo's service to other shippers, and in respect of such of South Buffalo's internal affairs as personnel and wage policies, engineering problems, purchases of equipment, and construction of additions and extensions. Such domination and control is more specifically demonstrated by these, among other acts: When South Buffalo was considering the sale of land to Republic Steel Corporation, South Buffalo's vice president wrote a letter to the general manager of the Steel Company's Lackawanna plants which described the factual situation and concluded, "kindly advise what policy should be adopted." The query was later sent

by the Steel Company's general manager to the Steel Company's manager of real estate at Bethlehem for further advice. The land was thereafter purchased by Republic from South Buffalo. The Seneca Iron & Steel Company wrote to South Buffalo officials requesting a reduction in switching charges. Apparently, this request was referred to Mr. Gross, a vice president and director of the Steel Company, for Mr. Gross, or Kemmerer acting for him, subsequently wrote to the South Buffalo vice president, on stationery of the South Buffalo Railroad Company bearing the signature of Mr. Gross as "General Traffic Manager," refusing the request. The vice president of South Buffalo then wrote the Seneca Iron & Steel Company that the request, though receiving the earnest consideration of the management, was refused. The Steel Company, thereafter, purchased the plant of Seneca Iron & Steel Company. Two problems arising in connection with South Buffalo's relation with its customer, the Buffalo Sintering
1703 Corporation, the first involving a property encroachment and the second a proposal that Buffalo Sintering Corporation be permitted to operate a locomotive on South Buffalo's tracks were referred by South Buffalo's vice president to Mr. Gross, who was in each instance addressed as "G. T. M., South Buffalo Railway Company." South Buffalo's referral of these problems to Mr. Gross was in terms of "I would ask your judgment" and "What is your view of this matter," "Kindly advise your wishes," and "we would appreciate your advice." Prior to December 5, 1939, miscellaneous internal management problems of South Buffalo such as the purchase of locomotives, the construction and enlargement of buildings, the location of a floodlight, and the propriety of forms adopted in its business were referred to Steel Company officials for their determination.

27. Over a period commencing in 1923 and continuing until 1939, considerable numbers of letters were written by officials of South Buffalo to officials of the Steel Company who were addressed as officials of South Buffalo. Also numerous letters were written by John M. Gross, a vice president, a director, and the general traffic manager of the Steel Company, to South Buffalo, on stationery of South Buffalo and purporting to be signed by him as an official of South Buffalo. Many or most of these letters from South Buffalo officials to Steel Company officials requested advice or instructions, and many responses contained advice and instructions. All written requests for advice and instructions addressed by persons associated with South Buffalo, to Edward F. Entwisle, the Steel Company's general manager at Lackawanna, were answered by Mr. Entwisle, either verbally or in writing.

28. Prior to December 5, 1939, Steel Company exercised some control with respect to the employment of certain personnel of South Buffalo. Under the then customary procedure South Buffalo would transmit a requisition for the employment of men to the Steel Company's supervisor of employment who would interview applicants for jobs and pass on their fitness. South Buffalo officials also conferred with Steel Company officials with respect to rates of pay to be adopted by South Buffalo. Since December 5, 1940, this practice has been abandoned.

29. Prior to 1940, South Buffalo to some extent, but to what extent is not disclosed, did not charge demurrage on loaded Steel Company cars when on South Buffalo tracks and there was a want of distinction in the use of tracks of South Buffalo and those of the Steel Company in the dealings between them in certain instances. Any practice in the above respects has been changed since 1939 and it is not claimed that there has been any violation of the demurrage tariff since then.

1704

30. Some time after the decisions in United States v. Elgin, Joliet & Eastern Railway, 298 U. S. 492, in 1936, the attention of officers of the Holding Company was directed to this decision. The Holding Company thereupon entered into an investigation of the relation and practices existing between South Buffalo and the Steel Company and ascertained that the Steel Company at Lackawanna, New York, was then exercising a degree of interest in supervision and domination over South Buffalo. The Holding Company then took steps with the purpose to preclude the continuation and the exercise of any degree of interest, supervision, or domination over South Buffalo by the Steel Company. Instructions were given to the officials of the Steel Company that thereafter no advice, instructions, or assistance to the South Buffalo should be given by the Steel Company and there should be no interference by the officials of the Steel Company in the operation or management of the South Buffalo.

31. In 1938, five directors of South Buffalo who were Steel Company employees resigned and in their places were elected five employees of South Buffalo. Since July 1938, none of the officers or directors of the South Buffalo has been an officer or director or employee of the Steel Company or of any manufacturing, mining, or producing subsidiary of the Holding Company and none of the directors, officers, or employees of the South Buffalo has ever been an officer or director or employee of the Holding Company.

32. At all times since the incorporation of the South Buffalo its Board of Directors has consisted of nine members and immediately prior to December 5, 1939, all of such members were employees of the South Buffalo.

33. On December 5, 1939, seven of the directors of the South Buffalo resigned as such directors and seven persons, none of whom theretofore had been directors of the South Buffalo, were directors of it. The other two directors were, one who had been until some time prior to that date President of South Buffalo and one who had been a Vice President and General Superintendent of South Buffalo. Of such seven persons who resigned, two shortly thereafter were elected, one to become president and the other secretary and treasurer of South Buffalo. The re-
1705 maining five directors were men who were not then and had never been connected with the South Buffalo or with the Steel Company, the Holding Company, or any other subsidiary of the Holding Company.

34. All of the outside directors of the South Buffalo are associated with some business or enterprise conducted in or near Buffalo, Lackawanna, or Hamburg, and all of them reside in or near the vicinity of Buffalo, Lackawanna, or Hamburg. All of them have been and continue to be directors of corporations other than the Holding Company and subsidiary and have had substantial experience in corporate and business affairs.

35. Since December 5, 1939, the South Buffalo has not transported over its line, or rendered services in connection with the transportation of any article or commodity (other than timer and the manufactured products thereof) which actually was manufactured, mined, or produced by it or under its authority, or which actually was owned in whole or in part by it or in which it actually had an interest, direct or indirect, except such articles or commodities as were necessary and intended for its use in the conduct of its business as a railroad carrier.

36. Since December 5, 1939, the Holding Company has never taken any part in transporting any commodities over the railroad of the South Buffalo or in operating or in managing the operations of such railroad or of any of the facilities of such operations or given any directions or exercised any control over the transportation services conducted over such railroad or taken any part in any of the transactions between the South Buffalo and the shippers over its railroad.

37. Since December 5, 1939, the existence and free functioning of the South Buffalo as a railroad corporation and as a separate corporate entity was not destroyed or obstructed or interferred with by the Holding Company or the Steel Company.

38. Since December 5, 1939, all material communications and conferences between representatives of the Holding Company and representatives of the South Buffalo, whether originating with the Holding Company or the South Buffalo, relate and have since

that date related solely to the corporate relations between the Holding Company and the South Buffalo.

39. The South Buffalo regularly files and has filed with the Interstate Commerce Commission and with the Public Service Commission of the State of New York and in accordance with
1706 the provisions of law has published tariff rates covering the services connected with transportation which are performed by it. Since December 5, 1939, in the conduct of its business, the South Buffalo has not discriminated against or in favor of any of its patrons, either in service or in charges.

40. Since December 5, 1939, the South Buffalo has not contributed any property or labor to, does not exercise and has not exercised any authority in, and has not taken any part in manufacturing, mining, or producing any of the commodities in connection with the transportation of which it performs services as a common carrier, and does not own and has not owned, in whole or in part, and does not acquire and has not acquired any interest, direct or indirect, in any of such commodities (other than timber and the manufactured products thereof, and such articles and commodities as were necessary and intended for its use in the conduct of its business).

41. For some time prior to 1930, the only rail connection between the main line of the South Buffalo and the South Buffalo's Seneca Division was over a piece of track, some three-quarters of a mile in length, owned by Northern Operating Company, over which the South Buffalo operated under a trackage agreement between it and Northern Operating Company. In and prior to and for some time after 1930, the Steel Company was interested in such property, because by acquiring it the Steel Company would be enabled to construct lead tracks from plants upon land which it had then recently acquired to the Northern Operating Company track. The Steel Company, however, then took no action to acquire such land. South Buffalo also was interested in acquiring the said land and received an offer to sell the land for $80,000. South Buffalo did not accept this offer, because its officers thought such price was too high. South Buffalo's officers did not confer with anyone connected with the Holding Company or the Steel Company concerning such contemplated purchase or decision not to purchase. In or about 1939, the Steel Company purchased such land of the Northern Operating Company. Prior thereto officials of the Steel Company communicated with officers of the South Buffalo concerning the latter's negotiations to purchase such land and the terms upon which it could be purchased. The Steel Company then entered into a trackage agreement with the South Buffalo, under which the latter continues to operate over

the tracks upon such land. The Court does not find in the
1707 transactions herein described any evidence that the Holding Company or the Steel Company was dominating, controlling, or operating the South Buffalo or that either of such companies then regarded or was treating the South Buffalo as an agent, agency, or instrumentality of themselves or of either of them.

42. For some years prior to 1940, the South Buffalo owned a dock along the Union Canal in the City of Buffalo, at the northern end of its line, known as the Dock Property. The South Buffalo had acquired the property years before in the hope of developing a general business of transporting cargoes to and from vessels on the Great Lakes, but such business had not developed. The Steel Company had used such property for storage purposes, for which the Steel Company had paid the South Buffalo $4,500 annually, and the South Buffalo also had the right to use such property. Following an investigation and study of Dock property by the directors and officers of the South Buffalo, the property was sold to the Steel Company, in 1940, for $391,000, which was the value of such property as shown by the books of the South Buffalo. The Court does not find in such transactions any evidence that the Holding Company or the Steel Company was dominating, controlling, or operating the South Buffalo, or that they or either of them regarded it as an agent, agency, or instrumentality of themselves or of either of them.

43. In June 1943, the Interstate Commerce Commission issued what is known as the "Coal Freeze Order," which forbade all railroads to deliver coal on their lines to a consignee unless such consignee filed with the railroad which was holding such coal and with the War Production Board a certificate showing that such consignee had on hand less than a ten-days' supply of coal. The South Buffalo serves two heavy consumers of coal, which constitutes a substantial part of its in-bound traffic. Such freeze order remained in effect for about three days, during which time the South Buffalo continued to receive from the line-haul carriers coal which it was unable to deliver, with the result that its line became somewhat congested. The South Buffalo did not deliver any coal to consignee in violation of the freeze order. It rendered daily reports to the Interstate Commerce Commission, showing coal held on its lines. The Government contends that the South Buffalo should have attempted to ascertain what consumers on its line
other than the Steel Company had need of coal and should
1708 have advised them to apply therefor. There was no obligation on South Buffalo in this respect. The Court does not

find that any action taken or not taken by the South Buffalo with respect to coal in its possession while such freeze order was in effect is any evidence that the Holding Company or the Steel Company dominated, operated, or controlled the South Buffalo.

44. A very considerable amount of evidence has been submitted, directed to show that the operations of the South Buffalo in connection with the transfer of materials within the area owned by the Steel Company west of the Hamburg Turnpike were carried out in such a manner, after December 5, 1939, as shows a coordination between the activities of the Steel Company and South Buffalo not compatible with the Commodities Clause, and were of such character as in uncommon for a railroad to follow in catering to the needs of its shippers. These operations are claimed to have taken place at the plants of the Steel Company in which are located the blast furnaces, the open hearths, and the slag dumps. For the most part the principal raw materials used at the blast furnaces are moved by the Steel Company itself, from storage or from ships. The South Buffalo moves to the blast furnaces a small amount of iron and turnings. The South Buffalo also moves the pig iron in moulten form from the blast furnaces to the open hearth furnaces and also moves slag to the slag dump. The Steel Company itself moves the steel ingots from the open-hearth furnaces to the slopping pits. The Steel Company posted a schedule showing the times when the blast furnaces are supposed to cast and the destination to which the molten metal is to be moved. There is evidence that at various times these schedules were not closely adhered to and that locomotives and crews of South Buffalo were compelled to stand by waiting for the cast. Instances are also shown of delays of South Buffalo's locomotives at the Steel Company's dump. Many of the instances of delays were for an inconsiderable length of time. Some were of considerable time. Most of these operations were of such duration only as ordinarily might be expected to occur in other comparable plants under comparable circumstances. When South Buffalo's General Superintendent was advised of these delayed operations in connection with the transportation of materials as aforesaid, steps were promptly taken to remedy the condition. Such action was taken in 1943, and there is no evidence of the recurrence of such operations since that date. Considering the nature and volume of work, it is not believed
1709 that such delayed operation evidenced any abnormal condition or coordination showing domination or control of South Buffalo by the Steel Company.

45. The method employed by South Buffalo in rendering its bills to the Steel Company for switching service is claimed to demonstrate the financial and operational integration of the South

Buffalo and the Steel Company. The facts simply are these: When South Buffalo makes a switch movement of a car not included in the shipper's order (designated R–115), the lists of such movements together with the shipper's order go to the South Buffalo car record department where they are checked one against the other. South Buffalo makes out an additional order, both are restrained by the car record department and a daily bill is sent to the Steel Company showing the number of moves and the cost of each. Settlement is made daily. The Steel Company is thus daily advised of the car movement for which no shipper's order had been furnished by it. South Buffalo's bills to the Steel Company are computed by the use of both orders. While this method seems to be somewhat loose, it is not shown it was intended to, or has resulted in any benefit to the Steel Company. It was beneficial to South Buffalo. The government asserts that the above practices are detailed by it, not as evidencing the railroad's domination of the Steel Company, but as establishing that the railroad is operated as a mere instrumentality or department of the Steel Company. It is not believed that it does establish or show the operation of South Buffalo as such instrumentality or department.

46. The South Buffalo regularly files and has filed with the Interstate Commerce Commission and with the Public Service Commission of the State of New York and in accordance with the provisions of law, tariff rates covering services connected with transportation which are performed by it.

47. Since December 5, 1939, the officers and directors of South Buffalo have operated and carried on the business and management of the South Buffalo Railroad independent of and from the Holding Company and the Steel Company, either or both. The South Buffalo does not subordinate and since December 5, 1939, has not subordinated railroad policy to the industrial policy of the Steel Company. Since December 5, 1939, there has been no discrimination in favor of the Steel Company as against
1710 the service rendered to other industries served by South Buffalo.

48. The Holding Company took an active interest in the effectuation of the reorganization of South Buffalo in 1939 and in the selection of directors and certain officers, and in so doing the Holding Company, which was the owner of all of the stock of South Buffalo, was acting wholly within its authority and rights.

49. The existence and free functioning of the South Buffalo as a railroad carrier corporation and as a separate corporate entity was not destroyed or obstructed or interfered with by the Holding Company or the Steel Company.

Conclusions of law

1. The South Buffalo is and for many years last past has been a common carrier by railroad engaged in interstate commerce and operating within Erie County, State of New York.

2. The South Buffalo is a railroad company within the purview of the Commodities Clause, paragraph (8) of section 1 of the Interstate Commerce Act (39 Stat. 584) 49 U. S. C. sec. 1 (8).

3. The Commodities Clause, paragraph 8 of Section 1 of the said Interstate Commerce Act, applies, though South Buffalo does not cross a state line, and whether or not it be designated as an industrial or switching railroad.

4. Over a period of years immediately preceding 1939, domination and control of the South Buffalo was so exercised by the Holding Company through its own activities and that of its subsidiary, the Steel Company, that the South Buffalo became thereby an agent or instrumentality or department of the Holding Company or of its subsidiary, the Steel Company.

5. Over a period of years immediately preceding 1939, the South Buffalo transported in interstate commerce articles or commodities in which it had an interest, direct or indirect, together with the Steel Company and the Holding Company, in violation of the provisions of the Commodities Clause paragraph (8) of section 1 of the Interstate Commerce Act (39 Stat. 584) 49 U. S. C. sec. 1.

6. On or about December 5, 1939, there was a reorganization of South Buffalo intended to and which did separate and has since separated the operation and management of South Buffalo
1711 from both the Steel Company and the Holding Company, and since said date there has been no commingling of the interests of South Buffalo with the Steel Company and the Holding Company in the operation and management of the South Buffalo.

7. At all times since 1939, South Buffalo has been a corporation separate and distinct from and independent of both the Steel Company and the Holding Company, and since said last-mentioned date South Buffalo has not transported or threatened to transport in interstate commerce any article or commodity manufactured or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect.

8. Since December 5, 1939, the South Buffalo has not violated the Commodities Clause, paragraph 8 of Section 1 Interstate Commerce Act (39 Stat. 584), 49 U. S. C. sec. 1 (8).

9. Since December 5, 1939, there has not been nor is there now any threatened domination of South Buffalo by the Steel Company or the Holding Company, and there is no probability or

present danger of any recurrence of the exercise of control or domination by the Holding Company or the Steel Company over the affairs of the South Buffalo.

10. The injunction as prayed herein must be denied, and the defendants and each of them are entitled to judgment dismissing the complaint upon the merits.

JOHN KNIGHT,
United States District Judge.

JANUARY 29, 1947.

1712 In United States District Court for the Western District of New York

Civil Action File No. 1464

UNITED STATES OF AMERICA, PLAINTIFF

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY, AND BETHLEHEM STEEL CORPORATION, DEFENDANTS

Judgment

March 28, 1947

This cause having come on for trial and the issues having been tried, and upon due consideration thereof, the Court having made and filed its Findings of Fact and Conclusions of Law, it is

Adjudged and decreed that the amended complaint herein be, and hereby is, dismissed on the merits as against the defendants South Buffalo Railway Company, Bethlehem Steel Company and Bethlehem Steel Corporation and each of them.

Approved:

JOHN KNIGHT,
United States District Judge.

Judgment rendered this 28th day of March 1947.

MAY C. SICKMON, *Clerk.*

(mg.)

1714 In United States District Court

[Title omitted.]

Petition for appeal

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgment of this

Court entered on the 28th day of March 1947, does hereby pray an appeal from said final judgment to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the judgment erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that this appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

JOHN F. SONNETT,
Assistant Attorney General.
GEORGE L. GROBE,
United States Attorney.

Dated this 26 day of May 1947.

1715 SIRS: Take notice of a Petition for Appeal of which the within is a copy, duly granted in the within-entitled action, on the — day of —, 19—, and duly entered in the office of the Clerk of the United States Court, Western District of New York, on the 26th day of May 1947. Dated Buffalo, N. Y., May 26, 1947.

1716 In United States District Court

[Title omitted.]

Assignment of errors and prayer for reversal

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final decree in the district court on March 28, 1947, in the above-entitled cause, and says that in the entry of the final decree the district court committed error to the prejudice of the plaintiff in the following particulars:

The court erred in:

1. Entering a final decree dismissing the plaintiff's complaint.

2. Holding that the evidence does not establish that the defendants are violating the Commodities Clause of the Act of June 29, 1906 (34 Stat. 584; 36 Stat. 547; 49 U. S. C. sec. 1 (8)).

3. Holding that the evidence does not establish that South Buffalo Railway Company has such an interest in the commodities transported by it for the other defendants as to make the transportation unlawful under the Commodities Clause.

4. Holding that, upon the facts established by the evidence, the decision in United States v. Elgin, Joliet & Eastern Ry. Co., 298 U. S. 492, is controlling.

5. Holding that neither the ownership by the Bethlehem Steel Corporation of all the stock in both the railroad and producing companies nor the power of control incident thereto is sufficient standing alone, to sustain the violation charged.

6. Holding that, though a railroad company transports 1717 the commodities of a producing company, both of whose stocks are wholly owned by a common parent company, a violation of the Commodities Clause results only if the parent company's power to control its railroad subsidiary through such stock ownership is affirmatively exercised so as to constitute dominance of the railroad subsidiary.

7. Failing to hold that the corporate relationship among the three defendants established such a commodity of interest that the transportation by South Buffalo Railway Companies of commodities for its codefendants was unlawful under the Commodities Clause.

8. Failing to hold that South Buffalo Railway Company was so dominated by one or both of its codefendants as to obliterate its independence and reduce it to a mere instrumentality, agent, or department of one or both of its codefendants.

9. Failing to hold that the affairs and operations of the defendants are so intermingled and the identity and community of interest among them is such that in substance and reality they are one and the same organization in Lackawanna, New York.

10. Holding that certain interferences in South Buffalo Railway Company's affairs by Bethlehem Steel Corporation represented only a normal and legitimate manifestation of the latter's interest in South Buffalo Railway Company's affairs as its sole owner.

11. Failing to hold that the ownership by Bethlehem Steel Corporation of the stock of South Buffalo Railway Company has been and is being used to dominate and control the operations and affairs of South Buffalo Railway Company, to destroy its freedom of action in the management of its affairs as a common carrier, and to bring it within the control and direction of its codefendants.

12. Determining that the reorganization of South Buffalo Railway Company in 1939 freed it from all control by its codefendants other than the ultimate power of control of Bethlehem Steel Corporation exercisable through stock ownership.

13. Failing to hold that the officers and directors of South Buffalo Railway Company were consciously so selected by Bethlehem Steel Corporation as to assure their loyalty to the latter and their operation of the railway in the interests of the Bethlehem organization.

14. Holding that the evidence of the relationship among defendants prior to the reorganization of South Buffalo might properly be disregarded in determining whether or not the
1718 defendants were now violating the Commodities Clause.

15. Failing to hold that all the evidence of record disclosed a continuing domination of South Buffalo Railway Company by its codefendants in order that its operations might be conducted in the interests of the Bethlehem organization as a whole.

16. Holding that the evidence of the relationship among defendants subsequent to the reorganization of South Buffalo Railway Company failed to establish the subservience of the latter to its codefendants.

17. Finding (Findings 21, 22, 41, 42, 43, 44, 45) that evidence of various relationships and transactions among the defendants failed to indicate and establish their essential community and identity of interest and the dominance of South Buffalo Railway Company by its codefendants.

18. Failing to find (see findings 24, 25, 29) that evidence of various relationships and transactions among the defendants indicated and established their essential community and identity of interest and the dominance of South Buffalo Railway Company by its codefendants.

19. Finding (Findings 35, 36, 37, 38, 39, 40, 47, 49) that since December 5, 1939, neither Bethlehem Steel Company nor Bethlehem Steel Corporation has exercised any control over South Buffalo Railway Company's functions and transportation services; that South Buffalo has had no interest in, and has not contributed to the production of, commodities transported by it (other than timber products and those necessary for its own use); that South Buffalo Railway Company has conducted its affairs independently and without discrimination among customers and free of control, obstruction, or interference by its codefendants.

20. Finding (Finding 48) that in effectuating the reorganization of South Buffalo Railway Company in 1939 Bethlehem Steel Corporation was acting wholly within its authority and rights, and failing to find that such reorganization had as its conscious purpose maintenance of the preexisting relationship among defendants wherein South Buffalo Railway Company, as an integral part of the Bethlehem organization, forwarded to the extent of

its ability and as its primary function the production of steel and its products by the Bethlehem organization.

21. Failing to grant the findings of fact and conclusions of law requested by the plaintiff.

1719 Wherefore, plaintiff prays that the final decree of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as the court may deem just and proper.

JOHN F. SONNETT,
Assistant Attorney General.
GEORGE L. GROBE,
United States Attorney.

Dated this 26 day of May 1947.

1720 SIR: Take notice of an Assignment of Errors, etc., of which the within is a copy, duly granted in the within-entitled action, on the — day of —, 19—, and duly entered in the office of the Clerk of the United States Court, Western District of New York, on the 26th day of May, 1947. Dated Buffalo, N. Y., May 26, 1947.

1721 In United States District Court

[Title omitted.]

Order allowing appeal

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court in this cause entered on the 28th day of March, 1947, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respect conformed to the statutes and rules in such cases made and provided,

It is therefore ordered and adjudged that the appeal be and the same is hereby allowed as prayed for.

JOHN KNIGHT,
United States District Judge.

Dated this 26 day of May 1947.

1722 SIR: Take notice of an Order allowing appeal of which the within is a copy, duly granted in the within-entitled action, on the 26th day of May, 1947, and duly entered in the office of the Clerk of the United States Court, Western District of New York, on the 26th day of May, 1947. Dated Buffalo, N. Y., May 26, 1947.

1723 [Citation in usual form omitted in printing.]

1725 In United States District Court

Praecipe for transcript of record

Filed May 26, 1947

To The Clerk, United States District Court,
Western District of New York.

The appellant hereby directs that, in preparing the transcript of the record in the above entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. All docket entries showing filing of the pleadings and papers hereinafter set forth, and the entry of the orders hereinafter specified.
2. Amended complaint.
3. Answers of defendants to the amended complaint.
4. Complete transcript of the proceedings at the trial, certified by the official court reporter, together with such certificates.
5. All exhibits.
6. Findings of fact and conclusions of law requested by plaintiff, filed on Sept. 24, 1946.
7. Opinion of Honorable John Knight, District Court Judge, filed November 7, 1946.
8. Findings of fact and conclusions of law entered by Honorable John Knight, District Judge, on January 29, 1947.
9. Order dismissing complaint of March 28, 1947.
10. Petition for appeal.
11. Assignment of errors and prayer for reversal.
12. Statement as to jurisdiction.
13. Order allowing appeal.
14. Citation.

1726 15. Statement calling attention to the provisions of Supreme Court Rule 12 (3).

16. Praecipe for transcript of record.
17. Proof of service of:

a. Petition for appeal;
b. Order allowing appeal;
c. Assignment of errors and prayer for reversal;
d. Statement as to jurisdiction;
e. Citation;
f. Statement calling attention to the provisions of Supreme Court Rule 12 (3);

g. Praecipe for transcript of record.

JOHN F. SONNETT,
Assistant Attorney General.
GEORGE L. GROBE,
United States Attorney.

1727 SIR: Take notice of an Praecipe for Transcript of record of which the within is a copy, duly granted in the within-entitled action, on the — day of —, 19—, and duly entered in the office of the Clerk of the United States Court, Western District of New York, on the 26th day of May 1947. Dated Buffalo, N. Y., May 26, 1947.

1728 In United States District Court

[Title omitted.]

Counter praecipe for transcript of record

To The Clerk, United States District Court,
Western District of New York.

In making up the transcript of record on appeal in the above-entitled cause the respondents South Buffalo Railway Company, Bethlehem Steel Company and Bethlehem Steel Corporation request that you prepare and include in such transcript and certify to the Supreme Court of the United States the following, in addition to the portions of the record designated by the appellant:

1. The amended answers of each of such respondents to the amended complaint herein.

2. This counter praecipe and proof of due service thereof.

Dated, June 4, 1947.

KENEFICK, COOKE, MITCHELL,
BASS & LETCHWORTH,
By (S) LYMAN M. BASS,
A Member of the Firm Marine Trust Building, Buffalo, New York, Attorneys for Defendants, South Buffalo Railway Company, Bethlehem Steel Company, and Bethlehem Steel Corporation.

CRAVATH, SWAINE & MOORE,
15 Broad Street, New York 5, N. Y.
Of Counsel.

Service of a copy of the foregoing Counter-Praecipe is hereby acknowledged this 4th day of June 1947.

(S) GEORGE L. GROBE,
U. S. Atty. Atty. for Plaintiff.

1730 [Clerk's certificate to foregoing transcript omitted in printing.]

1732 In the Supreme Court of the United States

Statement of points to be relied upon and designation of parts of the record necessary for consideration thereof

Filed Oct. 4, 1947

1. Now comes the Appellant in the above cause and for its statement of points upon which it intends to rely in its appeal in this Court adopts the points contained in its Assignment of Errors heretofore filed herein.

2. Appellant deems necessary for consideration of the foregoing points, and hereby designates for printing, the entire record in this cause, as filed in this Court pursuant both to appellant's praecipe and appellees' counter-praecipe, except Government's Exhibits 1 to 14, inclusive, Exhibit 16, and Exhibit 142, introduced in the course of the trial before the District Court. Appellant hereby further designates for printing:

1. Appellees' counter-praecipe.

2. A stipulation entered into between the respective parties dated September 30, 1947, heretofore filed with the Clerk of this Court.

PHILIP B. PERLMAN,
Solicitor General.

Dated October 2, 1947.

1733 In the Supreme Court of the United States

Stipulation as to printing of record

It is hereby stipulated by and between counsel for the respective parties in the above-entitled cause that Government Exhibits 1 to 14, inclusive, Exhibit 16, and Exhibit 142, introduced in the course of the trial before the District Court and which have been filed in this Court as part of the record in the above-entitled cause, be not printed but are deemed to be part of the Transcript of Record on Appeal herein and that any party be permitted to refer to, quote from, or reproduce any of said exhibits in whole or in part in its briefs or oral argument before this Court, as fully as though they were included in the printed record in this Court.

PHILIP B. PERLMAN,
Solicitor General.
BRUCE BROMLEY,
Counsel for Appellees.

Date September 30, 1947.

1735 Supreme Court of the United States

Order noting probable jurisdiction.

October 13, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] File No. 52428. Western New York, D. C. U. S. Term No. 198. The United States of America, Appellant vs. South Buffalo Railway Company, Bethlehem Steel Company and Bethlehem Steel Corporation. Filed July 8, 1947. Term No. 198 O. T. 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

achieve domination when, as in the present case, there has been a long history of domination of the subsidiary by means of orders issued directly to it. Cf. *National Labor Relations Board* v. *Southern Bell Co.*, 319 U. S. 50, 56.

The District Court disregarded the circumstance which most sharply differentiates the instant case from the *Elgin* case. Every executive officer and chief operating official of South Buffalo, with one unimportant exception, was a former employee of the Steel Company. South Buffalo's president, installed as part of the reorganization in 1939, had been an employee of the Steel Company for 30 years and was selected for his position by Holding Company officials because of his knowledge of steel operations and in spite of his lack of knowledge of railroad problems. Moreover, the executive officers of South Buffalo did not have its affairs as their exclusive concern but respectively held similar positions with six other railroads wholly owned by the Holding Company. The *Elgin* case presented a picture the reverse of this since none of its officers, as revealed by the record before the Supreme Court, had any prior connection with the Holding Company or any of its subsidiaries, or had any experience with companies producing similar products. The District Court's apparent view that control of South Buffalo was lodged in its directorate, a majority of whom were without other Bethlehem as-

sociations, falls before the fact that this board, with one minor exception, always approved unanimously the recommendations of the executive officers.

A further delineation of the extent and manner in which a parent's power of control must be actively exercised is obviously of great importance in future enforcement of the Commodities Clause. It is also important to determine whether the *Elgin* case correctly held that, under circumstances of corporate relationships such as are here presented, a violation of the Commodities Clause is shown only if it is established that the dominant Company's power of control was actively exercised. The *Elgin* case itself appears to be a departure from the only other decision interpreting the Commodities Clause which involved a similar three-company relationship. *United States* v. *Reading Company*, 253 U. S. 26.

A holding company, such as the Bethlehem Steel Corporation, exists for the very purpose of exercising whatever control over its subsidiaries may be necessary to weld them into a cohesive enterprise. Whether such control over operations of a railroad subsidiary is achieved by constantly advising and directing its management or by the process of consciously selecting managing officers who can be counted upon to pursue policies promoting the welfare of the over-all enterprise, would not appear to be material.

FILE COPY

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FILED
JUL 8 1947
CHARLES ELMORE CROPLEY
CLERK

No. 198

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY AND BETHLEHEM STEEL CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Western District of New York

CIVIL No. 1464

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

SOUTH BUFFALO RAILWAY COMPANY, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Supreme Court of the United States, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this case on March 28, 1947. A petition for appeal is presented to the District Court herewith, to wit, on May 26, 1947.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, 49 U. S. C. sec. 45), and Section 238 of the Judicial Code as

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amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. Sec. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492.

Union Pacific R. R. Co. v. *United States*, 313 U. S. 450.

United States v. *Chicago North Shore R. R. Co.*, 288 U. S. 1.

STATUTE INVOLVED

The so-called Commodities Clause of the Act of June 29, 1906, as amended (34 Stat. 584; 36 Stat. 547; 49 U. S. C. Sec. 1 (8)), reads as follows:

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign county, any article or commodity, other than timber and the manfactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own, in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

THE ISSUES AND THE RULING BELOW

This is an equity suit brought by the United States[1] in the Federal District Court for the Western District of New York against South Buffalo Railway Company (South Buffalo), Bethlehem Steel Company (the Steel Company), and Bethlehem Steel Corporation (the Holding Company), charging a violation of the Commodities Clause and requesting that South Buffalo be enjoined from further transporting commodities produced by the Bethlehem organization.

The Holding Company, owning all or substantially all of the shares of some 57 corporations, including the other two defendants, supervises and integrates the functions of all for the ultimate purpose of producing steel and its products. The Steel Company, largest of the subsidiaries, owns and operates plants for the production of steel at various points in the United States, including a plant at Lackawanna, Erie County, New York. South Buffalo is an industrial railroad operating six miles of main line and 81 miles of spur track, all within Erie County, New York, and serving the Lackawanna plant of the Steel Company and 27 other industrial customers. South Buffalo provides the only immediate rail connection for the Steel Com-

[1] Suit was brought at the request of the Interstate Commerce Commission. See 25 Stat. 858, 49 U. S. C., Sec. 12(1).

pany's Lackawanna plant, and about 70% of its revenues are derived from the Steel Company. Extensive switching and other services are performed by South Buffalo for the Steel Company within the latter's plant confines.

The District Court, following trial of the cause, determined that, under the corporate relationship involved and in the light of the decision in *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, a violation of the Commodities Clause resulted only if the Holding Company's undoubted power to control South Buffalo through stock ownership was in some manner affirmatively exercised by acts establishing "domination" of the latter. It further determined that the power of control had been so exercised prior to 1939 but that an alteration of the relationship among defendants in that year, ordered by the Holding Company and achieved in the main by a reorganization of South Buffalo's management, had freed the latter from other than the ultimate control of the Holding Company. On the ground that the 1939 reorganization was undertaken in good faith, the court refused to consider other than the subsequent relationship among the defendants. Accordingly, relief was denied and the complaint dismissed.

The District Court found that for a period of years prior to 1939 South Buffalo was required by the Holding Company to apply to local officials

of the Steel Company at Lackawanna for guidance and advice, and that the latter officials, often styling themselves as officials of South Buffalo, were accustomed to issue written and verbal instructions to South Buffalo governing in detail its operations. When the decision of the United States Supreme Court in the *Elgin* case, *supra*, was called to the attention of executive officials of the Holding Company, they determined upon a reorganization of South Buffalo and an alteration in the manner in which its affairs had been conducted. The nine-man board of directors, long comprised of four officials of South Buffalo and five officials of the Steel Company, were twice reorganized with the ultimate result that the Steel Company officials were replaced by independent Buffalo businessmen, selected for this purpose by counsel for the Holding Company.

Important changes in South Buffalo's executive personnel were also made by the Holding Company. South Buffalo's president was demoted to a vice-presidency and a new and much higher salaried president, formerly an employee of the Steel Company, was installed. This change was made, from the Holding Company's point of view, in order that South Buffalo might thereafter have within its own organization top-level administrative and engineering guidance such as it had previously obtained from local Steel Company officials. Both South Buffalo and Steel

Company officials were instructed by the Holding Company that thereafter the former's affairs were to be conducted without benefit of advice, and free from interference, from the Steel Company.

South Buffalo is one of seven railroads all of whose shares are owned by the Holding Company (with possible minor exceptions where shares are held as directors' qualifying shares). Each of the other six railroads is also located contiguous to and serves a plant of the Steel Company. These seven railroads have their primary officers and offices in common at Bethlehem, Pennsylvania, and by agreement, they prorate the common expenses of their administration.

The appeal raises the question whether the facts do not establish control over South Buffalo by the other defendants so effectively exercised as to result in a violation of the Commodities Clause. A further question is raised whether the *Elgin* case correctly determined that, though a railroad company transports the commodities of a producing company and a common parent owns all the shares of both, nevertheless no violation of the Commodities Clause results unless it is established that the parent company's power to control its railroad subsidiary is affirmatively exercised in such a way as to dominate the latter and obliterate its independence.

THE QUESTIONS ARE SUBSTANTIAL

The Commodities Clause forbids a railroad to transport any commodities in which it may have an interest, *"direct or indirect"* (with exceptions not relevant here). In the *Elgin* case this Court held that the fact that both the railroad and the company manufacturing the products transported were wholly owned by the same corporation did not by itself establish the necessary indirect interest, and that an additional showing of exercised control was essential, but that this necessary exercise of control had not been proved. The decision of the District Court appears to represent an erroneous extension of the ruling in the *Elgin* case. It is implicit in the present holding that actual exercise of the power to control a subsidiary may be established only by evidence disclosing constant supervision of its affairs and a continuous series of invasions of its management functions. The District Court rejected the view urged by the Government that an equally effective domination of the subsidiary may be achieved by a conscious policy of staffing it with executive personnel whose background, previously developed loyalty, and hope of future reward were such as to assure their primary devotion to the Holding Company and their operation of the railroad in its interests. Cf. *North American Company* v. *Securities & Exchange Commission*, 327 U. S. 686, 693. Such methods are particularly apt to

Decisions of the Supreme Court recognize that the legislative history of the Commodities Clause discloses that its purpose was to divorce the functions of transportation and production so that a railroad might not occupy the inconsistent positions of public carrier and private shipper. *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516, 525; *United States* v. *Reading Co., supra*, at p. 60. Whether the purpose of the clause is defeated when carrier and producer, through separate incorporate form, have a complete identity of interest as wholly owned subsidiaries of a common parent, presents a question of material importance.

CONCLUSION

It is submitted that the questions presented are substantial and represent matters of wide public importance.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MAY 1947.

In the District Court of the United States for the Western District of New York

Civil Action No. 1464

UNITED STATES

v.

SOUTH BUFFALO RAILWAY COMPANY, ET AL.

KNIGHT, *District Judge.*

This is a suit brought by the United States against the South Buffalo Railway Company (at times hereinafter called South Buffalo), Bethlehem Steel Company (at times hereinafter called Steel Company), and Bethlehem Steel Corporation (at times hereinafter called Holding Company) to enjoin them from violating the so-called Commodities Clause of the Interstate Commerce Act, 34 Stat. 584, 49 U. S. C. A. § 1 (8).

This Court has jurisdiction over the subject matter of this suit and the parties.

The Bethlehem Steel Corporation is a Holding Company organized under the laws of the State of Delaware, owning all or substantially all of the stock of 57 subsidiary corporations operating in various states and outside the United States. These latter are companies mining ore, producing materials used in the manufacture of steel, steamship companies, which transport iron ore from mines to subsidiary steel plants, engage in coast-wise shipping principally of products produced by one or more of

such subsidiaries, corporations engaged in the manufacture of steel and steel products, and railroad companies.

The South Buffalo Railway Company was incorporated in 1889 and, of its shares of capital stock of 5,000, 4,991 were issued to Lackawanna Iron & Steel Company. In 1903 these shares were transferred to the Lackawanna Steel Company. The remaining nine shares were held as directors qualifying shares. On October 10, 1922, Lackawanna Steel Company conveyed its steel manufacturing plant and other properties at Lackawanna, New York, and contracted to sell its stock in South Buffalo to the Bethlehem Steel Company of New York, Inc. In 1922 the name of Bethlehem Steel Company of New York, Inc., was changed to Bethlehem Iron and Steel Corporation, and the 4,991 shares of stock aforesaid were transferred in 1923 to that company. In 1935 the steel manufacturing plant and other properties at Lackawanna, New York, which had been conveyed to Bethlehem Steel Company of New York, Inc., were conveyed to Bethlehem Steel Company, defendant of that name herein, and in the following year the stock of South Buffalo which had been transferred from Lackawanna Steel Company to Bethlehem Steel Company of New York, Inc., was transferred on the books of South Buffalo to Bethlehem Steel Corporation, defendant herein, organized under the laws of the State of Delaware. The Bethlehem Steel Corporation since 1940 has owned all of the stock of South Buffalo. When Bethlehem Steel Company of New York, Inc., acquired the stock aforesaid of South Buffalo,

in 1922, it sold to South Buffalo 75 miles of track located west of what is termed the Hamburg Turnpike and certain other property, and also leased to it the roadbed under such track and land and other property for 99 years, and the following year leased to it certain additional land and roadbed for 98 years.

The Steel Company owns 1,027 acres of land along the Hamburg Turnpike in Lackawanna, New York, and on this are located the manufacturing properties of the Company. An intricate system of tracks is supplied and necessitated to serve the needs of the Steel Company. South Buffalo owns and operates six miles of main line track and 81 miles of other track. Of this 81 miles, about 58 miles, with 71 miles of broad and narrow guage track owned by the Steel Company, make up the total trackage serving the plant. The balance of the main track of the South Buffalo serves other properties of the Steel Company and some 27 other nearby industries. These various tracks within the plant are interconnected and South Buffalo and the Steel Company operates over them. The railroad has some 35 locomotives, steam and Diesels. It owns no freight cars except a few which are used for its own work. It has direct physical connection with five line haul carriers and direct and indirect connection with seven others. South Buffalo is one of seven railroads which is a subsidiary of the Bethlehem Steel Corporation. Each of these railroads serves a plant of the Steel Company. South Buffalo is the only railroad which has served the Steel Company's Lackawanna plant since its acquisition, and approximately 70 per

cent of its revenues come from the Steel Company. It delivers to the aforesaid line haul companies materials and products both from the Steel Company and these various industries destined for delivery outside the State of New York and receives over these line haul carriers materials and products for the Steel Company and these various industries.

The Commodities Clause of the Interstate Commerce Act, Section 1 (8), so far as material here, reads:

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, * * *, to any other State, * * *, any article or commodity, * * *, manufactured, mined, or produced by it, or under its authority, * * *, or in which it may have any interest, direct or indirect, * * *.

The purpose of the Commodity Clause was "to divorce the business of transporting commodities in interstate commerce from their manufacture, * * *, and thus to avoid the tendency to discrimination, forbidden by the the act to regulate commerce." *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 29 S. Ct. 527, 534, 53 L. Ed. 836; See also *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516, 35 S. Ct. 873, 59 L. Ed. 1438; *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 56 S. Ct. 841, 80 L. Ed. 1300. The abuses which the Clause sought to prevent grew out of the common ownership of railroads and coal mines in the Eastern States and the resulting power of discrimination in various ways and thereby suppress competition.

The defendants assert that the Commodities Clause has no application to these defendants; that neither of the parties defendant is a "railroad" within the contemplation of the Clause; that neither transports commodities from one State to another and that, if the three defendants are to be regarded as a single corporate entity, such entity would bring them within the exact language of the "Shippers Allowance Clause." Sec. 15 (13) of the Act, 49 U. S. C. A. § 15 (13). The merits of these contentions may well be first considered, as a decision upholding any of them would require a dismissal and obviate the necessity of considering the mass of evidence relating to the violation of the Clause.

The claim that the Commodities Clause was inapplicable was raised and presented at considerable length in the briefs in *United States* v. *Elgin*, *supra*. The Supreme Court made no reference to this contention, and it is a fair conclusion that the court saw no merit in it. However, all of the grounds now urged were not presented there.

Defendants term the South Buffalo an "industrially owned switching railroad" whether owned by the industry or a separate company and therefore say the Commodities Clause does not apply. Of course, there are many railroads which are so classified, but this railroad is more than such—more than a terminal facility. Its line of road extends inside and outside the Steel Company plant to the length hereinbefore stated; it serves numerous other industries; transports materials in interstate commerce; files tariffs; has connections with various line haul carriers outside the steel plant; does certain work for the Steel Company outside

of transportation; it owns railroad bed and track outside the plant and leases land within; has numerous locomotives; has its own office building, and other essential equipment.

Defendants cite *United States* v. *Terminal Railroad Ass'n*, 224 U. S. 383, 32 S. Ct. 507, 56 L. Ed. 810, and *State ex inf. Attorney General* v. *Terminal R. Ass'n of St. Louis*, 182 Mo. 284, 81 S. W. 395. Neither involved consideration of the Commodities Clause and neither is determinative of what type of a railroad South Buffalo is. The former said there was an "essential difference between terminal systems properly so described and railroad transportation companies" (224 U. S. 383, 32 S. Ct. 512). There is a wide difference between the terminal system there considered from the system here. *Omaha Street Ry.* v. *Interstate Commerce Commission*, 230 U. S. 324, 33 S. Ct. 890, 57 L. Ed. 1501, 46 L. R. A., N. S. 385, held that the Interstate Commerce Act, as then existing, did not apply to a streetcar company operating a railroad across state lines, and with the conclusion there well may be agreement. In *United States* v. *Delaware & Hudson*, *supra*, most of the business of the company's railroad was the transportation of coal from mines owned by the company. The company contended that its railroad was not a railroad within the purview of the Clause, but a coal company. The court there said: "The contention * * * is without merit. The facts stated * * * leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce." This was the first case in the Supreme Court con-

struing the Commodities Clause, and no later one holds to the contrary. The size of the railroad and the extent of its business are not determinative that it is an "industrial switching road." Such construction would subvert the purpose of the Commodities Clause with respect to discrimination.

The Commodities Clause applies irrespective of the fact that the South Buffalo does not cross the state line. Property is in interstate commerce from its delivery to the carrier for shipment into another state till delivered to the consignee. "Transportation," as the word is used in different provisions of the Interstate Commerce Act, refers to transportation in interstate commerce.

Section 1 (1) of the Interstate Commerce Act provides that, the Act "shall apply to common carriers engaged in—The transportation of passengers or property wholly by railroad, * * * from one State * * * to another State * * *." Regarding this section, in *United States* v. *Union Stock Yard etc. Co.*, 226 U. S. 286, 33 S. Ct. 83, 88, 57 L. Ed. 226, the Court said: "That the service is performed wholly in one state can make no difference if it is part of interstate carriage."

The language in the Commodities Clause, in so far as it relates to transportation, is the same as that in Section 1 of the Elkins Act, Section 41 (3) 49 U. S. C. A., formerly Section 2 of the Hepburn Act, and this, in part, fixes the liability of a carrier transporting property from one state to another where a rebate or off set against the regular charge is given. The courts apply this

statute where property is transported to and consigned to another state, and even if the line of the guilty railroad does not extend beyond the state of origin. *Powell* v. *United States*, 4 Cir., 112 F. 2d 764. The Carmack Amendment, Section 20 (11), 49 U. S. C. A., as originally enacted, provided that a common carrier receiving property "for transportation from a point in one State * * * to a point in another State * * * shall issue a receipt * * * and shall be liable * * *." This section has been construed to render a carrier liable whose lines lay entirely within one state but which had accepted property for transportation to another state. *Missouri, Kansas & Texas Ry. Co. of Texas* v. *Plano Milling Co.*, Tex. Com. Ann., 231 S. W. 100, certiorari denied 258 U. S. 624, 42 S. Ct. 317, 66 L. Ed. 797.

The Shippers Allowance Clause, Section 15 (13), of the Interstate Commerce Law has no application to a common carrier. Under its provisions, allowances are made to the shipper for services furnished in connection with transportation by the shipper through its plant facilities. These services are typified by switching service, pick-up delivery, elevator service, and other sorts which are part of the transportation itself. The Interstate Commerce Commission and the courts have many times considered the type of service contemplated by the Shippers Allowance Clause. The numerous cases cited by the defendants in this connection illustrate this.

South Buffalo is not a facility of the Steel Company. It is a separate corporation. It operates over its own tracks within and outside of

the Steel Plant. It serves not only the Steel Company but numerous other industries. The distinction betwen the status of this railroad and the facility of the shipper is plain. The theory of merger into one entity of the three defendant companies as "owner of property" on the assumption of domination and control of these companies by the Steel Company, as advanced by the defendants, is chimerical. The corporate distinction between the two companies is no way dissolved, and this is not changed though the physical and operational aspects in a case may seem to be commingled. The Allowance and Commodities Clauses apply to different conditions. They are consistent the one with the other. *In re Allowance to Kanawha, etc., Ry.*, 41 I. C. C. 53. The facts in *Manufacturers Ry. Co.* v. *St. Louis, etc., R. Co.*, 28 I. C. C. 93, are comparable here, and the Commission there stated: "Assuming the newly made carrier to be under the law a common carrier in all respects such as it represents itself to be, it is evident allowances under Section 15 of the act can no longer be made to the owning industry as for services rendered by the shipper, as the railway is no longer a part of or in law connected with the latter which is 'the owner of the property transported,' to whom alone * * * allowances may be made * * *."

On the question of the application of the Commodities Clause, *United States* v. *Baltimore & Ohio R. Co.*, 231 U. S. 274, 34 S. Ct. 75, 58 L. Ed. 218, and other cases are cited by defendants. In the *Baltimore* case, principally relied on, the Supreme Court expressly states that

it did not consider the question of the violation of the Commodities Clause because it was not raised before or considered by the Commission. Further, the partnership operating the terminals was not a party to the suit.

The American Short Line Railroad Association, appearing as Amicus Curiae, has raised the points urged by defendants to which we have referred and has also submitted an extensive brief on the history of the Commodities Clause. This history does not demonstrate the intent of the Congress to limit the prohibitions of the Commodities Clause to railroads which cross state lines.

Neither the ownership by the Holding Company of all the shares of stock in both the railroad and the steel company nor the power of control incident thereto is sufficient standing alone to sustain the violation charged herein. *United States* v. *Elgin, supra.* But "domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command." *North Am. Co.* v. *Securities Exchange Com'n,* 66 S. Ct. 785, 790. The question here is what control the Holding Company did exercise and whether it amounts to such domination as makes one subsidiary a mere agent of another. As such agent the railroad would have an "indirect" interest in the commodities of the Steel Company which it transports. *United States* v. *Reading Co.,* 253 U. S. 26, 60, 61, 40 S. Ct. 425, 64 L. Ed. 760; *United States* v. *Elgin, supra; United States* v. *Lehigh Valley R. Co.,* 220 U. S. 257, 31 S. Ct. 387, 55 L. Ed. 458. Whether such domination has been exercised to the extent that

brings the transportation in interstate commerce within the condemnation of the Clause is a question of fact to be determined on all of the evidence presented.

It is important to compare some of the facts found in the *Elgin* case as a basis for the application of the law with those found here, and we believe it is helpful to show these in juxtaposition.

United States v. Elgin, etc.	*United States v. South Buffalo et. al.*
Holding Corporation owned all stock of subsidiary	Holding Corporation owned all stock of subsidiary.
Holding Corporation controlled election of directors.	Same power of control.
Interlocking directorate for many years.	No interlocking directorate.
4 directors or officers of Holding Corporation directors of subsidiary.	No officer or director of Holding Corporation or Steel Company ever an officer or director of South Buffalo.
Many contracts undertaken by Holding Corporation before approval by subidiary.	No comparable facts.
Holding Corporation approved declaration of dividends.	Evidence does not show that the Holding Corporation approved. Government suggests only that approval is to be inferred.
All major projects were approved by Holding Corporation and all capital account expenditures over $5000 required Holding Corporation approval. ¾ of all capital expenditures approved at times.	No approval required by the Holding Corporation.
All purchases of land required Holding Corporation's approval.	No such requirement.
Holding Corporation designated bank depositories and controlled much of the cash funds of subsidiaries and designated certain banks as depositories of subsidiary.	No comparable facts. No funds commingled with the Holding Corporation funds or the steel Company funds.
Reports of all expenditures and where made were required to be submitted quarterly by subsidiary.	No comparable requirement until 1943.

United States v. *Elgin, etc.*	*United States* v. *South Buffalo et. al.*
Holding Corporation had a clearance account by which monthly settlements were made of accounts existing between subsidiaries.	No comparable situation.
All purchases of land had to have Holding Corporation approval.	No comparable requirement.
All projects involving agreements of major importance were submitted to Holding Corporation.	No such requirement.
Budget estimates submitted by subsidiary to Holding Corporation.	Nothing comparable here.
Holding Corporation had a bonus plan, pension plan, stock purchase plan.	Holding Corporation has pension plan, relief plan and so-called incentive plan. Incentive plan is for executives and officers of the subsidiaries and the Holding Corporation and was authorized by the Act of Incorporation of the Holding Corporation.
The Elgin leased Lake Shore Ry. and made a trackage agreement with the Chicago & Ill. Ry. with the active participation of the Holding Corporation with the President of Elgin.	A comparable situation in some respects appears as respects the lease of Northern Operating Co. by the Steel Co. to the subsidiary.
Holding Corporation and subsidiary had office in the same building.	South Buffalo and Holding Corporation did until 1940.
Same attorneys for subsidiaries and Holding Corporation.	Same attorneys.

It is to be noted that all of the foregoing activities of the Steel Corporation did not continue during all of the time in question in that suit.

The comparison which we have shown is not complete, and there are various other practices both between Elgin and the Steel Company, and between South Buffalo and the Steel Company and the Holding Corporation shown in the record in both cases. We will consider others of the

major matters between South Buffalo, the Steel Company and the Holding Corporation which are urged by the government as showing Holding Company domination. It is unnecessary to detail all of such.

We deem it advisable to consider separately the evidence as it relates direct to situations existing prior to 1940 and those subsequent to that date. This is because of a reorganization of South Buffalo effective in 1940.

The government asserts that immediately on the acquisition of South Buffalo in 1922 Bethlehem interests began the radical rearrangement of the properties between South Buffalo and Bethlehem and a change in the set-up of the South Buffalo organization with the intermingling of the steel and railroad operations. We do not find these to be the facts though Bethlehem interests were placed in a position to control. The record discloses that prior to 1922 the South Buffalo operated tracks West of the Hamburg Turnpike under a lease from Lackawanna Steel Company. (See *Industrial Railways case*, 29 I. C. C. 212, decided in 1914.) How long it was so operated does not appear. However, we do know it was not in effect in 1920. The maps in evidence show the same general line-up of the railroad within the plant before and after 1922; the officers of South Buffalo, following Bethlehem's acquisition of its stock, continued as such. Only two of these had been associated with any Bethlehem Company prior to their connection with South Buffalo. The President, Vice President and General Superintendent and Secretary and Treasurer continued in such positions for years fol-

lowing the acquisition. Formerly the railway and Lackawanna Steel Company had officers in common. This was not so after Bethlehem's acquisition. Under Lackawanna management the majority of directors were employees of the Lackawanna Steel Company and during a period of years prior to July 1938, directors who were employees of the Steel Company were in the majority. The form of operation as between the railroad and the Steel Company has long been common in large manufacturing plants. It has proved to have been beneficial financially for South Buffalo. Under the provisions of these leases South Buffalo could not re-locate its tracks or contruct additional structures without the Steel Company's approval. The minutes of meetings of South Buffalo's Board and stockholders do not record any action by either party relative to these leases or to the sale. This seems unusual. The record discloses a "journal voucher" of South Buffalo, dated January 16, 1923, approved for entry both by the auditor of South Buffalo and the Comptroller of Bethlehem Steel Corporation. This purports "to place at original value road and equipment purchases as per Indenture of Sale dated October 10, 1922." The last-mentioned date is the date when Bethlehem acquired both the Lackawanna plant and the stock of South Buffalo. There are also other minor provisions in these leases to which criticism has been directed. We do not believe that the record discloses any material change in policy, practice or procedure by the Bethlehem Company or the Bethlehem Corporation toward South Buffalo following the execution of these leases. In-

deed, standing alone far less domination or control appears than was shown in the *Elgin* case.

A considerable part of the record in this case is made up of Exhibits of letters between officials of South Buffalo and Bethlehem Steel and records from the files of these companies. A considerable number of these letters purport to have been directed by officers of South Buffalo to officials of Bethlehem Steel but addressed as officials of South Buffalo. Numerous ones purport to have been signed by officers of the Steel Company over their names as officers of South Buffalo. These and other Exhibits purport to ask, advise or seek authority from officials of Steel Company, and some purport to have been written by officers of the Steel Company giving directions with regard to certain operations, purchases and other concerns of South Buffalo. These communications cover a period of time commencing with 1923 and continuing until 1939. These Exhibits number altogther something a little upwards of 100. There is a considerable number of these which on their face do not tend to show control or are shown by their connection to relate to conduct or acts entirely consistent with independent operations. It is not necessary to refer in detail to this correspondence or file records. It is sufficient to refer to them somewhat generally in order to show their character.

Most of these communications from South Buffalo were directed to Gross, General Traffic Manager of Steel Company, as General Traffic Manager of South Buffalo, to Burns, General Manager of Steel Company, as General Manager of South Buffalo, and to Entwisle, General

Manager of Steel Company, as General Manager of South Buffalo. Many of these communications were written by or to Benning, Vice President and General Manager of South Buffalo, commencing as early as 1924 and continue through to as late as 1938. There are no less than 27 of these written by the Vice President of South Buffalo.

These communications and file records, among other things, relate or refer to transportation costs, repair of cars, extension of railroad lines, sale of property, purchase of equipment, rates of pay for South Buffalo personnel, track constructions, construction of buildings, and other matters concerning the management and operation of the railroad.

Gross denies any knowledge of numerous letters purported to have been signed by him. But these were received in evidence by stipulation, subject only to the right to an objection as to their relevancy or materiality.

In 1926 Seneca Iron & Steel Company, an industrial plant on the line of South Buffalo, requested of the railroad a reduction in switching charges. A letter from South Buffalo to Gross, "General Traffic Manager" of the Steel Company, at Bethlehem, Pennsylvania, asked whether the request should be granted. A reply came on South Buffalo stationery, purporting to be signed by Gross, styling himself "General Traffic Manager," and stating that it should not be granted. Defendants admit that this "may represent an isolated deviation from sound corporate practice."

In 1931, on numerous occasions, the Vice President and General Manager of South Buffalo wrote Gross, addressing him as "General Traffic Manager" of South Buffalo, regarding the encroachment of the Thawing House of the Sintering Company on land of South Buffalo and regarding the purchase of a plant locomotive or the use of one in connection with the Sintering Company and repeatedly requested the advice of Gross.

Prior to 1941, South Buffalo had trackage rights over a strip of an old railroad line lying East of the Hamburg Turnpike. The trackage was then owned by the Northern Operating Company, subsidiary of the Nickel Plate Land Owning Company. South Buffalo used this as a connecting link between its main line and its tracks at the so-called Seneca and Kalman plants which were purchased by the Steel Company in 1931–1932.

The Steel Company initiated action looking to the purchase of the strip. This was then primarily taken for the benefit of South Buffalo. There are in the record several letters purporting to have been written by Gross as "Vice President" to Burns as "General Manager." Both held such position with the Steel Company at that time. They are written on South Buffalo stationery. Gross has denied all knowledge of these letters. One K. A. Kemmerer, until some time in 1932 when he became President of all subsidiary railroads, was an employee of the Steel Company. The letters purport to have been dictated by "K. A. K." The initials evidently refer to Kemmerer. There is also a letter purporting to have been written by Gross on South Buffalo station-

ery, directed to James, Chief Engineer, and Burns, General Manager. James was Chief Engineer of the Steel Company. Kemmerer is now deceased. Whether Gross signed or authorized the signing of his name to the letters is of importance because he was an Executive officer of the Steel Company. The evidence justifies the conclusion that the Steel Company officials were knowing to the contemplated purchase of the land. In 1937, Benning, Vice President and General Manager of South Buffalo, brought up with the Steel Company the proposal that South Buffalo buy the strip, as is shown by letters from him to Entwisle, then General Manager of the Steel Company. Nothing came of this. In 1941 the Steel Company bought the strip and later made a trackage agreement with South Buffalo for the use of it. One cannot escape the conclusion that Gross either signed these or authorized the signing by Kemmerer.

In 1936, the Holding Company made two contributions to the capital of South Buffalo. One was to make up a deficit of $211,616, as shown on the books of the parent corporation at the end of 1935 and one of $1,900,000 was to enable South Buffalo to reduce an indebtedness in excess of $2,000,000 to the parent company. As to the deficit of $211,616, this contribution was made in order that a surtax might be avoided. The net earnings for 1936 as shown on the accounts of the railway amounted to $500,792. Under New York law the railroad could not declare or pay any dividend which impaired its capital. Under the Federal statutes, a surtax upon undistributed net income was imposed. To avoid the risk of a surcharge and the violation of the state law, the

Holding Company contributed to the capital of the railroad, $211,616, the amount of the 1935 deficit. The contribution of $1,900,000 to the capital was made to avoid payment of the penalty surtax provided for by the Federal Revenue Act of 1936, § 14, 26 U. S. C. A. Int. Rev. Acts, Page 823. There appeared to be only two methods by which such penalty tax could be avoided, by the railroad acquiring cash, or its equivalent, by means other than borrowing. For various reasons the issue of additional stock seemed inadvisable, and finally it was decided that the debt of the railroad to the amount of $1,900,000 should be discharged by contribution to capital. The fact of the contributions is not criticized. It is asserted and the proofs show that all the matters relative to the initiation and the naming of the contributions were carried out by the Holding Company. The railroad does not appear to have been consulted or to have had any part in them. The resolution adopted by the railroad on July 10, 1936, pointed to by the defendants, relates entirely to an interest arrangement of April 1936. The Holding Company had a right, as creditor and sole stockholder to initiate the contribution proceedings and to lay down terms, but in ignoring the railroad in them, it indicates the exercise of the power of control over railroad.

The unity of Bethlehem is claimed to be demonstrated in maintenance of an incentive compensation fund and its benefit relief plan. The former is compulsory under the Holding Company's Certificate of Incorporation. (Article Tenth.) Payments under it are made only to executives of the Holding Company and its sub-

sidiaries. The relief plan is operated solely by the employees themselves. As indicated, the *Elgin* case discloses a like plan. Further there is the aforesaid pension plan. We see nothing out of the usual in any of these plans and nothing indicating control over this subsidiary.

With reference to the employees benefit plans, requiring filing of detailed reports with the Holding Company and common counsel and occupancy of adjacent offices by South Buffalo and the Steel Company, the Government says: "These matters, heavily relied on by the Government in the *Elgin* case, have not been stressed in this case." Filing of detailed reports was first required in 1943. After 1940, South Buffalo had its separate office building.

At one time the Supervisor for employment for the Steel Company performed services in engaging employees for South Buffalo; South Buffalo's Chief Engineer was on the Steel Company pay roll; no demurrage charge was made by South Buffalo for the Steel Company cars when standing on South Buffalo tracks. The extent of liability for demurrage, however, does not appear. The attempt has not been made to show all the evidence bearing on the relations of the parties defendant. It is sufficiently established that prior to December 5, 1939, South Buffalo for many years had transported articles and commodities manufactured and produced by the Steel Company and raw materials consigned to the Steel Company, in all of which South Buffalo had an interest, in violation of the Commodities Clause. That interest results by reason of the control and the domination of the Holding Com-

pany and the Steel Company of the affairs of South Buffalo and the commingling of the identity and community of interest between the three. Much of the evidence bearing on the question of control comes from the many written communications and records of the parties extending over a period of many years. Other evidence, however, comes from other transactions, which considered alone might have little weight, but which coupled with these communications are of material weight.

The *Elgin* case was decided in 1936. This led to making certain changes in the South Buffalo organization. In 1938, five directors of the railroad who were Steel Company employees, resigned and in their places employees of South Buffalo were elected. The total directorate consists of nine South Buffalo employees. On December 5, 1939, further changes were made. The Holding Corporation arranged and carried out this reorganization. It had the legal right to do this. It requested and received the resignation of all but two of the directors of South Buffalo and of its President, and in their places seven persons, none of whom theretofore had been directors of the railway, were elected directors and of the seven, five were not and had never been connected with it. At all times since the date last-mentioned, the majority of the Board have been outside directors. The government states that there is "very little tangible evidence of domination * * * subsequent to the reorganization." If proofs of acts of the defendants subsequent to 1939 must be considered in connection with acts prior to that date in deter-

mining the question of liability, it is clear that a case of domination by the Holding Company is established. However, it is believed the evidence supports the conclusion that the reorganization as perfected in 1939 was entered into in good faith and that the period intervening that date and the date of the commencement of this action should be considered separate and apart from the transactions and activities preceding that date. Referring to the *Elgin* case, the government says "a material part of the instances stressed by the government had taken place years ago, * * *." That is largely so here.

Mainly, the tangible evidence of domination sice 1940, as claimed by the government, is purchase of the Northern Operating Company and the execution of a lease to South Buffalo in or about 1941, the sale of certain dock property, owned by South Buffalo in 1940, the violation of the coal freeze order in or about 1943, operations by South Buffalo in connection with the movement of material between different points within the plant, the method of billing of movement of cars, requirement for daily itemized statements of the operation of the railroad and certain other acts of minor significance and detail.

Bethlehem Steel had purchased the land adjacent to the Northern Operating Company right-of-way. Whether it should construct a railroad across this adjacent land or buy Northern Operating Company's right-of-way was a question under consideration. The Steel Company had a direct interest since it was concerned with access to its Seneca and Kalman plants. In giving South Buffalo a lease over this strip it was doing

only what had been done under comparable situations within its plant.

South Buffalo owned the so-called Dock Property on the Union Canal. This canal extends from Lake Erie East across Hamburg Turnpike. South Buffalo had owned this for some years, and it has been for some years the subject of a license from the South Buffalo to the Steel Company. The Government's brief says: "The Dock Property was not a profitable investment for South Buffalo. It was a dead horse or a white elephant." The project of developing an Ex-Lake business had failed. In 1940 South Buffalo sold this property to the Steel Company for $391,000, the price at which South Buffalo carried it on its books. There is no other evidence of the value of the property. It was promptly sold following the reorganization. Nothing in this sale shows domination by the Steel Company.

The Interstate Commerce Commission in 1943 issued what is known as the "Coal Freeze Order." It continued in effect about three days. It directed that no railroad should deliver any coal on its lines to consignees without a certificate of the War Production Board showing that it had less than ten days' supply of coal on hand. This order did not forbid delivery of coal from the line haul railroads to South Buffalo. South Buffalo serves two heavy consumers of coal, and this constitutes a large part of its in-bound traffic. It accumulated a considerable number of cars of coal at this time, and this created some congestion. South Buffalo received no certificate permitting delivery of coal to any consumer during this period. The Railroad reported daily to the

Interstate Commerce Commission the amount of coal it had. There is nothing to show any connection in this matter with the Steel Company or the Holding Company.

Considerable evidence has been given relative to the operations of the railroad in connection with the transfer of materials within the Steel plant. These operations were at the blast furnaces, the open hearths and the slag dump. The principal raw materials used in blast furnaces are ore, limestone and coke. These materials are mostly moved by the Steel Company from storage or from ships. The railroad handles to the blast furnaces a small amount of ore and turnings. Pig iron and slag are produced by the blast furnaces. This pig iron is moved by the railroad to the open-hearth furnaces. The Steel Company moves the ingots from the open-hearth furnaces to the soaking pits. The railroad moves the slag to the dump.

The Steel Company had a posted Schedule indicating the times the blast furnaces were supposed to cast and the destination to which the metal was to be moved. It is claimed that on observations made of the operations of the plant, in numerous instances, it appeared the schedule was not closely followed and that the variance demonstrated coordination between the requirements of the Steel Company and the service by South Buffalo. Considering the nature of the work and its volume, we believe nothing abnormal has been shown. The Steel Company benefited by operating on the schedule and naturally would attempt so to do. The railroad unadvised of probable delays had to stand by on occasions. In a sense it

coordinated its efforts to those of the Steel Company, but this is not shown to have been purposely done. In the instances of delays of locomotive at the slag dump, they are fully explained and justified by the work of the locomotive required there.

The government further urges that all this kind of a switching service should be furnished by Steel Company itself and not by a separate company. Whether it should or should not, the legality of this type of service has been many times sustained by the courts. The service is compensated under tariff charges, and it is not included in the line haul rate.

When South Buffalo's General Superintendent learned of some unnecessary delays in the operations of its locomotives, he promptly took steps to stop them. The evidence discloses some of the particular instances where movements out of the ordinary occurred. Most of them are of no significance. Such is one where Steel Company employees pulled a car from the South Buffalo track to the Steel Company track for unloading.

The government stresses South Buffalo's method of rendering its bills to the Steel Company for switching service. No purpose of favoritism to the Steel Company is seen in this. In substance all this amounts to is that, when some shipment is not included in the shipper's order, South Buffalo makes out a paper showing the movement of the omitted shipment, this together with the shipper's order to the car department and a daily bill is rendered the Steel Company. The method employed may seem a little loose as regards the Steel Company, because there was no

regular shipper's order for shipment omitted from the shipper's order. Ultimately the Steel Company is in a position to check all shipments. The facts do not evidence coordination or an integrated organization.

Attention has been drawn to the personnel of the Board of Directors of South Buffalo and specially to those members of the Board of Directors who had never been connected with Bethlehem's interests prior to 1940. It is claimed that the activities and the inactivities of the Board demonstrate that they have in numerous matters been influenced by the Holding Company and that this shows domination. The outside directors are all of them men of business experience and most of them have been or were connected with business interests of considerable importance and volume. The ability of each member of the Board is clearly demonstrated. The Board met regularly and as is the case usually in the work of any Board of Directors, it considered and acted on all matters presented by its officers. Necessarily they depended to a large extent upon the recommendations of these officials who had direct and immediate charge of operation. Each of these outside directors testified that at no time had he any understanding with the Steel Company or the Holding Company or any of their officers or representatives as to what action should be taken by them. So far as this record discloses, each of the directors has performed his duties in the sole interest of the railroad. There is some evidence that certain of these directors were not acquainted with certain of the railroad officials, but considering the volume

of the work with which the Board was concerned and the number of officials employed, this fact merits little consideration.

There is testimony from various shippers on the line of South Buffalo relating to the kind of service rendered by the railroad to them. This has been offered to show that South Buffalo did render service for them similar to that given the Steel Company and to rebut the claim of favoritism. We believe this testimony is of little material value. The situations as between South Buffalo and these shippers is not comparable with that between South Buffalo and the Steel Company. In the cases of these shippers, South Buffalo owns no tracks within these plant industries. It generally delivers and returns cars, either from an intercharge within the industry plant, or else from the plant industry property line. These industries as a rule do their own switching over their own tracks. None of these has switching service such as that furnished by South Buffalo. It does appear in particular numerous instances that South Buffalo has been called upon by the shippers to perform some particular types of switching service. In the instance of the Republic Steel Corporation, the railroad moves the slag from the open-hearth to dumping ground, dumps it and returns the empty car to Republic. The socalled blast furnace slag is moved from the Republic plant to the Buffalo Slag Company. The railroad in certain of these industries does spot cars on trestles over bins or hoppers, much as it does in the instance of Steel Company. At times it spots cars at points designated by the industry within the industry plant,

and performs certain other special switching movements. But, as we have stated, it is hardly comparable with the Steel Plant and South Buffalo set-up.

It is further claimed by the defendants that the evidence of the industry representatives is material to show that the services rendered to these shippers was satisfactory. This, again, we say we do not think is material. The fact remains, however, that South Buffalo was within its legal rights in the maintenance of its switching facilities within the Steel Company plant.

It is true that there are other transactions between South Buffalo and the Steel Company in addition to those to which we have referred which it is claimed, when connected with those to which we have referred, show the influence of the Steel Company and the Holding Company upon South Buffalo. Assuming these are sufficiently proved, they do not affect the conclusion at which we arrive.

It is undoubtedly true that the Holding Company at all times has been in a position to control South Buffalo. That would be the usual power of a Holding Company owning all of the stock of a subsidiary. The Holding Company is a legal organization. It is entitled to the rights accorded any other organization or any individual. The burden rests on the Government to show that this power to control has been exercised. That burden has not been met insofar as relates to matters arising since the reorganization. The Government has extended itself to show occurrence which, for the most part ordinarily

would be found between two companies comparable ~~to the railroad~~ and steel companies.

The purpose of an injunction is to prevent the occurrence of threatened acts in violation of law. The alleged threat here sought to be prevented is the domination and control by the Holding Company over South Buffalo. Since 1940 there is not sufficient evidence to show that the Holding Company has dominated nor that it now so threatens. In the absence of proof of threatened domination, the court cannot enjoin. There is nothing to enjoin. When, and if, the situation is changed, the Government has its remedy. Whether the *Elgin* case decision is good law, insofar as concerns the period subsequent to 1940, this case presents much less proof to sustain injunctive relief.

Both the government and the defendants have submitted proposed Findings of Fact and Conclusions of Law. It is incumbent upon the Court to make Findings of Fact and Conclusions of Law. Because of the fact that this decision divides the periods of the activities of South Buffalo in connection with the Steel Company and the Holding Company, it seems advisable to the Court that new Findings be submitted, and perhaps this may be done with the cooperation of both the plaintiff and the defendants.

JOHN KNIGHT,
United States District Judge.

NOVEMBER 7, 1946.

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No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY AND BETHLEHEM STEEL CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 891) is reported in 69 F. Supp. 456.

JURISDICTION

The decree of the District Court was entered on March 28, 1947 (R. 923). The petition for appeal was filed on May 26, 1947, and was allowed the same day (R. 927). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 49

U. S. C. 45, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. 345. Probable jurisdiction was noted on October 13, 1947 (R. 931).

QUESTIONS PRESENTED

Whether the ownership by a holding company of all the stocks of a railroad and a producing company results in the railroad company violating the Commodities Clause when it transports commodities owned by the producing company, and whether *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, which gave a negative answer to this question, should now be overruled.

If it is necessary to show beyond the mere fact of such a three-company relationship that the power of control of the holding company has been so exercised as to constitute a community of interest between the railroad and producing companies, or domination of one by the other, whether the evidence here establishes such a community of interest or such domination.

STATUTE INVOLVED

The so-called Commodities Clause of the Act of June 29, 1906, as amended, 34 Stat. 584, 36 Stat. 547, 49 U. S. C. 1 (8), provides:

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from

any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

STATEMENT

This is an equity suit brought by the United States[1] on June 4, 1943, in the District Court of the United States for the Western District of New York against South Buffalo Railway Company (South Buffalo), Bethlehem Steel Company (the Steel Company), and Bethlehem Steel Corporation (the Holding Company), charging a violation of the Commodities Clause and requesting that South Buffalo be enjoined

[1] Suit was brought at the request of the Interstate Commerce Commission pursuant to the provision of Section 12 of the Interstate Commerce Act which reads in part: "* * * upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part * * *." 25 Stat. 858, as amended, 49 U. S. C. 12 (1).

from further transporting commodities produced by the Bethlehem organization.

The answers of appellees denied that their activities and relations violated the Commodities Clause and trial of the cause followed, commencing January 22, 1946. The District Court concluded in its opinion that the relations among appellees prior to 1940 resulted in a violation of the Commodities Clause, but that those relations were significantly altered in December 1939, by a reorganization of South Buffalo's management and did not subsequently result in a violation of law. On the ground that the reorganization was undertaken in good faith, the court refused to consider other than the subsequent relationship among appellees. Accordingly, relief was denied and the complaint dismissed.

The findings of fact entered by the District Court were made primarily on the basis of the testimony of some 18 officers, employees, and directors of appellees, called by the Government, and more than 150 documents, mainly letters and memoranda of appellees, introduced by the Government. The statement of facts which follows is primarily rested upon the court's findings, but is supplemented occasionally by reference to the evidence, particularly with respect to the 1939 reorganization of South Buffalo's management, the effect of which is a principal ground of dispute between the parties. We accept almost in

their entirety those of the court's findings which deal with the pre-reorganization relations of the appellees and with the facts of the reorganization;[2] we challenge only those of the court's findings which deal with appellees' post-reorganization relations.[3]

I. DESCRIPTION OF APPELLEES

The Holding Company, a Delaware corporation, owning all or substantially all of the shares of approximately 57 corporations, including South Buffalo and the Steel Company, supervises and integrates the activities of all for the ultimate purpose of producing steel and steel products. Among the subsidiaries are those engaged in producing basic raw materials, such as iron ore and coal, in various States and in South America, and those engaged in transporting raw materials and finished products in ocean-going commerce and in inland waters. The products of the manufacturing subsidiaries range from ingots and slabs of raw steel to finished products such as ships and

[2] These are findings 1 to 34, inclusive (R. 909–917). Of these we challenge only minor portions of findings 21, 22, 24, and 29. While we do not challenge the correctness of findings 30 to 34, inclusive, which deal with the reorganization, we contend that they inadequately reflect undisputed evidence as to the reorganization.

[3] These are findings 35 to 49, inclusive (R. 917–921). Most of these do not purport to state evidentiary facts but are conclusory in nature. See, e. g., findings 35 to 40, inclusive, and findings 47, 48, and 49.

railway cars. The trial court found, "The activities of the subsidiaries are primarily undertaken for the ultimate purpose of the production of steel and steel products, chiefly by the Steel Company, and the sale thereof." (Fdg. 5, R. 910; Fdg. 19, R. 912.)

The Steel Company, a Pennsylvania corporation, is the principal manufacturing subsidiary of the Holding Company, engaged in the fabrication and sale of iron and steel and their products. The Holding Company owns all of the outstanding capital stock of the Steel Company. Manufacturing plants owned and operated by the Steel Company are located, among other places, at Lackawanna, New York. (Fdgs. 4, 6, R. 910.) All directors of the Steel Company are also directors of the Holding Company, and the companies have in common their respective presidents, secretary-treasurers, vice-presidents in charge of legal and financial matters, and comptrollers (Fdg. 6, R. 910).

South Buffalo, a New York corporation, is one of seven railroad companies, each of which is a wholly-owned subsidiary of the Holding Company. Each of these seven railroads is located in the vicinity of a steel manufacturing plant of the Steel Company and in each instance there is a direct physical connection between the respective railroads and the various plants of the Steel Com-

pany. The operating relations between the several railroads and the respective plants they serve is about the same as that existing between South Buffalo and the Steel Company's Lackawanna plant and, in each case, the railroad's principal source of revenue is the Steel Company. The railroads and the points at which they are located, which points are also the locations of plants of the Steel Company, are as follows:

South Buffalo Railway Co., Lackawanna, N. Y.
Conemaugh and Black Lick R. Co., Johnstown, Pa.
Cornwall R. Co., Lebanon, Pa.
Fore River R. Corp., Quincy, Mass.
Patapsco and Back Rivers R. Co., Sparrows Point, Md.
Philadelphia, Bethlehem and New England R. Co., Bethlehem, Pa.
Steelton and Highspire R. Co., Steelton, Pa.

(Fdg. 17, R. 912; R. 106-107, 240.)

The principal offices of all seven railroads are filled by the same persons and their salaries are prorated by agreement among the railroads, each of six, including South Buffalo, paying 16% of such salaries, and the seventh paying 4%. The offices of the railroads filled by the same person are those of president, vice-president, secretary-treasurer, general agent, auditor, purchasing agent and chief engineer. A common

audit and bookkeeping organization is maintained for all seven railroads. Since 1940, the railroads have their general offices in a building at Bethlehem owned by one of them, with rent and general offices expenses apportioned among them by agreement. Prior to 1940 all had their offices in the Steel Company's main building at Bethlehem.[4] (Fdgs. 17, 18, R. 912; R. 244–245, 597.)

The Holding Company operates under a system of management whereby specific fields of activity are placed in charge of individuals who usually also hold offices as presidents or vice-presidents of various companies within their fields. There are individuals in charge of financial and legal matters (McMath, a director of both the Holding Company and the Steel Company and a vice-president of both),[5] operations (Bent, a vice-president of the Steel Company), traffic problems (Gross, a vice-president of the Steel Company and a director of both it and the Holding Company), raw materials, purchasing, shipbuilding activities, and sales activities. When the Holding Company felt it necessary to put a

[4] At Lackawanna South Buffalo has had its own building since 1940 but prior to that time it rented office space from the Steel Company (Fdg. 17, R. 912).

[5] Finding 20 (R. 912) describes McMath as a director of the Holding Company and vice president of the Steel Company. McMath's uncontradicted testimony indicated he was an officer and director of both companies (R. 104–105).

man in charge of railroad activities in 1931 or 1932, Kemmerer was made president of each of its seven railroad subsidiaries. (Fdg. 20, F. 912; R. 122–123.)

Procurement of funds for the Bethlehem organization is largely the function of the Holding Company. Under ordinary circumstances a subsidiary would seek funds from it and not from outside sources. The Holding Company is primarily interested in the financial results of operations of its subsidiaries rather than in their declaration of dividends. Consolidated financial reports of the Bethlehem organization have been periodically issued since about 1905, based on reports rendered by the subsidiaries to the Holding Company as frequently as once a month. (Fdgs. 23, 24, R. 913; R. 119–121.)

South Buffalo operates 6 miles of main line track and 81 miles of spur track, all in Erie County, New York. It has direct physical connections with five railroad trunk-line systems and connections through interchange within the Buffalo Switching District with seven other trunk-line systems.[6] It transports freight between such trunk-line systems and the various industries it

[6] The court's finding 14 (R. 911) is that South Buffalo has direct connections with two trunk-line systems and indirect connections with five. "Direct connections" result when the connection is effected through interchange with a switching railroad (R. 92). When effected only through interchange with other trunk-line systems, the connection is "indirect."

serves. South Buffalo owns and operates about 35 locomotives, steam and Diesel, and a few freight cars used for its own work. (Fdg. 3, R. 909; Fdgs. 14, 15, R. 911.)

South Buffalo serves the Steel Company's Lackawanna plant and about 27 other independent business enterprises, but about 70% of its revenue over the five-year period ending December 31, 1945, was received from the Steel Company. South Buffalo provides the sole terminal connection between the Steel Company's Lackawanna plant and the trunk-line carriers. Its services include the outbound transportation, in interstate commerce of finished commodities produced by the Steel Company at Lackawanna, and the inbound transportation in interstate commerce of raw materials used by the Steel Company. (Fdgs. 15, 16, R. 911–912.)

The Steel Company's Lackawanna plant is located on 1,027 acres of land, west of and fronting on the Hamburg Turnpike in Lackawanna, New York. Within this plant confine are 58 miles of broad-gauge track and 13 miles of narrow-gauge track owned by the Steel Company and 58 miles of broad-gauge track owned by South Buffalo. The broad-gauge trackage of the two companies is interconnected at numerous points and South Buffalo operates over all such trackage in performing an extensive intraplant switching service for the Steel Company. Among other things,

South Buffalo moves the pig iron in molten form from the blast to the open hearth furnaces and the slag to the slag dumps. (Fdg. 13, R. 911; Fdg. 44, R. 920.)

The intermingling of trackage within the Lackawanna plant enclosure was brought about by the common corporate predecessor[1] of the Holding Company and the Steel Company on the day it acquired the properties. On October 10, 1922, Lackawanna Steel Company sold to such predecessor the steel plant at Lackawanna and 4,991 shares of South Buffalo (or all its outstanding shares except those used for qualifying directors). On that day, the predecessor sold to South Buffalo for about $850,000 approximately 75 miles of track located in and about the steel plant, and leased to South Buffalo for a period of 99 years the land and roadbed under the track. On October 10, 1923, additional land and roadbed were leased to South Buffalo for 98 years. (Fdgs. 8–12, R. 910–911.)

[1] The predecessor was the Bethlehem Steel Company of New York, Inc., which, about October 21, 1922, changed its name to Bethlehem Iron and Steel Corporation. In 1935 the latter conveyed the Lackawanna plant in its then existing condition to the Steel Company. The 4,991 shares of South Buffalo were transferred on its books from Bethlehem Iron and Steel Corporation to the Holding Company in 1936. On January 3, 1940, the Holding Company acquired the remaining nine shares previously used to qualify directors. (Fdgs. 9–11, R. 910–911.)

II. THE DOMINATION OF SOUTH BUFFALO PRIOR TO 1940

The trial court found that "From on or about October 10, 1923, to about December 1939, the Holding Company and the Steel Company in numerous ways and on numerous occasions so dominated South Buffalo as to effect a commingling of the identity and community of interest among South Buffalo, the Holding Company, and the Steel Company" (Fdg. 26, R. 914). Upon the basis of this finding, the trial court declared (in its Conclusions of Law, R. 922) that "Over a period of years immediately preceding 1939, the South Buffalo transported in interstate commerce articles or commodities in which it had an interest, direct or indirect, together with the Steel Company and the Holding Company, in violation of the provisions of the Commodities Clause." The trial court's conclusions as to the domination of South Buffalo prior to 1940 is supported by detailed findings derived from substantially undisputed evidence.

A. *Control through Selection of South Buffalo's Management.*—The trial court found that for a number of years prior to July 1938, five of South Buffalo's nine directors were employees of the Steel Company, while the remaining four directors were employees of South Buffalo. From July 1938 to December 1939, all of South Buffalo's directors were employees of South Buffalo

(Fdg. 31, 32, R. 916). Trageser, who became President of South Buffalo in 1933, had been an employee of the Steel Company since 1917. He discussed his candidacy for the presidency of the subsidiary railroads with McMath, the Holding Company's financial Vice-President, but he did not discuss it with the directors of South Buffalo. (R. 177–178, 186–187.) Similarly, Peters, Buffalo's Vice-President from 1923 to 1938, Donnelly, its Secretary-Treasurer from 1922 to 1938, together with the persons who served as Assistant Secretary and Treasurer, Auditor, Purchasing Agent, and Chief Engineer during those years, were all former employees of the Steel Company (Plts. Ex. 20, R. 696).

B. *Control of South Buffalo's Operations.*—The Holding Company required South Buffalo to apply for guidance and advice in the conduct of its operations to officials of the Steel Company. Among the problems referred by South Buffalo to the Steel Company for decision were problems concerning South Buffalo's service to other shippers and concerning such of its internal affairs as personnel and wage policies, equipment purchases, engineering matters, and construction of additions and extensions (Fdg. 26, R. 914).

Testimony of high officials of the Holding Company and Steel Company disclosed the basis upon which South Buffalo's routine problems were resolved for it by the Steel Company. The

Steel Company had a large, fully-developed, and well-trained organization, and South Buffalo, as a relatively small corporation, did not have the money to hire the type of managerial talent which the Steel Company had available. From the viewpoint of economy it was sensible and wise for South Buffalo to rely for guidance upon the Steel Company's expert organization. Since both companies were owned by the Holding Company, it was natural for South Buffalo to seek, and the Steel Company to proffer, advise from the latter's highly-paid and highly-qualified talent. (R. 123–126; Ex. 149, R. 819–820.)

Prior to 1940 numerous letters were written by officials of South Buffalo to officials of the Steel Company in which the latter were addressed as officials of South Buffalo. Many or most of these letters requested advise or instructions and were couched in terms of "I would ask your judgment," "What is your view of this matter?" "Kindly advise your wishes," and "We would appreciate your advice." Numerous letters were also written to South Buffalo by John M. Gross, a vice-president, director, and the general traffic manager of the Steel Company. Such letters were written on stationery of South Buffalo and purported to be signed by him as an official of South Buffalo. Many contained advice or instructions to South Buffalo. (Fdgs. 26, 27, R. 914–915.)

The domination and control exercised over South Buffalo was found by the district court to be specifically illustrated by the following, among other things:

(1) South Buffalo's vice-president wrote to the general manager of the Steel Company's Lackawanna plant asking that he "kindly advise what policy should be adopted" in regard to a possible sale of land by South Buffalo to Republic Steel Corporation. The inquiry was referred by the Steel Company's Lackawanna manager to its manager of real estate at Bethlehem for further advice;

(2) The Seneca Iron & Steel Company requested of South Buffalo a reduction in switching charges. This request was referred to Gross, the Steel Company's vice-president, who wrote to South Buffalo (on South Buffalo stationery as "General Traffic Manager") refusing the request. South Buffalo then wrote the Seneca Company that its request, though receiving the earnest consideration of South Buffalo's management, was refused. The Steel Company thereafter purchased the plant of the Seneca Company;

(3) Two problems arising from South Buffalo's relations with its customer, Buffalo Sintering Corporation, one involving a property encroachment and the other a license to the Sintering Corporation to operate a locomotive on South Buffalo's tracks, were referred to the Steel Company;

(4) South Buffalo officials conferred with Steel Company officials with respect to rates of pay to be adopted by South Buffalo. Under customary procedures, when it desired to employ personnel, it would submit a requisition to the Steel Company whose supervisor of employment would then interview applicants for jobs and pass on their fitness;

(5) Miscellaneous internal management problems of South Buffalo were referred to the Steel Company for determination, among such problems being the propriety of forms to be used in South Buffalo's business and the desirability of purchasing locomotives, of constructing or enlarging buildings, and of locating a floodlight. (Fdg. 26, R. 914–915; Fdg. 28, R. 916.)

C. *Control of South Buffalo's Finances.*—The Holding Company determined upon and made two contributions of capital to South Buffalo in late 1936 in the amounts of $211,616 and $1,900,000. South Buffalo took no part in any action leading to these contributions or the forms in which they were made. One officer of South Buffalo may have been advised of the Holding Company's general purpose in making the second contribution.

The first contribution was undertaken to avoid the payment of surtaxes (imposed by the Federal Revenue Act of 1936 on undistributed net income) on the more than $500,000 net income which South Buffalo realized from operations in 1936. The

books of South Buffalo showed a deficit from all operations by the end of 1935 in the amount of $46,163, and since New York law forbade the declaration of dividends which would impair the railroad's capital, it was necessary to clear away the deficit as a prerequisite to declaration of a dividend. Despite what South Buffalo's books showed as to its deficit, the books of the Holding Company showed its deficit to be $211,616 and a contribution in that amount was therefore made to South Buffalo by the Holding Company.

The second contribution arose from the fact that South Buffalo owed an open-account indebtedness of about $2,000,000 to the Holding Company. Officials of the Holding Company were concerned that South Buffalo's payment of most of its net income in dividends would be criticized in view of its substantial debt. Also, they considered that South Buffalo needed a proper credit standing. The matter was discussed among top officials of the Holding Company, and, with approval of its Board, it was determined to put $1,900,000 into South Buffalo's hands. At first it was contemplated that the transaction would take the form of a purchase by the Holding Company of further stock to be issued by South Buffalo. But it developed that the provisions of a mortgage on South Buffalo property required any additional stock issued by South Buffalo to be pledged under the mortgage. The Holding Com-

pany then decided that the sum already advanced to South Buffalo, should be treated as a contribution. (Fdg. 25, R. 914; R. 128–132; Ex. 142 (not printed).)

III. THE REORGANIZATION OF SOUTH BUFFALO'S MANAGEMENT.

Sometime after the decision of this Court in *United States* v. *Elgin, Joliet & Eastern Ry.*, 298 U. S. 492 (decided in May, 1936), the decision was called to the attention of Holding Company officials by its counsel. An investigation of the relationship between South Buffalo and the Steel Company caused Holding Company officials to conclude that "the theory of management had, to some extent, slopped over" (R. 125), and aroused their fear "that there were certain things which had happened which might possibly be within the language, at least of the minority decision, of the Court in that case" (R. 125–126). The matter was discussed by the financial vice-president of the Holding Company with its president, counsel, and other vice-presidents, and a decision was reached to reorganize South Buffalo so as to preclude the continued domination of South Buffalo. The Holding Company then instructed Steel Company officials to cease advising and instructing South Buffalo and interfering in its affairs. (Fdg. 30, R. 916; R. 135–136.)

An initial step in reorganization was taken in July 1938. For a long period of years prior to

that time a majority of the nine-man board of directors of South Buffalo were elected from among employees of the Steel Company. In July 1938, five directors of South Buffalo who were Steel Company employees resigned and their places were filled by employees of South Buffalo. The nine-man board of directors was thus constituted entirely of South Buffalo employees when, late in 1939, the principal reorganization was effected. (Fdgs. 31, 32, R. 916; Amended Complaint, Par. 18 (b), R. 8; South Buffalo's Answer to Amended Complaint, Par. 15, R. 36.)

In the view of Holding Company officials, a reorganization of South Buffalo's management to make it independent of the Steel Company required the selection of a new president for South Buffalo. The existing president, Trageser,[8] who had served satisfactorily since 1933 as president of South Buffalo and the other railroad subsidiaries, was not an engineer. Since prior reliance on the Steel Company organization for assistance was no longer to be encouraged, officials of the Holding Company considered it desirable to have as president of South Buffalo someone trained to deal with practical and operating prob-

[8] Trageser had been an employee of the Steel Company from about 1917 to 1933. He dealt with the Holding Company's financial vice president in connection with his candidacy in 1933 for the presidency of the subsidiary railroads and in connection with his salary. He did not speak to any of the directors of South Buffalo in connection with his desire to be president of South Buffalo. (R. 177–178, 186–187.)

lems who knew a great deal about the steel business and what steel plants required in the way of service. (R. 136–138.)

David M. Petty was selected by Holding Company officials to be the new president of the railroad subsidiaries following an interview which he had with Eugene Grace, president of both the Holding Company and the Steel Company. Grace told Petty he thought a man with his background would be helpful in the operation of the railroads and that he would like to place his name before the boards of directors of the seven railroads serving the seven Steel Company plants. Grace said that Petty's compensation would be about $25,000 per year as it has been. (R. 237–238, 269–271.) Petty had previously been for 30 years an employee of the Steel Company. He was not a railroader and had only such knowledge of railroad operations as he had gained in connection with Steel Company work. Petty's substantial asset was that he knew a great deal about the steel business and what steel plants require in the way of service. It is easier for the Steel Company to work with a man who represents the railroad if he knows something of the Steel Company's problems. Knowledge of the intricacies of railroading alone does not meet the Steel Company's requirements. (R. 137, 180, 236–237, 241–242.)

At the reorganization meeting of South Buffalo's board of directors on December 5, 1939, at

this point consisting of nine South Buffalo employees, Trageser submitted his resignation as president and suggested that Petty be chosen his successor as he had agreed with Holding Company officials to do. He was elected vice-president and Petty was elected president of South Buffalo to succeed him. Sellers, formerly an employee of the Steel Company, was elected to replace Craig, not a former employee of the Steel Company as secretary-treasurer. Craig was made assistant secretary-treasurer. (R. 221-223; Ex. 20, R. 696.)

Following the elections of the meeting, the important officers of South Buffalo were all former employees of the Steel Company. Vacancies filled since 1940 have, with one exception, involved only the replacement of one former Steel Company employee by another.* At the time of trial the officers of South Buffalo who were former Steel Company employees were:

D. M. Petty, President.
Paul A. Trageser, Vice-President.
C. F. Dullenkopf, Vice-President and General Superintendent.
G. E. Sellers, Secretary-Treasurer.

*Benning, not a former Steel Company employee, was replaced as vice-president and general superintendent by a Steel Company employee in 1941 (Ex. 20, R. 696). Benning, a South Buffalo employee since prior to its acquisition by the Bethlehem organization, had shown complete subservience to Bethlehem as the author of such letters as Exs. 54 (R. 726); 55 (R. 727); and 64 (R. 734).

C. J. Fatzinger, Auditor.
R. F. Maguire, Purchasing Agent.
Hugh M. Dalziel, Chief Engineer.

(Ex. 20, R. 696.)

All of these officers, except Dullenkopf, hold similar offices in the other six subsidiary railroads (*supra*, pp. 7-8).

At the meeting of December 5, 1939, seven directors resigned effective at the close of the meeting, leaving only Trageser and a vice-president and general superintendent of South Buffalo to continue as directors. Replacements of two were made by the election of Petty and Sellers, the newly installed secretary-treasurer of South Buffalo, as directors. (Fdg. 33, R. 917.)

The other five new directors, elected to take office in January 1940, were Buffalo businessmen having no connection with the appellees. While all are directors of other corporations and have had experience in business affairs, only one had previous experience in the management of railroads, having been at one time an assistant secretary of the Niagara Junction Railroad. (Fdg. 34, R. 917; R. 447, 465, 479, 493, 498.) They were solicited for the purpose by counsel for the Holding Company. None of these five "outside" directors knew that Petty and Trageser were former employees of the Steel Company or of the events at the meeting on December 5, 1939. (R. 451–453, 466–467, 481–482, 489–490, 500–501.) One was

told that the Steel Company wanted to divorce South Buffalo from Steel Company control and was looking for local directors (R. 500). Another was told by counsel for the Holding Company that he represented South Buffalo (R. 449); a third was told nothing but simply asked if he wished to become a director of South Buffalo (R. 480–481).[10]

IV. CONTROL OF SOUTH BUFFALO SINCE 1940

A. *Management Control.*—Since the reorganization, the board of directors of South Buffalo has continued to be composed of four employees of South Buffalo and five "outside" directors. Meetings of the board are held quarterly with an infrequent special meeting. (R. 447, 489.) At the meetings of the board either Petty or Trageser presides, and places before the board the matters for consideration and expresses his views why the various proposals should be adopted (R. 479–480, 489, 498–499). Each of the outside directors relies on the opinion of the presiding officers (R. 449, 470, 480, 489, 499). Every matter, with one possible exception, considered by the Board since 1939 has been determined by unanimous vote of

[10] One of the five directors originally chosen in 1939 resigned and was replaced in 1942 (R. 489). The statement above made relates to the five persons who were directors and testified at the time of trial; the resigned director did not testify.

the board in line with the recommendation of the presiding officer (R. 258, 453, 499).[11]

Although the South Buffalo board of directors annually elects, among others, an auditor and a purchasing agent (R. 601), not one of the "outside" directors could give the names of either of these officers or the name of the general agent (R. 453, 468–469, 483, 490–491, 502).[12] When Dullenkopf, who, since September 1943, has been general superintendent of South Buffalo, was recommended to the board by Petty, Petty told of Dullenkopf's experience with another railroad subsidiary of the Holding Company but did not mention that for 24 years Dullenkopf had been an employee of the Steel Company (R. 318–319, 468, 482–483, 501–502). Some of the directors were still unaware at the time of trial that Petty and Trageser were former employees of the Steel Company (R. 451, 459, 467–468, 501).

B. *Other Elements of Control.*—The incidents and occurrences subsequent to 1940 which were urged by the Government to establish a continuance of control over South Buffalo by its co-

[11] It appears that one year the amount of the dividend to be declared as suggested by Petty was lowered following discussion by the board (R. 258, 457). Compare the district court's finding that the Holding Company was interested in the results of operations by subsidiaries rather than their declaration of dividends (Fdg. 24, R. 913).

[12] One director testified he knew the name of the purchasing agent but did not give it. He also testified he knew the name of the auditor but it developed that he did not (R. 502).

appellees and the existence of a community of interest among them were the subject of adverse findings by the district court. In the interests of brevity and an orderly presentation, the relevant findings and evidence are reserved for statement at the appropriate point in our argument (*infra*, pp. 88–97).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In failing to hold that South Buffalo had an interest in commodities owned or produced by the Steel Company, the transportation of which by South Buffalo violated the Commodities Clause.

2. In failing to hold that the production of commodities by the Steel Company and the transportation of those commodities by South Buffalo were undertaken by the same authority, thereby making such transportation a violation of the Commodities Clause.

3. In holding that upon the authority of *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, the evidence fails to establish that appellees have violated the Commodities Clause.

4. In failing to hold that the evidence establishes a community of interest among appellees, and that South Buffalo has been so continuously dominated by its co-appellees that it has been operated as a mere department, agency, or instrumentality of one or both of them.

Both the express language and the clear purpose of the Commodities Clause require its application to prohibit a railroad company from transporting commodities owned by a manufacturing company where both companies are wholly-owned subsidiaries of a management holding company. Nothing in the legislative history of the Commodities Clause justifies an interpretation that Congress intended to permit easy evasion of its prohibition through the use of wholly-owned subsidiaries. Recognition of business realities compels the conclusion that where all of the stock of both railroad and shipper is owned by a single person, there is united in a single interest the conflicting roles of common carrier and shipper which the Commodities Clause requires to be separated. *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, should be overruled, because (1) it is a clear departure from the only prior case which considered the precise problem; (2) it is based upon a misinterpretation of the legislative history of the Commodities Clause; and (3) it ignores the community of interest and control which exists between railroad and shipper where both are wholly-owned subsidiaries of a common parent. Even assuming that such common and complete ownership of both railroad and shipper is not *per se* such a relationship as would preclude the railroad from transporting commodi-

ties owned by the shipper, the *Elgin* case further ignores realities by holding that the facts there involved did not constitute such actual domination of the railroad by the holding company as to warrant the conclusion that the railroad was operated merely as a department of a larger enterprise.

Even if this Court reaffirms the doctrine of the *Elgin* case—that mere ownership by a single person of all of the stock of both railroad and shipper is not sufficient to invoke the prohibition of the Commodities Clause—the substantially undisputed evidence in this case establishes that South Buffalo has been so completely dominated by the Holding Company, both directly and through the Steel Company that South Buffalo must be regarded as a department in an integrated steel-making enterprise. In fact, the elements which evidence domination and control of South Buffalo by the producing interest here far exceed the elements upon which the Government relied in the *Elgin* case. Under these circumstances, South Buffalo has an "interest, direct or indirect" in the commodities which it transports for the Steel Company, and is thereby violating the Commodities Clause.

The appellees' contentions (a) that the Commodities Clause has no application to the transportation service rendered by South Buffalo and (b), that a finding that South Buffalo is so dominated by the Holding Company will result in

the application of the Shippers Allowance Clause, and therefore in the non-applicability of the Commodities Clause, are without merit.

ARGUMENT

I

A RAILROAD VIOLATES THE COMMODITIES CLAUSE BY TRANSPORTING COMMODITIES OWNED OR PRODUCED BY AN AFFILIATE WHERE THE SHARES OF BOTH ARE WHOLLY HELD BY A MANAGEMENT HOLDING COMPANY

When South Buffalo transports commodities owned or produced by its close affiliate, the Steel Company, its activities fall squarely within the prohibition of the Commodities Clause against a railroad's transportation of articles "manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."[13] But this Court held in *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, that the fact that both the railroad and its customer were wholly owned by the same corporation did not of itself establish a Commodities Clause violation; and that it was further necessary to establish by evidence that the power of control vested in the dominant company by virtue of stock

[13] There are two excepted classes of commodities neither of which is relevant here; timber products, and products necessary and intended by the railroad for use in its business as a carrier.

ownership had been so affirmatively exercised as to reduce the railroad to an agent, department or instrumentality of the producing interest. We will demonstrate that *Elgin* is based upon a misinterpretation of the legislative history of the statute and, by ignoring business realities, fails to give effect to the clear statutory command. Further, we contend that even accepting the doctrine of the *Elgin* case, the facts there involved should have compelled the conclusion that the railroad was actually so dominated by the holding company as to invoke the prohibition of the Commodities Clause.

A. *The Earlier Decisions under the Commodities Clause.*—This Court has often recognized that Congress, in enacting the Commodities Clause, sought to achieve genuine divorcement of the functions of interstate railroad transportation and production. The immediate impetus which underlay enactment of the Clause was provided by the situation about 1900 in the Pennsylvania anthracite coal regions, where a few railroads were rapidly obtaining control of all mines by ruthless suppression of the competition of non-railroad coal companies. But, though spurred by this dramatic example, Congress legislated generally to remedy the evils which resulted when railroads occupy "the dual and inconsistent positions of public carrier and private shipper." *United States* v. *Delaware, Lackawanna &*

Western R. Co., 238 U. S. 516, 525. The purpose of the Clause was "to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper." *United States* v. *Reading Co.*, 253 U. S. 26, 60-61.[14]

The Commodities Clause first came came before this Court in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. The United States had commenced proceedings by bills in equity against six railroads, all operating in the Pennsylvania coal regions and all owning shares in companies engaged in mining coal, ranging from a small to complete stock ownership.[15] On the basis of the

[14] "The language of the commodities clause, read in the light of its legislative history, can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier * * * [It] was aimed * * * at the suppression of the power and the favorable opportunity * * * to engage in practices * * * inimical to the performance of carrier duties to the public." Mr. Justice Stone, dissenting in *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 504.

[15] The six railroads were: Delaware & Hudson Company, Erie Railroad Company, Central Railroad Company of New Jersey, Delaware, Lackawanna & Western Railroad Company, Pennsylvania Railroad Company, and Lehigh Valley Railroad Company. The answer of Delaware, Lackawanna & Western left it uncertain whether it owned shares in companies engaged in mining coal. Some of the defendants also

submitted pleadings, the lower court had determined that the Commodities Clause was unconstitutional, being, not a regulation of interstate commerce within the powers of a Congress, but an absolute exclusion from commerce violative of the Fifth Amendment."

This Court entered upon an extensive analysis of the Commodities Clause, indicating that a cardinal guide in its construction was the necessity of avoiding what it regarded as serious questions of constitutional power. As to the point of current inquiry, the Government contended that any stock ownership, however small, by a railroad company in a coal company constituted an "interest" in the coal transported by the railroad for the coal company within the meaning of the Commodities Clause. (Brief for the United States, Nos. 559–570, October Term 1908, pp. 134–136). This contention was rejected by the Court primarily in view of the constitutional doubts engendered by a construction with such "far-reaching consequences" (213 U. S. at 415) but also on the

owned or leased fields and mined coal directly as well as through the agency of subsidiaries.

" *United States* v. *Delaware & H. Co.*, 164 Fed. 215 (C. C. E. D. Pa.). The constitutionality of the Commodities Clause was at this date a lively issue. See William Draper Lewis, *Constitutional Questions Involved in the Commodity Clause of the Hepburn Act* (1908), 21 Harv. L. Rev. 595; Learned Hand, *The Commodities Clause and the Fifth Amendment* (1909), 22 Harv. L. Rev. 250.

basis of this Court's interpretation of the legislative history of the Commodities Clause (as to which, see *infra*, pp. 51–52). The Commodities Clause was held to prohibit a railroad's transportation of commodities in which it had a legal or equitable interest, "not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder" (p. 415).[11] Thus, in the *Delaware & Hudson* case, this Court held, *inter alia*, that a Commodities Clause violation was not established by merely showing that the railroad owned all of the capital stock of a shipper whose goods were transported by the railroad.

On remand of the cases, the United States sought leave to amend the bill against the Lehigh Valley Railroad Company. The amended bill averred that the railroad owned all the shares of

[11] Mr. Justice Harlan, dissenting, said: * * * In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transportation company from doing injustice to other owners of coal" (p. 149).

one coal company (the Lehigh Valley Coal Company) and had so used the power resulting from its stock ownership "as to deprive the coal company of all real, independent existence and to make it virtually but an agency or dependency or department of the railroad company." The lower court's refusal to permit the amended bill to be filed was reversed by this Court. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 268. The Court, adhering to the view that a carrier's ownership of shares in a *bona fide* producing corporation would not violate the Commodities Clause, determined that a violation would result if the carrier exercised control over the producer through stock ownership

> which was not the necessary result of a *bona fide* exercise of such ownership and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad [p. 273].[18]

[18] The United States moved in the Circuit Court that the bills against the Erie, Central of New Jersey, and Pennsylvania be dismissed without prejudice. On denial of this motion and upon the Government's statement that it did not intend to proceed further with the cases, the Circuit Court entered decrees dismissing all absolutely. This action was affirmed. *United States* v. *Erie R. Co.*, 220 U. S. 275.

A third decision involving the Lehigh Valley's efforts to engage both in transportation and coal mining came before this Court in *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255. Following the decision above set forth, the railroad suggested to its wholly-owned subsidiary, the Lehigh Valley Coal Company, that it consider the organization of a sales company. On the same day that the Railroad Company declared a dividend of $6,060,800, the Coal Company announced the organization of the Lehigh Valley Sales Company and authorized the purchase of stock in it by shareholders of the Railroad Company in an amount not to exceed $6,060,800. The stock of the Sales Company was consequently held 97% by shareholders of the Railroad Company. The Sales and Coal companies entered into a contract whereby the Sales Company agreed to buy all the coal of the Coal Company, and no other coal. The resulting involved relationship was held not to have divested the Railroad Company of interest in the coal so as to permit it to transport the coal in compliance with the Commodities Clause.

A similar relationship was held to involve a violation of the Commodities Clause in *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516. There, following the decision in the first Commodities Clause case, the railroad organized a coal company, invited its shareholders to subscribe to stock in the coal company, and declared a cash dividend adequate to

cover payment for stock in the new coal company. The two companies had common officers and 99% common shareholders. The railroad continued to mine coal but transferred title to it to the coal company at the mouth of the mines before transportation began. A peculiarly restrictive sales agreement, very similar to that in the last *Lehigh Valley* case referred to above, provided that the railroad should sell, and the coal company buy, all coal mined by the railroad, the coal company not to buy coal from any other source. Pointing out that the coal company was a mere puppet subject to the railroad's control, this Court concluded that the railroad had an interest, violative of the Commodities Clause, in the coal which it transported."[19] In this case, the Court referred to the legislative history of the Commodities Clause as indicating that mere ownership by a railroad or its stockholders of all of the stock of a shipper was not intended by Congress to constitute a violation of that statute.

It will be observed that all the foregoing cases involve instances in which the railroad company is the dominant interest involved, either holding shares of a producing company directly or stage-

[19] In *Delaware, Lackawanna & Western R. Co.* v. *United States*, 231 U. S. 363, this Court affirmed a judgment of guilty following the railroad's indictment for transporting hay to be fed to mules employed in its coal mines, thus holding that the Commodities Clause applies to the inbound transportation of raw materials, as well as to the outbound transportation of commodities.

managing the creation of an affiliated producing corporation whose stock would be owned by the railroad's stockholders. Only two cases have arisen involving a basic factual pattern identical with the present case in that a holding company has owned all the shares of both a shipper and a railroad which transported commodities owned or produced by such shipper.

In the first of these, *United States v. Reading Co.*, 253 U. S. 26, we believe that this Court distinguished the earlier cases on the basis of the differing organizational patterns involved and determined that a violation of the Commodities Clause necessarily resulted from the relationship before it. This Court said that the question before it was not one in which a railroad owned shares in a producer and criticized the lower court's reliance upon the *Delaware & Hudson Company* case, saying (p. 60):

> The real question is whether combining in a single corporation the ownership of all the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.

The Court pointed out that the Commodities Clause was designed to prevent potential discrimination and continued that "the evil to be remedied" was present in the case before it

> as fully as if the title to both the coal lands and the railroads were in the Hold-

> ing Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury,—and discriminating practice which would harm the general shipper would profit the Holding Company [p. 61].

The Court concluded that the situation before it was within the language of the Commodities Clause since coal was both mined and transported under the same authority, and so gave an affirmative answer to what it had posed as the "real question" before it.[20] It then turned to the situation of another defendant railroad (the Central Railroad Company of New Jersey) which owned eleven-twelfths of the stock of a coal company, and described this relation as posing a "different question" as to which the authority of earlier

[20] While the Court based its distinction of the earlier cases entirely upon the differing corporate relations involved, without further elaboration, it may well have been influenced by such considerations as were subsequently expressed by Mr. Justice Stone in his dissent in the *Elgin* case. He considered control of a railroad by a producer "far more menacing to the public and to rival producers than is domination of producer interests by a carrier. When the carrier interest predominates, extension of its transportation facilities beyond the demands of its producing affiliates, and even to their competitors, with resulting benefit to the public, may well ensue. But where the producing interest is dominant, and the carrier is chiefly engaged in transporting the commodities of producing affiliates, restricted or indifferent service to competing producers and to the public, tardy or inadequate extension of facilities, discrimination in furnishing service and facilities, are dangers especially to be anticipated." *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 507.

cases was applicable. It concluded in fact that the railroad had used the coal company as the "coal mining department of its organization" and consequently that the transportation involved was within the ban of the Commodities Clause (pp. 62–63).[21]

In *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, the second case involving the three-company relationship, this Court rejected the view that such a relationship of itself established a Commodities Clause violation. It held that the language in *Reading* could not be taken as the "declaration of an abstract principle" (298 U. S. at 501), but had application only to the particular circumstances there presented. The principal distinguishing circumstance was considered to be that in *Reading*, unlike *Elgin*, the three companies had the same officers and directors. This Court, therefore, brushed aside the *Reading* precedent and reverted, as authoritative, to the reasoning of the older cases which *Reading* had rejected. It concluded that, though a management holding company held all the stock of both railroad and shipper, a Commodities Clause violation resulted only if the holding company's undoubted power of control was affirmatively exercised, and that this exercise must be

[21] It is significant that Chief Justice White, author of the first two opinions under the Commodities Clause, dissented in the *Reading* case for the reasons set forth in the lower court opinion: i. e., that the rule enunciated in *Delaware & Hudson* was applicable and the cases were indistinguishable.

established by proof of acts involving invasion of the subsidiary's management function.

We believe that the decision should be reconsidered, but not merely because of its *Elgin* rejection of the *Reading* precedent. The primary ground upon which we ask this Court to overrule *Elgin* is predicated upon our contention that the *Elgin* decision is in disregard of the plain language and purpose of the Commodities Clause. To this contention we now turn.

B. *Both the Express Language and Purpose of the Commodities Clause Require a Holding that it is Violated Where Both the Railroad and the Shipper are wholly-owned Subsidiaries of a Common Parent.*—Reading the Commodities Clause, and giving to its words their natural meaning, two things seem clear: first, Congress prohibited a railroad company from transporting any commodity which it owned or produced, in the usual sense of direct ownership or production; secondly, since the Congress was concerned with substance, it extended the prohibition to commodities produced under the "authority" of the railroad company and to commodities "in which it may have any interest, direct or indirect." This choice of language, on its face, can only mean that Congress intended genuinely to divorce the interstate transportation of commodities from their manufacture or production, and that it further intended that this policy was not to be thwarted and evaded by indirection.

The purpose of the Commodities Clause, as this Court has often recognized (see, *supra*, pp. 29–30), is to prohibit a railroad from transporting commodities as to which, because of the railroad's ownership of or interest in such commodities, the railroad company might be tempted to give discriminatorily favorable treatment, to the prejudice of competing shippers. In brief, the railroad was to be prohibited from dealing as a carrier with itself as a shipper. In every case arising under the Commodities Clause, the real question would seem to be what "interest, direct or indirect," by a railroad company in commodities, or what exercise of authority by the railroad company over the production of commodities, is sufficient to require that their transportation by the railroad company be prohibited. In the light of the statutory purpose, it would seem to be obvious that the "interest" referred to is a sufficient financial interest of the railroad in the fortunes of the shipper to constitute an inducement to discriminate in favor of the shipper. The further prolfibition, against the transportation of commodities produced under the "authority" of the railroad company, would normally be considered to cover instances where both transportation and production were undertaken by the same financial or business group. In brief, the purpose of the Commodities Clause is to prohibit the production and transportation of commodities by the same business enterprise.

In the light of this statutory purpose, it seems plain beyond argument that transportation by one subsidiary of an affiliated subsidiary's products is prohibited. Every evil at which the Commodities Clause was directed is fully present in this type of situation. Where railroad and shipper are wholly-owned subsidiaries of a common parent company, both embody and act for the identical proprietary interest. Under these circumstances, the railroad has the same interest in commodities owned by the shipper that an unincorporated department of a business has in the profitable operation of other departments. The situation is further within the literal language of the Commodities Clause in that both transportation and production are in the hands of the same "authority"—i. e., the management holding company.

There is no magic in the corporate form which should obscure these realities. A corporation, it is now generally recognized, is simply a method of doing business. In many business enterprises, geographical and functional divisions have been established as wholly-owned subsidiaries. This has been done for a variety of legitimate reasons—limitation of liability, qualifying to do business in particular states, etc. The law has often recognized the separateness of wholly-owned subsidiaries from each other and from the parent company in such matters as the scope of tort and contract liability where it appeared that the affairs of the subsidiary were handled consistently

with the theory of a separate corporation—separate assets sufficient to meet its ordinary needs, separate books, careful observance of corporate ritual, etc. See, generally, Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations* 39 Yale L. J. 193; *Stevens on Corporations*, pp. 80–87.

However, the fact that under such conditions the law recognizes wholly-owned subsidiaries for purposes consistent with the corporation laws has not, except in cases under the Commodities Clause, been taken to mean that a public policy might be thwarted merely by the creation of subsidiary corporations. Rather, it has been held "that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was in the aim or only the result of the arrangement." *Anderson v. Abbott*, 321 U. S. 349, 363. The transportation of commodities as a common carrier by the same business enterprise that owns or produced the commodities is prohibited by the Commodities Clause. The crux of the Government's position is that such a dual enterprise, however conducted, is forbidden by that statute.

Considerations of the character set forth above were wholly ignored by the majority of the Court in the *Elgin* case. In lieu of any realistic appraisal of the facts before it, undertaken in the light of the purposes of the Commodities Clause, the majority drew a distinction between a holding company's "power of control" over its subsidiary

and its actual exercise of the power of control. Further, the Court indicated that the fact that the power of control was affirmatively exercised could be established only by proof of acts which disregarded the separate corporate form of the subsidiary. The majority predicated its opinion upon such findings of fact by the district court as those respecting Elgin's separate corporate existence and its ownership of property and conclusion of contracts in its own name (p. 503). The district court had further found that Elgin conducted its affairs in its own name in the usual form of a corporation and that communications between Elgin and its parent "were carried on in the form of transactions and communications between two separate and distinct corporations" (Elgin R. 498).[22] Moreover, when the holding company wanted information from, or action by, Elgin, it "never obtained such information or took such action directly by its own officer or agents, but always made request for such information or action through the officers of [Elgin], in the way which is customary and usual between corporations which are separate and distinct corporations" (Finding of Fact 11, Elgin R. 498).

We submit that mere observance of separate corporate ritual should be wholly immaterial in determining whether a Commodities Clause violation exists. Congress made plain on the face of

[22] Reference in this form are to the Transcript of Record in the *Elgin* case, No. 660, October Term, 1935.

that Clause that it wanted a divorcement of the functions of transportation and production in order to prevent the evils which, as this Court has recognized, inevitably flow from this combination. In providing that railroads should not haul goods in which they had an interest, Congress did not indicate that it desired only a divorcement in form. It is startling to suppose that the potential evils which produced the Commodities Clause would be any less present in the situation now under consideration because the railroad subsidiary is in form a separate corporation and this separateness in form has been ritually recognized by its parent. The dissenting minority of three members of this Court in the *Elgin* case noted (p. 506):

> Those familiar with present day methods of corporate control will not be so naive as to suppose that the complete domination in fact of its subsidiaries by a holding company owning all their stock is in any way inconsistent with scrupulous recognition of their separate corporate entities, or with the maintenance of separate accounts and distinct personnels of officers and directors.

We further submit that there is no valid basis for the distinction drawn in the *Elgin* case between the "power of control" and "exercise of the power of control." If the holding company does not exercise the power of control over its 100% subsidiary, then it is proper to inquire who does and how it can be done. Assuredly, the

power of control is exercised by those in whom it legally resides even in the act of temporarily relinquishing it to selected others.

A holding company which has no operating functions exists only for the purpose of exercising whatever control over its subsidiaries may be necessary to weld them into a single cohesive business enterprise. It must inevitably exercise its dominant power to guide and control, or what is intended as an efficient device for conducting a large-scale business will disintegrate through the subsidiaries' failure to cooperate to the advantage of the whole. Indeed, a holding company would be derelict in the discharge of the duty it owes its shareholders if it failed effectively to supervise and coordinate the activities of the subsidiaries.[22a]

No claim has been or could be made here that the Holding Company owns stock in its co-appellees for investment purposes only or that it was "a holding company which was content to hold." *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 523. Such an argument would not be compatible with the facts in this record or with an 100% ownership.

[22a] Accountants and businessmen would instinctively ignore the division of an integrated business enterprise into corporate segments. It has long been recognized that the affairs of an enterprise in the form of a holding company and subsidiaries cannot be comprehended without the use of consolidated financial statements, which reflect the aggregate enterprise, rather than the internal legal entities.

Speaking of a situation in which a holding company owned varying interests in subsidiaries, often less than 20%, and meeting an argument that the stock interest was held only for investment purposes, this Court said in *North American Co.* v. *Securities & Exchange Commission*, 327 U. S. 686, 701:

> The dominant characteristic of a holding company is the ownership of securities by which it is possible to control or substantially to influence the policies and management of one or more operating companies in a particular field of enterprise.

The interest which the transporting subsidiary has in the products of its affiliate, and proof that both transportation and production are carried on under the same authority, are given concrete form by the facts apparent from the record respecting the Bethlehem organization. Obviously, Bethlehem may be viewed realistically only as a cohesive, integrated, large-scale steel producer. The Holding Company is not a mere investment trust—it is the top management and the integrating force for the entire enterprise. Subsidiaries are engaged in the mining of various types of iron ore in Chile, Venezuela, Cuba, and the region about the Great Lakes (R. 116–117). Other subsidiaries mine coal in Pennsylvania and West Virginia (R. 117). These raw materials flow to producing subsidiaries since Bethlehem prefers not to sell such materials to outsiders (R. 117–118). Of the prin-

cipal raw materials required by manufacturing subsidiaries of the Holding Company, 80% of the iron ore, 70% of the coal, and 56% of the limestone was obtained from other subsidiaries during the five-year period 1935–1939, inclusive (R. 157–158).

Iron ore is transported from South American points to the United States by a subsidiary steamship company engaged almost exclusively in such transportation (R. 116). A second ocean-going steamship company transports Steel Company products between the coasts of the United States (R. 114), while another shipping subsidiary carries from Upper Great Lakes points to Lackawanna most of the iron ore used there by the Steel Company (R. 113). The Bethlehem organization uses its own transportation facilities and its own steel and steel products whenever possible (R. 110–111, 113–114). No opportunity is lost to sell steel produced by the Steel Company to other subsidiaries (R. 112).

Any realistic appraisal of the Holding Company and its approximately 57 subsidiaries requires the conclusion that it is conducted as an integrated enterprise for the ultimate purpose of producing steel and steel products. South Buffalo has a limited but definite function as a cog in this organization—to provide transportation for the Steel Company's Lackawanna plant. There is no reason to believe that the Holding Company's ownership of South Buffalo is con-

tinued for a reason different than its ownership of the coast-wise steamship company. Operation of that company was admittedly based on problems arising from improper stowage or packing which the organization met in shipping its products, and the desire for more satisfactory service (R. 115). In the broad view, it is impossible to contend that South Buffalo has no "interest" in products of the Steel Company or that its transportation of those products does not flout the Congressional purpose to divorce transportation and manufacture.

In asking this Court to view realistically the operations of the Bethlehem organization, we do not ask it to adopt an approach in any way different from that of a leading Holding Company official. This official was McMath, a director of both the Holding Company and the Steel Company, a vice-president in charge of finances and legal matters of both (R. 104–105), an officer of "a number of these other companies" [i. e., Bethlehem subsidiaries] (R. 117), but never, he was quite sure, an officer or director of South Buffalo (R. 148).

McMath had constant difficulty, resulting from his use of the pronouns "we" and "our" to refer indiscriminately first to one appellee, then to another. This difficulty continued throughout his testimony despite repeated promptings by appellees' counsel. Frequently, "we" or "our" referred to the Holding Company (R. 121, 122–

123, 130).[23] Sometimes, these first person pronouns referred to the Steel Company (R. 111, 122–123).[24] Again, they might refer to South Buffalo (R. 125).[25] When he testified "we have important transportation business," he merely meant that the Holding Company owned stock in subsidiaries which were engaged in important transportation businesses (R. 149). When he spoke of "manufacturing departments" he did not mean the manufacturing departments of the Holding Company, which had none, but of the Steel Company (R. 146–147).

During the course of his direct examination by Government counsel, appellees counsel's interjection led to the following (R. 117):

> Mr. BROMLEY: When you say "we," each time do you mean the Bethlehem Steel Corporation? Will you make that clear in your answer?
>
> A. No, I don't—to be accurate. Being an officer of a number of these other companies, I use the word "we" in a pretty

[23] "Mr. BROMLEY: When you say 'we,' who do you mean?
"A. Bethlehem Steel Corporation. (R. 121.)
"Q. Who do you mean by 'we'?
"A. I should say Bethlehem Steel Corporation" (R. 130).

[24] "Mr. ADKINS: When you say 'our,' you mean Bethlehem Steel Company?
"A. Yes—Bethlehem Steel Company. (R. 122–123.)

[25] "Q. When you say 'our people'—do you mean the South Buffalo Railway people?
"A. Yes." (R. 125.)

broad sense without attempting to distinguish between ownership.[26]

The incongruity of a failure to recognize the essential unity of the Bethlehem organization and the inevitable domination of South Buffalo by its co-appellees is sharpened by the type of arguments advanced by them below. Instances of domination of South Buffalo by the Holding Company were repeatedly dismissed as "necessarily involved in the holding company form of corporate management."[27] The Government assertedly failed to recognize that there are "facts and relations necessarily growing out of the holding company set-up," many things in respect of South Buffalo's affairs it was "appropriate" for the Holding Company to determine in view of its stock ownership. As an example, the Holding Company was "entitled as stockholder to determine that it was for the advantage of its seven railroad subsidiaries as a matter of policy to operate under the same executive officers and management."

The same character of argument was advanced to explain away any showing of the close relations between South Buffalo and the Steel Company. Of course, it was argued, relations would

[26] In this instance it developed that "we have properties both in West Virginia and also in Pennsylvania" meant that the holding Company owned the mines in West Virginia and the shares of a subsidiary which owned the mines in Pennsylvania (R. 117–118).

[27] The quotations in this paragraph are from the brief of appellees below (pp. 34–36).

necessarily be close. The Steel Company was South Buffalo's largest customer and in the exercise of ordinary business judgment South Buffalo would endeavor to provide service as efficient as possible. This was a constant explanation of instances of special services rendered to the Steel Company not available to other and smaller customers.

We submit that this type of argument does not exculpate appellees. On the contrary, any relationship from which such arguments may be derived is a relationship which should be suspect under the Commodities Clause. Divorcement of railroad and shipper is not achieved when they maintain a legal relationship which entitles one to intermeddle in the policy affairs of the other.

C. *There is Nothing in the Legislative History of the Commodities Clause which Requires or Suggests the Propriety of a Contrary View.*— We have previously indicated that, in the first case involving the Commodities Clause to reach this Court (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366), the fact was that the several defendant railroads owned varying interests in coal companies, ranging from a small stock interest to complete stock ownership, and that the Government contended that any such stock ownership, however small, by a railroad company in a customer coal company involved a Commodities Clause violation. (*Supra*, pp. 30-31.) We have also indicated that this Court rejected the Govern-

ment's contention both on the basis of the constitutional questions such a construction would pose and in view of the legislative history of the Commodities Clause. With respect to the latter ground of decision, this Court said (p. 414):

> Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 1906, 40 Cong. Rec. pt. 7, pp. 7012–7014. And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language

gives rise to the implication that it was not the purpose to include it.

This view of the legislative history was also expressed in *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516, 526–7.[28] Since the language of this latter case was quoted with apparent approval in *Elgin*, this interpretation of the legislative history must be regarded as a major factor underlying the decision there reached. It is noteworthy, however, that in the *Reading* case, *supra*, an argument predicated on the legislative history was not even alluded to by the Court in its opinion. In any event, examination of the legislative history reveals that it in no way evidences a Congressional understanding or intention that the common and complete ownership of railroad and shipper should be without the scope of the Commodities Clause.

The Commodities Clause (Section 1 (8) of the Interstate Commerce Act) was enacted as Sec-

[28] "But mere stock ownership by a Railroad, or by its stockholders, in a producing Company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such Road to transport coal belonging to such Company. The amendment, however, was voted down; and, in the light of that indication of Congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a Corporation in which the Road held stock."

tion 1 of the Hepburn Act of 1906 (Act of June 29, 1906, 34 Stat. 585). It originated as an amendment offered by Senator Elkins in the Senate to the bill as passed by the House. Senator Elkins' amendment as adopted in Committee of the Whole (40 Cong. Rec. 6568) read as follows:

> From and after May, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier.

It will be noted that at this point the clause was in its present form, except that "common carrier" was to be changed to "railroad company" so as to exclude pipe lines, and the exception for timber and timber products had not yet been inserted.

A few days later, Senator Tillman, after referring to possibilities of evasion by corporate devices, introduced the following substitute for Senator Elkins' amendment (40 Cong. Rec. 7012):

> After May 1, 1908, it shall be unlawful for any common carrier to engage in the

transportation of interstate commerce, if such common carrier shall at the time be interested, directly or indirectly, by stock ownership or otherwise, in the article or property which is the subject-matter of such commerce, or if it be interested at the time, directly or indirectly, by stock ownership or otherwise, in the mines or factories producing such commerce; or if at the time any officer, director, agent, or employee of such common carrier be interested, directly or indirectly, by stock ownership or otherwise, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same; or if at the time stockholders owning more than 10 per cent of the capital stock of such common carrier be interested, directly or indirectly, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same.

This section shall not prevent a common carrier from mining coal or carrying articles or property for its own use or for the use of its officers, directors, agents, employees, or stockholders.

Senator Tillman's substitute amendment was rejected without any discussion (40 Cong. Rec. 7012).

Senator Tillman then stated that his proposal might be "dangerous" or "too strong"; he had

submitted it as a "drastic provision" with the expectation that it would be carefully considered and modified in conference. He thought that provision in the bill under discussion "while very broad, is also very loose." He continued (40 Cong. Rec. 7012):

> It may be wiser to wait a while and let the courts interpret the provision already in the bill. * * * I want to ask the Senate to incorporate in this provision, in line 7, page 6, after the word "indirect," the words "by partnership, stock ownership, or by any arrangement whatsoever." Thus the broad provision in regard to the public carrier being prohibited from transporting anything which it produces, will be broadened and more particularized by the words I have used.

This amendment was also rejected without discussion. 40 Cong. Rec. 7012.

These were the only amendments offered during the Congressional consideration of the Commodities Clause which had any relation to the issue of whether its prohibition is avoided by the use of corporate devices which in reality permit the combination in a single financial interest of the dual roles of carrier and shipper which is the target of the statute. It is extremely important to note that both of Senator Tillman's amendments went far beyond the question of whether the prohibition should extend to the interest of

a railroad company in the commodities of a shipper where both are wholly-owned subsidiaries of a common parent. His first amendment would have extended the ban of the Commodities Clause to the situation where an officer, director, or employee of a railroad company has a stock interest, no matter how small, in a shipper of commodities transported by the railroad. It would also have prohibited the transportation of any commodity by a railroad as to which the holders of more than 10 per cent of its capital stock are also "interested, directly or indirectly, in the business of buying or selling such article * * * or in the mines or factories producing the same." Senator Tillman's second amendment would have apparently prohibited a carrier from carrying commodities of a shipper if there was any connecting financial interest between the two companies, e. g., as by stock or partnership interests, no matter how small.

It is obvious, therefore, that the Senate's rejection of Senator Tillman's amendments cannot be interpreted as meaning more than that the Senate was unwilling to extend the ban of the Commodities Clause to situations where the relationship between railroad and shipper comprised no more than a minor stock interest of the one in the other or of a third person in both. The attention of the Senate was not focused on the situation where the shipper was a wholly-owned sub-

sidiary of the railroad, or vice versa, or where both shipper and railroad were wholly owned subsidiaries of a common parent. Furthermore, the fact that the Congress (and particularly the Senate) simultaneously left the prohibition of the Commodities Clause applicable not only to commodities produced or owned directly by the railroad, but also to commodities manufactured, mined, or produced "under its authority * * * or in which it may have any interest, direct or indirect," can only mean that by these phrases Congress intended to reach clear and obvious subterfuges, whether based upon the corporate device or otherwise.

In *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, the application of the Robinson-Patman Act to a discriminatory pricing system resulting from adoption of a basing point method of pricing was before this Court. Petitioner there urged that the rejection by Congress of a proposed amendment to the Act which would have prohibited all basing point systems, indicated its intention to sanction all such systems as not in contravention of the Act. But this Court refused to read such meaning into the rejection of the proposed amendment; it considered that the legislative history indicated only that Congress left the legality of all such systems to be determined according as they might be within the language of the Act as adopted.

A similar conclusion is required here. Rejection of the Tillman amendments indicates at the most only a refusal to extend the prohibition of the Commodities Clause to every situation in which a railroad may be connected with a shipper by a stock interest, no matter how small. It does not mean that a relationship resulting from 100% common ownership of railroad and shipper was not intended to fall within the condemnation of the Clause. In fact, we are of the opinion that the legislative history is entirely consistent with the view that the Commodities Clause is applicable wherever a majority of the railroad's stock is owned by a holding company with producing subsidiaries whose goods are transported by the railroad. Certainly, if ownership by one person of all of the stock of both railroad and shipper is prohibited by the statute, nothing in the statutory language, purpose or history suggests that ownership of only 90% of the railroad's stock should be regarded as a relationship permitted by the statute. At the very minimum, only the existence of substantial minority holdings of the railroad's stock should be regarded as a sufficient safeguard against the possibility that the interests of the railroad as a common carrier may be subordinated to the other interests of the parent company and its producing subsidiaries.

Since the Commodities Clause was enacted in 1906, there have been repeated proposals to amend it. All of these proposals, so far as here relevant, resemble Senator Tillman's proposed amendments in that they would have extended the prohibition of the Commodities Clause to wherever a control relationship existed, e. g., to every situation where railroad and shipper were controlled by the same person even though through far less than *complete* stock ownership. Thus, during consideration of the legislation which became the Mann-Elkins Act of 1910, 36 Stat. 539, there was offered in the House, and rejected, an amendment to the Commodities Clause which would have prohibited a railroad from transporting commodities for a shipper where one-fifth or more of the capital stock of the shipper is owned by a corporation which also owns one-third or more of the stock of the railroad, or where one-half or more of the shipper's stock is owned by a corporation which owns one-fifth or more of the railroad's stock. 45 Cong. Rec. 5594–5595 (1910). In 1914, Representative Adamson introduced a bill to amend the Commodities Clause which, among other things, would have made it applicable wherever railroad and shipper had the same controlling stockholders or were "otherwise subject to the same control", a condition which is obviously met by far less than complete stock ownership. H. R. 20470, 63d Cong., 3d Sess.

(1914). This bill died in committee.[29] During the drafting of the Transportation Act of 1940, the Senate Committee on Interstate Commerce considered an amendment to the Commodities Clause which would have prohibited a carrier from transporting commodities manufactured, mined or produced under the authority of "subsidiary, affiliate, or controlling person of such carrier" or in which such subsidiary, affiliate, or controlling person had any interest. Confidential Committee Print No. 2, S. 2009, Senate Committee on Interstate Commerce, 76th Cong., 1st Sess. (1939), p. 50. This amendment would, of course, have extended the prohibition of the Commodities Clause to every situation where there existed a control relationship between carrier and shipper—even though based upon less than majority stock ownership. This amendment was rejected by the Senate Committee as too drastic. Sen. Rep. 433, 76th Cong., 1st Sess. (1939), p. 15.

[29] Both the bill introduced by Representative Adamson and the suggested amendment to the Mann-Elkins Act would also have prohibited transportation even where the railroad did not have an interest in the commodities at the time of transportation but at one time had had an interest in the commodities as producer, miner, or owner. In the *Delaware & Hudson* case, *supra*, this Court had construed the Commodities Clause as applying only where the railroad had an interest in the commodities at the time of transportation. Cf. *United States* v. *Delaware, Lackawanna & Western R. Co.*, *supra*.

To summarize, since all of these proposed amendments to the Commodities Clause went far beyond the instant situation of carrier and shipper being wholly owned subsidiaries of a common parent, the failure of Congress to enact them is without significance here. In any event, the limited consideration which they received precludes their being viewed as evidence of legislative purpose. And see *Corn Products Refining Co.* v. *Federal Trade Commission, supra.*

II

THE EVIDENCE ESTABLISHES THAT THE HOLDING COMPANY EXERCISED ITS POWER OF CONTROL OVER SOUTH BUFFALO TO SUCH A DEGREE AS TO REDUCE IT TO A MERE DEPARTMENT OF THE BETHLEHEM ORGANIZATION

If this Court determines that the decision in *United States* v. *Elgin, Joliet & Eastern Ry. Co., supra,* enunciates principles of current validity, then the fact that both railroad and producer are wholly-owned by the same corporation does not of itself establish the railroad's interest in the producer's commodities. It is further necessary to establish by evidence that the power of control vested in the dominant company by virtue of stock ownership has been so affirmatively exercised as to reduce the railroad to an agent, department, or instrumentality of the producing interest. We will now demonstrate that the Holding Company's power of control was in fact exer-

cised to such a degree as to require the conclusion that South Buffalo, as a mere instrumentality of its co-appellees, had a forbidden interest in the commodities of the Steel Company which it transported.

Before proceeding to the facts of this case, we point out the inapplicability of decisions which consider for other purposes when it may be proper to disregard the corporate entity or "pierce the corporate veil."[30] The formal separateness of affiliated companies may be important of itself, even though "domination" of one by the other exists, as, for example, in determining whether jurisdiction may be obtained over a parent by serving process on its subsidiary. *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333. On the other hand, this Court has disregarded the legal individuality of a railroad and its subsidiary wharfing company on very slight evidence of "domination," where the wharfing company was an integral unit of a single transportation system and its separate existence was used as a guise to charge discriminatory rates and avoid regulation by the Interstate Commerce Commission. *Southern Pacific Terminal Company* v. *I. C. C.*, 219 U. S. 498. See, also, *Chicago, M. & St. P. Ry. Co.* v. *Civic Ass'n*, 247 U. S. 490.

A. *Domination of South Buffalo prior to its Reorganization.*—The District Court found that

[30] See generally, Latty, *Subsidiaries and Affiliated Corporations*, particularly pages 156–165, 54–56.

for over sixteen years prior to about December 1939, "the Holding Company and the Steel Company in numerous ways and on numerous occasions so dominated South Buffalo as to effect a commingling of the identity and community of interest among South Buffalo, the Holding Company, and the Steel Company" (Fdg. 26, R. 914).[a] In our submission, this ultimate finding and the detailed, related findings upon which it rested, were amply supported and required by uncontradicted oral testimony and by documentary evidence.

The domination of South Buffalo (in the interest of its producing sister-subsidiary) flowed directly from the management theories of the Holding Company. Prior to 1940, South Buffalo and the other six railroad subsidiaries of the Bethlehem organization maintained principal offices in Bethlehem, Pennsylvania, located in the Steel Company's main building. At Lackawanna, New York, South Buffalo and the Steel Company were represented by resident managers, the office space of South Buffalo again being located in the Steel Company's building (Fdg. 17, R. 912). The testimony of the Holding Company's financial vice-president (McMath) indicates clearly that the organization regarded it as wasteful and improvi-

[a] In its conclusions of law numbered 4 and 5, the district court held that prior to 1939 South Buffalo's transportation of Steel Company products was in violation of the Commodities Clause in that it was so dominated by its co-appellees as to be their mere instrumentality (R. 922).

dent for South Buffalo to fail to take advantage of the readily-accessible talent available in the Steel Company's organization.

McMath's testimony is filled with passages of which the following are indicative: "those [steel] plants had fully developed and well-trained organizations, engineering talent, and I guess capable of doing almost anything" (R. 123); "you had in Buffalo a large [steel] plant, a large engineering organization, that was close to the job" (R. 125); "on certain matters the steel company engineering organization could do a better job than the railroad company could for the simple reason that it takes money to hire talent" (R. 126); "I always recognized that it was the sensible thing to do [for South Buffalo] to get the benefit of their [the Steel Company's] advice and help" (R. 126); it was "sensible and wise * * * from the viewpoint of economy to get the benefit of a trained organization in the steel plant" (R. 126). As a consequence of this view, the Holding Company expected South Buffalo to seek the advice of the Steel Company and to follow it, at least where it was good advice as would be expected (R. 126).

His testimony at times took the form of virtual admissions that the relations among appellees violated the Commodities Clause prior to 1940. He testified that the local managers of the Steel Company at Lackawanna "were at times called

upon, called upon from time to time, for advice and assistance" by South Buffalo, and that "I am not sure that at times, perhaps, even greater reliance might have been put upon the plant managers in the early days than would now be regarded as proper or as required by the Commodities Clause" (R. 124). In view of the Steel Company's large organization, South Buffalo was "naturally relying to some extent upon the advice and assistance from the managing departments of the steel plant" (R. 125). The relations between South Buffalo and the Steel Company at Lackawanna were such "that there were certain things which had happened which might possibly be within the language, at least of the minority decision," of this Court in the *Elgin* case (R. 125).[n] In summing up the degree of control exercised over South Buffalo by the Steel Company, McMath testified that "there were instances where the theory of management had, to some extent, slopped over" (R. 125).

The counterpart to the testimony of this important official of both the Holding Company and the Steel Company was provided in the examination of Entwisle, general manager of the Steel Company's Lackawanna plant continuously from 1936 to the time of trial (Ex. 149, R. 818). He

[n] In response to a question whether there was danger the relations of the two subsidiaries might run afoul of the majority opinion, McMath testified: "Well, there was some language in the majority opinion, yes, that possibly we had to take into account." (R. 127.)

admitted exercising supervision over South Buffalo

> to the extent that I felt entirely free to offer such advice and counsel to the superintendent of the South Buffalo Railway from the standpoint that both of us were companies owned by the Bethlehem Steel Corporation. I had an organization which was much larger than the South Buffalo Railway. I had a lot of highly qualified and highly paid talent in it, and I felt entirely free to offer suggestion for improving the mechanics of the operation of the railroad [Ex. 149, R. 819].

He was interested in increasing the operating efficiency of South Buffalo as well as the Steel Company since both were owned by the Holding Company (Ex. 149, R. 820). "You can call that a big brother attitude, if you want to" (Ex. 149, R. 820).

The testimony of these officials indicate both the basis upon which it was deemed expedient to require supervision of South Buffalo's affairs by the Steel Company and to some extent the scope of this supervision. The extensive sweep of the supervision actually exercised over South Buffalo is more particularly depicted by the documentary exhibits which are in evidence. These documents are several score letters covering a period from 1923 until 1940 exchanged between South Buffalo and the Steel Company.

Before considering the content of these letters, we point out that their form alone sufficientl-

indicates that South Buffalo's independence was completely obliterated by the Steel Company's supervision. As the District Court found, many letters were written by officials of South Buffalo to officials of the Steel Company, addressing them as officials of South Buffalo.[33] Gross, a vice-president, director, and general traffic manager of the Steel Company, addressed letters written on South Buffalo stationery both to South Buffalo officials and other officials of the Steel Company which purported to be signed by him as an official of South Buffalo.[34] (Fdg. 27, R. 915.) Clearly, this usurpation by Steel Company officials of important managerial offices of South Buffalo refutes any notion of the separateness of these two corporations.

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[33] Burns, general manager of the Steel Company's Lackawanna plant until 1936, was addressed as "General Manager, South Buffalo Railway Company" in exhibits 26, 40, 42, 46, 48, 50, 53, 54, and 55. Entwisle, successor to Burns as general manager of the Steel Company's Lackawanna plant, was similarly addressed in exhibits 56, 60, 61, 62, 63, 64, 65, 67, 68, 70, 72, and 76. Gross, a vice-president, director, and general traffic manager of the Steel Company was addressed as "G. T. M." or "General Traffic Manager" of South Buffalo in exhibits 30, 34, 36, 37, 38, and 39.

[34] Examples of letters of this type to other officials of the Steel Company are exhibits 121, 122, 124, 125, and 127. Examples of such letters to officials of South Buffalo are exhibits 21 and 23.

There is no correspondence in the record from the Steel Company's Lackawanna plant manager, probably because South Buffalo's requests were answered verbally (Ex. 149, R. 826).

These letters exchanged by South Buffalo and the Steel Company are almost uniformly requests for advice by South Buffalo and responses by the Steel Company. They fully support, apart from confirming oral testimony, the finding of the District Court that South Buffalo applied to the Steel Company "for guidance, advice, and decisions in respect of South Buffalo's service to other shippers, and in respect of such of South Buffalo's internal affairs as personnel and wage policies, engineering problems, purchases of equipment, and construction of additions and extensions" (Fdg. 26, R. 914). The court also mentioned in its findings as additional South Buffalo problems which were the subject of Steel Company advice matters such as the purchase of locomotives, the construction and enlargement of buildings, the location of a floodlight, and the propriety of office forms to be used by South Buffalo. Referral by South Buffalo of these problems was in terms of "I would ask your judgment"; "What is your view of this matter"; "Kindly advise your wishes"; and "We would appreciate your advice" (*ibid.*). While letters from South Buffalo to the Steel Company substantially outnumber replies, the reason for this is apparent from the court's further finding that South Buffalo's requests for instructions addressed to the Steel Company's Lackawanna plant manager were at times answered by him verbally (Fdg. 27, R. 915).

We do not consider it necessary to set forth extensively the content of the exchanged correspondence. As a significant example of the manner in which the Steel Company usurped South Buffalo's management function, we call attention to the manner in which a customer's request for a reduction in South Buffalo's charges was handled. Seneca Iron & Steel Company wrote to South Buffalo setting forth detailed reasons why it thought that the existing intraplant switching charges of South Buffalo should be halved (Ex. 29, R. 703). South Buffalo's general manager immediately relayed this request to a Steel Company vice-president (addressing him as an officer of South Buffalo) and inquiring "Do you wish to make a special rate for this service?" (Ex. 30, R. 705). The Steel Company's response to South Buffalo (on stationery of South Buffalo) announced that "*We* are not in a position to take any action in reducing *our* local switching rates" though "*we* appreciate the merit of some of the arguments as outlined in this shipper's complaint" (Italics added) (Ex. 31, R. 705). South Buffalo then wrote to the Seneca Company that its request for a reduction in switching charges "has had the earnest consideration of this Management, and while it is realized from your point of view a reduction is desirable, it is a source of regret that it is not consistently possible. * * * I am sorry your request cannot be acceded to" (Ex. 32, R. 706).

We submit that this correspondence discloses a flagrant example of the precise type of evil which the Commodities Clause was designed to strike down. The request of South Buffalo's customer for a lowered rate is rejected, not by the railroad whose primary interest may be to keep its customer in business, but covertly by a competing producer whose primary interest may be the elimination of its competitor. There is obvious prejudice to the public interest in the maintenance of a free competitive system which the Commodities Clause was designed to foster. In this case the District Court found that the Steel Company subsequently purchased the plant of the Seneca Company (Fdg. 26, R. 915).

Among other examples of the type of inquiry addressed by South Buffalo to the Steel Company, we enumerate the following: In Exhibit 36 (R. 709), after detailing that a structure of a customer encroached on South Buffalo property, the inquiry is in terms of "I would ask your judgment as to our obligations as a carrier in these conditions"; in Exhibit 48 (R. 720), a contemplated sale of land to South Buffalo's customer, Republic Steel Corporation, was placed before the Steel Company's Lackawanna plant manager to "advise what policy should be adopted";[35] in Exhibit 55 (R. 727), South Buffalo

[35] The Lackawanna plant manager considered it necessary to refer this problem to the Steel Company's manager of real estate in the home offices at Bethlehem, Pa. (Ex. 49, R. 721).

asks whether it should take legal action in an effort to modify an injunction governing the elevation of one of its grade crossings; in Exhibit 56 (R. 728), the Steel Company is asked whether it desires South Buffalo to hold a contemplated meeting with representatives of South Buffalo's enginemen's group and whether a specified wage vote for locomotive helpers is satisfactory;[36] in Exhibit 63 (R. 733), South Buffalo requests permission from the Steel Company to acquire from another railroad a flue repair shop which is "offered to us for $1,500 which we consider cheap"; in Exhibit 64 (R. 734), South Buffalo requests Steel Company advice on a proposed track acquisition from Nickel Plate railroad.

Fully indicative of the status of South Buffalo as a mere department or instrumentality of the Bethlehem enterprise is a memorandum prepared by the Steel Company's Lackawanna plant manager addressed jointly to the President and Superintendent of South Buffalo and to the person (Clarke) in charge of the Steel Company's own standard and narrow gauge railroad system (Ex. 25, R. 699). In this joint memorandum all are taken to task and required to report because in a "comparative statement of the transportation costs

[36] Exhibits 57 (R. 729) and 62 (R. 732) are further illustrations of Steel Company determination of South Buffalo personnel and wage problems.

of all steel plants * * * Lackawanna plant looks very much out of line." South Buffalo's vice-president responded, addressing the Steel Company's plant manager as "General Manager, South Buffalo Railway Company" and sending a copy to Clarke (Ex. 26, R, 700). In his response, South Buffalo's vice-president gave a detailed explanation of costs, saying among other things "So far as the South Buffalo is concerned I will say that its charges are below cost," and giving several "fair samples of special service."

While up to this point we have thrown primary emphasis on domination of South Buffalo by the Steel Company, this merely fortifies its further dominance by the Holding Company. For it was the Holding Company, because of the management theories it entertained, which required South Buffalo to apply to the Steel Company for guidance. The domination of South Buffalo by its co-appellees is in reality nothing other than its absorption into the Bethlehem organization. This is reflected by the District Court's ultimate finding that a commingling of identity and community of interest existed among appellees, which it predicated upon specific evidentiary findings as to the manner and methods whereby South Buffalo was "dominated" by its co-appellees.

As one example of direct domination by the Holding Company of South Buffalo in the period prior to 1940, we point to the two contributions

made by the Holding Company to South Buffalo, the facts of which are set forth, *supra*, pp. 16–18. We call attention to the manner in which the Holding Company initially determined, without any consultation with South Buffalo, that it was desirable that the latter's books reflect a more solvent financial condition. To that end, the Holding Company contemplated that South Buffalo would increase its outstanding capital stock from $500,000 to perhaps as much as $3,300,000, or more than a 550% increase (Ex. 131, R. 780). The Holding Company's counsel wrote to its financial vice-president (McMath) (Ex. 131, R. 780), enclosing a form of letter agreement respecting South Buffalo's share issuance to be sent to if by the Holding Company. Such a letter agreement was sent and executed, providing for South Buffalo's issuance of $1,900,000 in stock (Ex. 132, R. 781).[37] Later, the Holding Company's counsel discovered an obstacle which he called to McMath's attention (Ex. 133, R. 782), who then considered it preferable to postpone indefinitely South Buffalo's issuance of stock

[37] The letter, forwarded to South Buffalo by the Holding Company, commences:

> We understand * * * you desire to issue * * * $1,900,000 par value of shares * * * we desire to acquire the additional shares * * * we write this letter to evidence the agreement * * *. We have been advised by counsel [the proposal] is entirely within the law and that you should be able to accomplish it in due course. (Ex. 132, R. 781.)

(Ex. 134, R. 783). A letter agreement effecting such a postponement was then executed (Ex. 135, R. 784).[38]

Assuredly, a corporation which has no voice in determining whether its capital stock shall be virtually quintupled cannot assert its independence. The District Court found that South Buffalo took no part in any action leading to this transaction, though it appeared that one South Buffalo officer was advised of the Holding Company's general purpose (Fdg. 25, R. 914). This officer was Trageser, then South Buffalo's president, whose testimony clearly reflects that he was not consulted but was merely generally advised by Holding Company officials as to what the Holding Company intended to have South Buffalo do (R. 198).[39]

Before passing to a consideration of the reorganization of 1939, we point out that the account previously given of relations among appellees prior to the reorganization is not exhaustive of

[38] Payment for the proposed stock was made by the Holding Company to South Buffalo coincident with the Holding Company's forwarding to South Buffalo the original proposed letter agreement (Ex. 132, R. 781).

[39] The loose manner of dealing between South Buffalo and the Holding Company consequent on their close relations is further depicted by Exhibit 129 (R. 776). This exhibit discloses that South Buffalo, which prior to 1936 had paid no interest on its open-account indebtedness to the Holding Company, then aggregating over $2,000,000, undertook thereafter to pay interest to the Holding Company under certain conditions.

what the record discloses. A primary method whereby domination is now and always has been maintained over South Buffalo results from the type of management with the Holding Company has provided for it, a point which we consider in connection with the "reorganization." Furthermore, there were certain practices and elements of control which continued unchanged through the period of reorganization and of which we shall treat in considering the post-reorganization relations among appellees.

B. *Domination of South Buffalo as Evidenced by the "reorganization."*—In the Government's view, the managerial reorganization of South Buffalo, climaxed in the action of December 5, 1939, serves merely to illustrate further the control exercised over South Buffalo by its parent. Both the manner in which the "reorganization" was effected and the results it produced, disclose fully that South Buffalo has been considered and operated by the Bethlehem reorganization as a service appendage to further its primary function of producing steel and steel products.

The essential facts relating to the reorganization, set forth *supra*, pp. 18–23, are not in dispute, nor do we challenge any finding of the District Court on this aspect of the case. We do disagree with its conclusion that the reorganization terminated appellees' prior violation of the Commodities Clause and that, since it was undertaken "in

good faith," determination of a Commodities Clause violation should be reached by considering only the post-reorganization relations among appellees. We do not believe that there is any issue of "good faith" involved nor do we believe that the managerial reorganization of 1939 created any substantial alteration or recasting of relations among appellees.

In no event was it proper for the district court to disregard the evidence of practices among appellees prior to 1940 in reaching its final conclusion. In considering an analogous problem, this Court has recognized that "the effects of long practice persist." *N. L. R. B.* v. *Southern Bell Co.*, 319 U. S. 50, 57. There, the Labor Board's conclusion that Southern Bell was dominating and supporting a union in 1941 was met by the argument that, irrespective of any domination prior to 1936, a "reorganization" of the union at that time resulted in its independence. But this Court pointed out that the "reorganization" was guided by the principal officers of the existing union and that the vice-president of the old became the president of the new. Domination of the union prior to 1936 was held proper evidence for the Board to consider in reaching its determination as to the situation in 1941, both in view of the continuity of the organization and in view of the recognized tendency of prior practices to persist.

Considerations of this character persuasively indicate that the District Court erred in holding that the relations among appellees were substantially altered by the events of December 5, 1939. Under any realistic view, the Holding Company did not even intend any basic alterations of relations between its producing and transporting branches. It attempted to escape the impact of the Commodities Clause in order that those relations might continue. At the same time that it sought to give South Buffalo the appearance of independence by the selection of five "outside" directors, it was at equal pains to assure that South Buffalo could continue its primary function of serving the Steel Company effectively. This was accomplished primarily by the installation of Petty as South Buffalo's president.

Two basic contradictions in the position of appellees with respect to the reorganization are immediately apparent. In the first place, the reorganization itself, the result of which is asserted to be South Buffalo's independence, was determined upon and carried through by the Holding Company acting alone, and in obvious and complete dominance of South Buffalo. The possible impact of the *Elgin* decision upon South Buffalo's activities was discussed among top Holding Company officials and they, with the Holding Company's counsel, determined both that a reor-

ganization should be undertaken, and its extent and form. The new president of South Buffalo was decided upon when the Holding Company's president approved the recommendation of lesser Holding Company officials; his salary for service as president of South Buffalo and the other six subsidiary railroads was fixed by the Holding Company's president (R. 140–141, 237–238).

A second contradiction stems from a further action of the Holding Company when, as a result of their investigation of South Buffalo's affairs, it became apparent that "the theory of management, to some extent, had slopped over." As the District Court found, the Holding Company then instructed officials of the Steel Company that they should no longer instruct South Buffalo (Fdg. 30, R. 916). The proof that the Holding Company issues no instructions to one subsidiary is thus strangely bottomed upon the basis of instructions it issued to another.

The major vice of the district court's assessment of the effect of the reorganization consists, we believe, in its assumption that actual exercise of the power of control over a subsidiary may be established only by evidence disclosing constant supervision of its affairs. An equally effective domination of the subsidiary may be achieved by a conscious policy of staffing it with personnel whose background, developed loyalty, and hope of reward, assure their devotion to the parent.

Precisely this was recognized by the Court in *North American Co.* v. *Securities & Exchange Commission,* 327 U. S. 686, where, in connection with a determination of the constitutionality of § 11 (b) (1) of the Public Utility Holding Company Act of 1935 (49 Stat. 803), the question arose whether the Commission was justified in treating North American as possessing domination or the power of domination over certain subsidiaries in many of which it held much less than a 100% stock interest (in one, only a 17.71% interest in the common stock). This Court, after noting that North American's active intervention in the affairs of subsidiaries had been of "limited character," continued (pp. 692–693):

> This lack of active intervention, however, is indecisive. It appears to have resulted in large part from North American's satisfaction with the local managements of the subsidiaries and from the fact that the local managements have often included men selected by or historically related to North American. See *Detroit Edison Co.* v. *Securities & Exchange Commission,* 119 F. (2d) 730, 734–735; *Pacific Gas & Electric Co.* v. *Securities & Exchange Commission,* 127 F. (2d) 378, 383–384. The Commission was thus warranted in considering the harmonization of local policies with those of North American as a fact, the absence of conflicts making affirmative action by North American unnecessary. But it does not

follow that North American's domination of its system was any less real or effective. Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control. See *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 491–492; *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 307–308. Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146. In light of the extensiveness of North American's holdings of the securities of its subsidiaries and the penetration of local managements with men of North American background, the Commission was justified in treating North American as possessing domination over its subsidiaries or the power to dominate them when and if necessary.

That the Holding Company has always pursued the conscious policy of staffing South Buffalo with personnel from the Bethlehem organization is an inescapable conclusion from the evidence. Exhibit 20 (R. 696), setting forth the executive officers and chief operating officials of South Buffalo from 1922 to 1944, indicates which of these persons were former employees of the Steel Company. With occasional exceptions, officers of

South Buffalo have always been drawn from among Steel Company personnel. Of those who were officers at the time of trial, the president, both vice-presidents, the general superintendent (who was one of the vice-presidents), the secretary-treasurer, the auditor, the purchasing agent, and the chief engineer were all former Steel Company employees. The assistant secretary-treasurer, perhaps the least important officer, alone was not.

The record in respect of the three principal officers discloses the following:

1. *Petty,* president of South Buffalo since 1940, and whose three predecessors as president were all former Steel Company employees, was a Steel Company employee from his graduation from college in 1909 until he assumed South Buffalo's presidency (R. 236). He was in the electrical department of the Steel Company until 1919 and from then until 1940 he worked in the service department of the Steel Company's Bethlehem plant (R. 236). While in Bethlehem for a long period beginning in 1921, he knew and frequently worked with Entwisle, the man who from 1936 to the date of trial was the Steel Company's Lackawanna plant manager (R. 242). When Petty was made president of South Buffalo, he simultaneously became president of the Holding Company's other six railroad subsidiaries. His office is in Bethlehem, Pa. (R. 239–240).

2. *Trageser,* vice-president since 1940, was an employee in the traffic department of the Steel Company from 1917 to 1933 (R. 185). During all this time Trageser worked with and under Gross, the Steel Company's general traffic manager. Trageser became president of South Buffalo and the other subsidiary railroads in 1933.[49] At that time he dealt with McMath and Gross, but not with any directors of South Buffalo, in connection with his candidacy and his salary. In 1940 Trageser stepped down from the presidencies of the railroads to make room for Petty in compliance with suggestions from McMath (R. 185–187, 218–220). At the time of the trial, he was also vice-president of the other six railroad subsidiaries.

3. *Dullenkopf,* a vice-president and general superintendent since 1943, had been an employee of the Steel Company for 24 years. He then served as vice-president and superintendent for 11 years for another subsidiary railroad of the Bethlehem organization (R. 319).

Of the other South Buffalo officers, *purchasing agent Maguire,* elected by the boards of South Buffalo and of the other six subsidiaries about December 1, 1942, had been an employee of the

[49] Trageser's reported testimony at one point (R. 185) that he become president of South Buffalo in 1938 is probably a transcription error. The record is otherwise clear that he became president in 1933 (see, e. g., R. 187; Ex. 20, R. 696; Ex. 79, R. 745).

The same looseness characterized the manner in which South Buffalo and the Steel Company handled the determination of demurrage. At times South Buffalo assessed too much and at times too little. The district court found that prior to 1940 South Buffalo failed to assess demurrage properly owing, and that "there was a want of distinction in the use of tracks of South Buffalo and those of the Steel Company in the dealings between them in certain instances" (Fdg. 29, R. 916). This part of the finding was clearly supported and required by the evidence (R. 373–374). But the district court concluded that existing practices were changed since 1939 and "it is not claimed that there has been any violation of the demurrage tariff since then." This portion of the finding is manifestly erroneous since we did and do claim further violations of applicable demurrage tariffs. The testimony disclosed that until 1942 South Buffalo and the Steel Company computed demurrage under an agreement between them the effect of which was: loaded cars, consigned to the Steel Company from interchange, or consigned to interchange by the Steel Company, were considered to be on Steel Company tracks from interchange to interchange (R. 375–376, 616). This, of course, resulted in overcharges to the Steel Company since cars were on demurrage from inbound to outbound interchange. This agreement was in violation of filed tariffs [*] which

[*] The demurrage tariff is included in Exhibit 155, R. 854.

may not be altered by private adjustment. *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Lowden* v. *Grain Company*, 306 U. S. 516.

A significant incident occured in 1943 when the Interstate Commerce Commission, owing to the stoppage of production of bituminous coal, issued its so-called "Coal Freeze Order." The order, effective June 1, forbade any railroad to deliver bituminous coal to a consignee having more than a ten days' supply on hand, but permitted the delivery of coal (regardless of the fact it was consigned to other) to persons who certified they had less than a ten days' supply on hand (Ex. 144, R. 798). South Buffalo had on its track over 250 cars of coal, mostly consigned to the Steel Company, but the Steel Company had more than a ten days' supply on hand (R. 326, 333-334). Though congestion resulted interfering with South Buffalo's operations, it made no attempt to ascertain if other coal consumers on its line needed coal (R. 335, 340-341).

In Finding 43 (R. 919), the district court correctly pointed out that South Buffalo was not under any legal obligation to ascertain if other consumers needed coal, and from this fact considered that South Buffalo's inaction had no significance. We think the incidence is of striking significance in illustrating in what unusual ways a carrier may inconspicuously and by mere non-action confer

possibly vast benefits on an affiliated producer. The incident takes on added significance in the light of the fact that South Buffalo customarily undertook to hold about a three days' supply of coal on hand for the Steel Company to protect it against mine shut-downs or transit delays (R. 372).

A persuasive inducement for Holding Company officials to exert supervision over its subsidiaries is achieved by the adoption of plans for incentive compensation to key personnel of the Holding Company. The Holding Company's certificate of incorporation provides for special incentive compensation to "executives of the Corporation," heads of departments having general control of matters affecting it and its subsidiaries as a whole, and Holding Company directors employed either by the Holding Company or any of its subsidiaries. This plan is based on total earnings of the Holding Company available for dividends on its common stock. (Fdg. 21, R. 913; R. 132.) Further, the Holding Company's certificate of incorporation grants it discretionary power to approve plans for incentive compensation to officials of subsidiaries, and the Holding Company has in fact approved a plan under which South Buffalo operates and under which its officials receive a portion of its income (Fdg. 21, R. 913).

The District Court, after making the foregoing finding of fact, added that "neither plan evi-

dences domination by the Holding Company." We submit that this conclusion from the facts is erroneous. As to the Holding Company plan, clearly its operation discloses the integration of the Bethlehem organization. The large sums Holding Company executives have received as incentive compensation is made to depend on the results of all operations. As to South Buffalo, the Holding Company's power to approve or reject a plan for it is an immediate element of control of obvious importance.

The District Court found that the Holding Company had relief plans and pension plans, both of which were available generally to employees of the Holding Company and its subsidiaries (Fdg. 22, R. 913). While the existence of such plans may not establish domination of South Buffalo, they are further evidence, fortifying a conclusion otherwise required, that the Bethlehem organization is operated as an integrated whole.

D. *The Control Exercised over South Buffalo since 1940 is more Pervasive and Effective than the Control Exercised over the Railroad in the Elgin case.*—The domination of South Buffalo by its co-appellees and its essential integration into the Bethlehem organization present a picture far more striking than was depicted in the *Elgin* case. In primary outline, the cases are identical since in *Elgin* also a holding company (United States Steel Corporation) owned all the stock of a railroad

Steel Company for a total of 18 years, commencing in 1914 with but two interruptions of service (R. 591–592; Ex. 20, R. 696). His four predecessors in office all had been former Steel Company employees. *Dalziel, chief engineer* of all seven railroad subsidiaries including South Buffalo since June 1940, was a Steel Company employee at the Lackawanna plant for "quite a few years * * * ten or more" (R. 597). Dalziel replaced James, a regular Steel Company employee who from 1922 to 1940 gave a small part of his time to South Buffalo,[a] the latter paying the Steel Company an agreed monthly amount for his services (R. 194–195). *Fatzinger, auditor* of all seven railroad subsidiaries since 1932, and *Sellers, secretary-treasurer* of all subsidiaries and of South Buffalo since January 1940, were both prior Steel Company employees whose length of service as such does not appear (R. 275; Ex. 20, R. 696). *General Agent Handwerk* assumed that position for the seven subsidiaries in 1934, having previously been in the employ of one of them since 1917 (R. 280).

These men would be more than human if, in view of their long-existing loyaltics, their areas of special skill and the manner of their selection as officers of South Buffalo, they were able to approach the problems of South Buffalo as railroad-

[a] South Buffalo retained DeWitt, a Steel Company employee, as its employment manager until at least 1940 under the same type of agreement (R. 192–193).

ing problems. Their whole experience suggests their necessary conception of South Buffalo as an adjunct to the primary function of the Bethlehem organization to produce steel. They are Bethlehem men; they rise and fall in the Bethlehem hierarchy, as Trageser did, dependent wholly on the organization's determination. Inevitably Bethlehem's whisper is their command.

Moreover, the officers of South Buffalo did not have its affairs as their exclusive concern. With the exception of Dullenkopf, the seven officers of South Buffalo above enumerated all hold similar offices in six other railroad subsidiaries of the Bethlehem organization (Fdg. 18, F. 912; R. 597). This factor is of obvious and vital significance in appraising the relationship of South Buffalo to its co-appellees.

The management reorganization of South Buffalo resulting from the meeting of December 5, 1939, served to heighten the extent to which Bethlehem men have been placed in charge of South Buffalo, and to underline the Holding Company's essential purpose that South Buffalo should serve as an integrated cog in the steel-producing organization. The selection of Petty to serve as president of the seven subsidiary railroads is particularly striking. He had never been a railroader, having only such knowledge of railroad operations as he gained in 30 years employment with the Steel Company. He was selected for the par-

ticular reason that he was fully familiar with Steel Company operations and without regard to his lack of experience in railroad problems. The installation of Sellers, a Steel Company employee, as secretary-treasurer to replace Craig, not a former Steel Company employee, who was demoted to assistant secretary-treasurer, was the second essential move in assuring that South Buffalo would have a thoroughly indoctrinated management.

Appellees will doubtless urge, as they did below, that the background of South Buffalo's executive officers is not significant since its affairs were in the hands of an independent board of directors. As part of the 1939 reorganization, the Holding Company's prior policy of electing only officials and employees of the Steel Company or South Buffalo to the latter's nine-man board of directors was abandoned. Five businessmen of the Buffalo area, having no connection with the Bethlehem organization, were elected and installed while the other four directors continued to be officers of South Buffalo. We have set forth, *supra*, pp. 22-23, the manner in which outsiders were solicited for the purpose.[42]

[42] The testimony of Gale, a vice president of a Buffalo bank, illustrates how these directors were chosen. The president of his bank told him that South Buffalo had come to the bank saying it desired a local representation on its board and asking if the bank cared to name a man to go on the board.

The record discloses that these outside directors, in terms of actual impact on the conduct of South Buffalo's affairs, were ciphers. With a single possible exception (the declaration of a dividend in which the Holding Company is not primarily interested (Fdg. 24, R. 913)), the directors at all times voted unanimously to follow recommendations made to them by Petty or Trageser. They were all unaware of the background of Petty and Trageser and unaware of the circumstances which caused them to be placed on the board.[42] Under the circumstances it is not to be anticipated that men who attend a few meetings a year can play any significant part in altering the established pattern of South Buffalo's conduct.

Of course these outside directors, all of whom were called by the Government, testified in response to questions on cross-examination that they followed the recommendations of Petty and Trageser only because they believed them to be good recommendations and that they independently exercised their judgment as directors of

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The bank president asked Gale if he would be willing to serve and he said he would (R. 465–466).

[42] When Dullenkopf was recommended to the board as general superintendent by Petty, he told of Dullenkopf's experience with another railroad but board members could not remember that any mention was made of the fact that for twenty-four years Dullenkopf had been an employee of the Steel Company (R. 482–483, 501–502).

South Buffalo (See, e. g. R. 456–457, 471).[44] But balanced against such testimony was the fact as to what they did. And what they did obviously in no way hindered, impeded, or affected the manner in which Petty and Trageser, the men selected for the purpose by the Holding Company, conducted the affairs of South Buffalo.

The directors were strangely lacking in all knowledge that their officers were prior employees of the Steel Company. Repeatedly they were asked whether they knew that Petty, Trageser, the secretary-treasurer, or some other officer of South Buffalo was a former employee of the Steel Company. We count a total of 22 questions of this type and in every instance the answer was negative.[45] No director showed any awareness of the basic reason why he was chosen.

C. *Domination of South Buffalo After the Reorganization.*—The effective control maintained over South Buffalo since 1940 has been primarily a

[44] The testimony of Director Fiske on cross-examination by Appellees' counsel suggests the worth of this type of testimony and how easily in practice the "outside" directors have been led (R. 503–504):

Q. Do you accept propositions put forward by Mr. Petty and Mr. Trageser merely because they are recommended by them?

A. No.

Q. What do you do, if anything, about exercising your own judgment on the matter?

A. Well, we raise a great many questions, but usually the case is laid out very logically as to what is to be done, what it is to cost and what is to be saved or what is to be accomplished by the change.

[45] R. 451, 453, 467, 468, 481, 482, 483, 489, 490, 501, 502.

result of the "penetration of its management" previously effected. Of course, there is no such documentary evidence as covered the period from 1923 to 1939 when South Buffalo's officers were required constantly to seek the Steel Company's advice. It was precisely to avoid this that the Holding Company installed Petty as president. In providing a highly-qualified president for South Buffalo, one thoroughly familiar with steel operations and selected for that reason, it became unnecessary for South Buffalo constantly to inquire how it might best serve the Bethlehem organization's interests.

The physical facts governing the relationship between South Buffalo and the Steel Company were not altered. Exactly two-thirds of South Buffalo's trackage, or 58 miles of its 87-mile total, is located within the Steel Plant's enclosure, and 70% of its total revenues derive from the Steel Company. The intermingling of track within the steel plant enclosure commenced when the Bethlehem organization acquired the Lackawanna facilities in 1922 and caused to be conveyed from the Steel Company's predecessor to South Buffalo most of the trackage which it now operates within the enclosure."

" Ownership of the maze of tracks within the plant enclosure could be determined only by reference to maps prior to 1941 at which time ownership tags were placed (R. 311, 313-314). A booklet prepared by South Buffalo labeled "South Buffalo Railway Company, List of Sidings" includes the trackage and sidings of both South Buffalo and Steel Company without discriminating between ownership (Ex. 12, not printed).

Finding 44 (R. 920) of the district court described the operations of South Buffalo within this enclosure. South Buffalo moves the pig iron in moulten form from the blast to the open hearth furnaces and also moves slag to the slag dump. The Steel Company itself usually moves the raw materials to the blast furnaces, and the ingots from the open hearth furnaces to the slopping pits. South Buffalo performs its part of the intra-plant switching pursuant to a schedule posted by the Steel Company showing the times when the blast furnaces are supposed to cast and the destination to which the molten metal is to be moved. The district court expressly found that there was evidence that at times the posted schedules were not closely followed and that South Buffalo engines and crews stood by waiting, sometimes for a considerable period of time. It concluded, however, that, "considering the nature and volume of work," no abnormal condition or coordination showing control of South Buffalo was disclosed.

We urge that this conclusion was manifestly erroneous. The degree of coordination in the producing operations is, of itself, abnormal. South Buffalo serves Republic Steel Corporation, but the service consists of delivering and receiving cars at one place (R. 569, 626–627). Republic owns the 18 miles of trackage within its plant enclosure and performs itself the intricate intra-

plant switching in the operation of its steel plant (R. 565–566). Some of the line haul carriers provide terminal switching service for steel manufacturers in the Buffalo area, but they perform no intra-plant switching for a steel manufacturer in any way comparable to that rendered by South Buffalo to its affiliate (R. 673 681, 686).

We believe the District Court should have concluded from the history of relations between South Buffalo and the Steel Company, from the manner in which South Buffalo assisted in the steel manufacture operations, and from the physical facts of South Buffalo's trackage relationship to the Steel Company's furnaces and hearths, that the Steel Company inevitably dominates and controls South Buffalo's operations.[47] Particularly would this conclusion be necessary in view of the fact that evidence respecting the day-to-day coordination of operations lies peculiarly within the province of the appellees. Yet there was ample concrete evidence of this coordination of effort to suit the Steel Company's convenience, beyond that found by the District Court.

[47] The testimony of Jacobs, assistant to the Steel Company's general manager at the Lackawanna plant, suggests the inevitability of keying South Buffalo's operations to the Steel Company's need since the manufacture of steel is a unified process. Raw materials must be kept flowing to the blast furnaces, and molten metal must be kept flowing to the open-hearths to keep them in operation and to avoid "skulling" the ladles in which the metal is carried. (Ex. 47, R. 808–809.)

At times a separate locomotive and crew of South Buffalo stood by at the Steel Company's structural shipping yard where orders were received directly from Steel Company employees (R. 319–321, 323).[*] At times it is plain that the Steel Company, in turning over loaded cars to South Buffalo for delivery to other points within the plant where they could not be received owing to congestion, utilized South Buffalo's facilities for purposes of storage (Ex. 148, R. 816–817). South Buffalo in 1941 was still consulting the Steel Company as to the type of locomotives to be purchased for maximum service to the Steel Company (Exs. 87, 88, R. 753–755). The testimony of an Interstate Commerce Commission employee who observed operations between South Buffalo and the Steel Company in 1943 reveal the coordination of effort for the Steel Company's convenience in producing steel (R. 410–426).

Among unusual practices showing the essential unity of South Buffalo and the Steel Company is one whereby the Steel Company pays substantial sums to South Buffalo based on the latter's records alone and despite the Steel Company's records. The Steel Company issues a shipper's order (known as R–115—see Ex. 152, R. 851)

[*] This was a practice stopped by Dullenkopf when he became superintendent in 1943 as "not an arrangement that I felt was proper" (R. 321).

supposedly for each switching service movement requested (R. 355). South Buffalo's conductors make out switch lists showing each switching movement (Ex. 153, R. 852). Both the R–115's and the switch lists are passed to South Buffalo's Car Record Department where, if the switch list shows a movement not covered by an R–115, South Buffalo makes out ("forces") an R–115 for the movement shown by the switch list (R. 355–357). Since ten or fifteen R–115's are forced by South Buffalo daily (R. 358) and a switching move cost ranges up to $8.80, the sum involved is substantial. Daily South Buffalo bills, and the Steel Company pays, the sum owing as a result of forced R–115's (R. 360). The district court detailed this practice in shortened form in Finding 45 (R. 920) and thought it "somewhat loose." But, considering the practice beneficial to South Buffalo, and not to the Steel Company, the court concluded it did not evidence Steel Company domination of South Buffalo. We think in this conclusion the court took far too narrow a view of the evidence before it. The parties engaged in this "loose practice" precisely because it was immaterial which of the two it benefitted since both were merely different pockets of the Bethlehem organization. Evidence of practices of this character is particularly impressive in establishing the lack of divorcement between production and transportation.

(Elgin) and of several steel producers (including Illinois Steel Company) whose products were transported by the railroad. Elgin operated about 195 miles of road, known as the "Chicago Outer Belt Line," which served many industrial plants and connected with every railroad entering Chicago. About 60% of Elgin's tonnage was derived from transporting the products of six producing companies wholly owned by United States Steel Corporation. Elgin's shares were acquired by the Steel Corporation upon the Corporation's formation in 1901. Suit against Elgin was brought by the Government in 1930.

The elements of the instant case which most clearly establishes the domination of South Buffalo also presents its sharpest contrast with the *Elgin* case. The manner in which South Buffalo was staffed by Steel Company personnel has been previously set forth (*supra*, pp. 81–86). At the time of trial, the seven important executive officials of South Buffalo were prior employees of the Steel Company. South Buffalo's president was chosen because he had 30 years' experience in steel-making with the Steel Company. Moreover, South Buffalo's officers (with one exception) held identical offices with six other similarly situated railroad subsidies of the Holding Company.

The picture in the *Elgin* case was the reverse of this. No single one of the executive officers of Elgin whose experience was revealed by the

record was shown to have had any prior connection with the holding company or any of its subsidiaries or any experience with companies producing similar products. Elgin's president at the time of complaint had been employed by Elgin for more than 30 years, progressing from clerk to the president to the presidency (Elgin R. 77). His predecessor as president had served in that office for 30 years, had been an Elgin employee for almost 40 years or before the creation of the United States Steel Corporation, and his prior experience had been that of a railroader (Elgin R. 25, 35-36). Elgin's vice-president served it some 24 years, rising from clerk in the Traffic Department, and his earlier employment record included railroad experience (Elgin R. 76, 86). Both the purchasing agent and chief accountant of Elgin had long employment records with Elgin (at least 23 years and 16 years, respectively) (Elgin R. 72, 94, 98).

Elgin's board of directors was selected and voted upon by Elgin's president to whom the holding company gave its proxy as stockholder (Elgin R. 30, 42, 47). After 1920, Elgin's directors were selected from officials or employees of Elgin with a few exceptions (all Chicago bankers (Elgin R. 47)). Elgin's officers were selected by the directors on the basis of recommendations by its president (Elgin R. 42).

There is a second striking point of dissimilarity between *Elgin* and the present case. There was

not the least direct linkage between Elgin and any of the producing subsidiaries of United States Steel which Elgin served. The control over Elgin alleged by the Government was the control of the Holding Company only. Attention was focused on the relations between Elgin and United States Steel, and nothing was developed respecting Elgin's relations with the producing subsidiaries in Chicago. This is in complete contrast to the constant and intimate relations between railroad and shipper which the record here presents.

The facts upon which the Government relied in the *Elgin* case may be fairly summarized as follows:

(1) Three types of what may be described as home-office fiscal control were disclosed: (a) The parent corporation, United States Steel Corporation, required subsidiaries, including Elgin, to secure approval of capital expenditures in excess of $10,000, later $5,000. In fact, there was no instance in which the parent's approval was withheld (Elgin R. 37, 97). Less than 4% of Elgin's total expenditures over a five-year period was subject to the formality of its parent's approval (Elgin R. 414). (b) Elgin deposited surplus funds in a so-called Advance Account maintained by the parent, and in times of need withdrew funds by virtue of drafts drawn on the account (Elgin R. 54). The evidence was in dispute as to whether such deposits

were required and whether withdrawal required the parent's consent. (c) The parent maintained a "Clearance Account" through which transactions among its various subsidiaries were cleared (Elgin R. 53).

(2) Two instances of the parent's invasion of the details of Elgin's management were asserted. Both involved conclusion of highly important agreements by Elgin: (1) the lease of a railroad which was wholly owned by another subsidiary of United States Steel and of which Elgin's president was also president prior to the lease (Elgin R. 28); and (2) the conclusion of a trackage agreement with a second and independent railroad (Elgin R. 30–32). Both agreements became effective as to Elgin in 1909. The Chairman of the parent's board of directors and its Comptroller were consulted respecting the making of the lease in 1909 and on several occasions in later years respecting amendments to both agreements. The Government asserted undue tampering in the conclusion of these two agreements only out of 2,313 agreements executed by Elgin over a 23-year period (Elgin R. 39, 81).

(3) The parent had system-wide bonus, pension and stock purchase plans. Reports and estimates were required to be furnished the parent by the subsidiary.

(4) Elgin and other United States Steel subsidiaries had contiguous offices in Chicago, employed common counsel, and periodical meetings of their presidents were held as to which Elgin's president "attended probably half of them, maybe more" (Elgin R. 26). Elgin's president had discussed its declaration of dividends with officials of the parent.

We submit that it is apparent that virtually all of the controls present in *Elgin* are equalled or exceeded by similar controls here present. The loose and long-range fiscal controls by the holding company in *Elgin* are not so clearly within the very evil at which the Commodities Clause was aimed as are the day-to-day and on-the-ground control of South Buffalo by the producer in this case. We do not here indicate disagreement with the view of the dissenters in *Elgin* that the railroad was in fact dominated by its parent; we only assert that proof of domination is stronger here.

Finally, it may be noted that even the majority in *Elgin* appeared to feel that a determination of domination would have been reached at an earlier date. The majority referred to "isolated acts" which indicated "undue control over the carrier" but said that most of these had taken place years ago, some of the more important in 1909 (p. 503). The objectionable practices have not ceased here. An unbroken record of domination over South Buffalo from 1922 to the time of trial was disclosed.

III

THE MISCELLANEOUS ARGUMENTS ADVANCED BY APPELLEES TO ESCAPE THE APPLICATION OF THE COMMODITIES CLAUSE ARE WITHOUT MERIT

A. *South Buffalo is a "Railroad Company" within the Purview of the Commodities Clause.*— Appellees urged below that, irrespective of any interest which South Buffalo may have in the commodities it transports, the Commodities Clause is not applicable to its operations. In their view, South Buffalo escapes the prohibitions of the clause because it is not a "railroad company" within the purview of the clause. While we have difficulty in following this argument in the face of the obvious physical facts, it appears to be that South Buffalo is merely an "industrial" or "switching" or "terminal" railroad and that the Commodities Clause was never intended to apply to limited operations of this character.

This argument is bottomed primarily on South Buffalo's relatively restricted size when compared with line-haul carriers. But the Commodities Clause makes no distinction based on size nor does size alone have any material relation to the evils at which it was aimed. If strategically located railroads such as South Buffalo are permitted to escape the impact of the Commodities Clause merely because they are small, that Clause will be substantially stripped of its effectiveness. Domination of the strategically placed railroad,

however small, which other shippers, including competing shippers,[50] are forced to use, presents the producing interest full opportunities to engage in discriminatory practices against such shippers. And, whatever the length of such a railroad, a division of joint through rates with line-haul carriers must be made, and here the producing interest is presented with the opportunity to exact and conceal discriminatory rates.[51]

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[50] South Buffalo serves the following industries which are competitive with the Steel Company: Republic Steel Company, Donner-Hanna Coke Corporation, Hanna Furnace Company, and Bliss & Laughlin, Inc. (R. 598).

[51] This is an ancient evil. The Interstate Commerce Commission in its Eighteenth Annual Report (Dec. 19, 1904) referred to the manner in which manufacturers "obtained what was in effect a rebate upon the transportation of its product to certain points by organizing a railroad, publishing a joint through rate with and obtaining a division from the various railroads transporting that product" (p. 19). The "length to which this evil may go" was illustrated by the situation between the Chicago, Lake Shore & Eastern Railway and Illinois Steel Company, both wholly owned companies of United States Steel Corporation. The Commission reported that the Lake Shore road had only some 6 or 7 miles of main line but that some 62 miles of track were operated within the private grounds of Illinois Steel's South Chicago plant. Its primary function was intra-plant switching for Illinois Steel and only secondarily did it interchange traffic. The Lake Shore was allowed a division with eastern lines of 10% on business to eastern seaboard destinations, 15% to Pittsburgh and points west, 20% on business to the Missouri River. The divisions to Lake Shore were "much in excess of fair compensation" (pp. 21–22). See also *In the Matter of Divisions of Joint Rates and Other Allowances to Terminal Railroads*, 10 I. C. C. 385.

In the *Elgin* case, the railroad presented fully to this Court the argument now made that the Commodities Clause was intended to apply only to line-haul carriers and not to small roads which, for certain purposes, might be described or classified as "switching" or "terminal" railroads. This Court's failure to allude to the argument must be considered a complete rejection of it. While it is true that the railroad in *Elgin* operated across state lines, this point is immaterial as we shall shortly demonstrate (*infra*, pp. 107–113). For the criterion for application of the Commodities Clause is engagement in interstate commerce, not transportation across a state line, and South Buffalo undeniably engages in interstate commerce.

In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, the appellee corporation pointed out that it was originally authorized to mine coal and construct a canal, and only subsequently to operate a railroad. The corporation urged, therefore, that it was an industrial, not a railroad, company, asserting "clearly the term 'railroad company' as used in the commodity clause does not apply to every corporation which operates a railroad" (p. 387). This argument was rejected as "without merit" since "the corporation was engaged as a common carrier by rail * * * in the channels of interstate commerce, and as such

we think it was a railroad company within the purview of the clause" (p. 418).

To establish that South Buffalo was not a "railroad company," appellees relied below on a quotation taken from context where this Court recognized, for purposes of the problem before it, the "essential difference between terminal systems properly so described and railroad transportation companies." *United States* v. *St. Louis Terminal*, 224 U. S. 383, 401–402. The statement was made in the course of the Court's refusal to apply to the terminal railroad the same standards of enforced competition under the Sherman Act which it applied to line-haul carriers in *Northern Securities Co.* v. *United States*, 193 U. S. 197. The Court reasoned that to require a number of terminal railroads, with necessary attendant facilities, might slash a city to ribbons and perhaps be impossible in St. Louis the peculiar topography of which severely limited the space available for location of terminal facilities. The "essential difference" the Court was recognizing thus consisted in governing geographical facts; the statement has no possible reference to what constitutes a "railroad company" under the Commodities Clause."

[1] Actually the Court concluded 224 U. S. at 406 that the St. Louis Terminal was "something more" than a terminal company since its activities were not confined to interchange and pickup of traffic. South Buffalo is not merely a "terminal company." It files tariffs for transportation from points on its line to others.

The legislative history of the Commodities Clause fully refutes the argument now made in disclosing clear Congressional intent that it apply to all common carriers by rail, however small. The Clause's application and possible undue injury to "small" railroads was urged without success as a reason for rejecting the Clause's enactment. The exemption respecting the transportation of timber and its products was written into the Clause expressly to cover logging company railroads, stated to be as small as five miles in length. (See, *infra*, pp. 112 to 113).

B. *The Commodities Clause is Applicable though South Buffalo Does Not Operate Across a State Line.*—Appellees further contend that the Commodities Clause is in no event applicable to South Buffalo's operations because those operations fall outside the prohibition against transportation of commodities "from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia * * *." While is true that South Buffalo does not cross a state line, it is also true and undenied that it operates in interstate commerce.

Section 1 of the Interstate Commerce Act itself specifies its application to carriers engaged in transportation from one state to another. It has always been clear that the act applies to carriers engaged in interstate commerce though they operate wholly within one state. *United States* v.

Union Stock Yard Co., 226 U. S. 286; *Tap Line Cases*, 234 U. S. 1, 26.

Two other sections of the act originally embodying the Commodities Clause [23] couched their prohibitions as applicable to carriers in performing transportation from one state to another state. The prohibitions have been held to extend to transportation in interstate commerce, whether or not the carrier involved in fact operates across a state line. *Powell* v. *United States*, 112 F. 2d 764 (C. C. A. 4); *United States* v. *New York Central R. Co.*, 153 Fed. 630 (W. D. N. Y.); *M. K. & T. R. Co.* v. *Plano Milling Co.*, 231 S. W. 100 (Tex. Civ. App.), certiorari denied, 258 U. S. 624.

The Congressional understanding that, in using in the Commodities Clause the long phrase describing transportation from one state to another, it was simply using a phrase of art which comprehended interstate commerce, has always been recognized by this Court. In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, the Court repeatedly referred to the issue as one involving whether a railroad company engaged in "interstate commerce" should be free of interest in the commodities it transported (pp. 406, 407, 409;

[23] The act is the so-called Hepburn Act (34 Stat. 584). The sections are section 2 (the Elkins Act), now embodied, as amended, in 49 U. S. C. 41 (3) and section 7 (the Carmack Amendment) now embodied, as amended, in 49 U. S. C. 20 (11).

415). Subsequent cases have similarly referred to the Commodities Clause as operative upon carriers engaged "in interstate commerce."[54]

The legislative history of the Commodities Clause discloses clear Congressional intention that it apply to all railroads engaged in interstate commerce, irrespective of whether the railroad crossed a state line. The original draft of the bill introduced by Senator Elkins provided in substance that it should be unlawful for common carriers "subject to the provisions of this act" to engage in production or manufacture. (40 Cong. Rec. 6455). Discussion of this draft resulted in the tentative conclusion that its purpose might be construed to control industry rather than commerce, and, hence, beyond the power of Congress. Senator Daniel then said:

> It seems to me that the amendment takes hold of the subject by the wrong handle and puts its interdict on the wrong thing. It is the transportation of such things in interstate commerce, not engaging in interstate commerce at all, to which it seems to me the aim of Congress should be directed. *If the amendment would say in so many words that no carrier shall transport in interstate commerce* articles of

[54] *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 263, 265, 266, 271–272; *Delaware, Lackawanna & Western R. Co.* v. *United States*, 231 U. S. 363, 373; *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516, 525; *United States* v. *Reading Co.*, 253 U. S. 26, 61.

> which it is itself the producer or the manufacturer, that would reach it, if Congress can reach it. (Italics supplied) (40 Cong. Rec. 6458).

Senator Daniel proposed an amendment, which for parliamentary reasons could not then be considered, in which the phrase "from one State, Territory * * * to another State, Territory" appeared for the first time. It read:

> It shall be unlawful for any common carrier to transport from one State, Territory, or district of the United States to another State, Territory, or district of the United States or to any foreign country any article or commodity whatever which may be owned by it or in which it has any interest, excepting such as are necessary for its own use in its business as a carrier and not intended for sale, barter, or commercial traffic of any sort. (40 Cong. Rec. 6461).

There was no discussion of the phrase above partially quoted; but from his previous statement it seems clear that Senator Daniel intended his amendment to mean that "no carrier shall transport in interstate commerce articles of which it is itself the producer or the manufacturer."

Senator Elkins two days later introduced the following modification of the amendments that he had previously introduced, and, except that the words "railroad company" were later substituted for "common carrier" and that the exception

relating to timber and timber products was inserted, this amendment is substantially in the form in which it was adopted and as it now appears as Section 1 (8), 49 U. S. C.:

> From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier. (40 Cong. Rec. 6568.)

Thereupon, Senator Bacon stated that he did not think this amendment would be effective in that it "does not in any manner prevent (railroad companies) continuing to own the coal mines or continuing to transport the coal, so long as that transportation is limited to the particular State in which the coal mines are located and the railroad is situated." (40 Cong. Rec. 6568.) Senator Bailey immediately rejoined:

> * * * Mr. President, no law of Congress can control the transportation of any article taken up inside and put down inside of a State. But no carrier can be or will be permitted to withdraw its interstate com-

> merce from the jurisdiction of the Federal Government by consigning it twice, because if it starts from one State and finally goes into another State or into a foreign country the Federal Government's jurisdiction attaches." (40 Cong. Rec. 6569.)

No exception was taken to Senator Bailey's rejoinder as to the effect of the amendment on transportation in interstate commerce and no further comment upon this point was made by Senator Bacon. The amendment was agreed to by the Senate acting as the committee of the whole. (40 Cong. Rec. 6570.)

The intention of Congress to apply the Commodities Clause to all railroad companies engaged in interstate commerce is further apparent from the circumstances under which timber and timber products were excepted from its operation. Senator Piles, of Washington, was much concerned about the effect of the proposed statute upon small logging roads owning or owned by sawmills in his state. He said:

> * * * We are not logging in that country with horses and wagons or oxen. We are logging by means of railroads. Those railroads, running from 5 to 40 or 50 miles back into the forests, necessarily penetrate the valleys. People to a certain extent have settled in those valleys and have builded for themselves homes. Their little freight, as a matter of accommodation more than any-

> thing else, and some passengers, are carried by the logging railroads. Those logging roads own sawmills on tide water, or the mill companies own the logging roads. The roads take the timber to the sawmills, where it is sawed into lumber. The mill companies own their own schooners, both steam and sail. When the timber is sawed into lumber it is transported on these schooners to all parts of the maritime world. (40 Cong. Rec. 7012–7013.)

In order, therefore, that these logging railroads might be excepted from the provisions of the statute, Senator Piles introduced the amendment excepting timber and timber products and this amendment was adopted. (40 Cong. Rec. 7015).

Finally, Senator Elkins, in reply to Senator Piles and other Senators who contended that this statute, if enacted, would jeopardize small industrial railroads in their respective states, stated that this might be so but that, nevertheless, it was necessary that this legislation be enacted. He said:

> This is the main question. If incidentally during production and transportation it works injustice to small enterprises or to large ones, like those alluded to in California, Washington, and Oregon, the great principle contended for should not be prevented from becoming law because it might injure some smaller interest. (40 Cong. Rec. 7014.)

C. *Violation of the Commodities Clause May Not Be Justified by Reference to the Shippers Allowance Clause.*—Appellees next argued below that, if it is determined that South Buffalo has an interest in the commodities of the Steel Company which it transports, that determination will necessarily be reached only by concluding that South Buffalo has no separate corporate existence which must be respected. The obliteration of South Buffalo would mean that what remains is an entity essentially engaged in producing steel though also operating limited railroad facilities. To this situation, it is asserted the Commodities Clause would have no application; it is governed solely by the Shippers Allowance Clause which, in substance, authorizes a common carrier to make a just allowance to a shipper who renders a service connected with the transportation.[55]

[55] The Shippers Allowance Clause provides (49 U. S. C. 15 (13):

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

We do not believe that the application of the Commodities Clause may thus ingeniously be defeated by what this Court has recognized as proof that it applies. But the singular nature of this argument has not prevented its previous advancement. It was a principal contention of the railroad in the *Elgin* case but, though its acceptance there would have defeated the Government's case at the threshold and rendered it unnecessary for this Court to consider the voluminous evidence as to "domination," this argument received no mention in the Court's opinion.

The line of demarcation between the Commodities Clause and the Shippers Allowance Clause for present purposes is the plain one which the Interstate Commerce Commission long ago set forth. In *Manufacturers Ry. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93, 101–102, the Commission said:[56]

> Similarly, allowances are frequently made by the trunk line to an industry under Section 15 of the act for services rendered by an industrial line owned by it or its stockholders, as for an instrumentality furnished by the shipper, the only concern of the Commission in such case being to satisfy itself that the allowances

[56] The order issued by the Commission in this case was affirmed, by this Court, but without reference to the present point of inquiry, in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.

are not above the reasonable cost of the service and therefore are not indirectly a rebate of a part of the trunk line's charge to the owning industry through the medium of the latter's industrial railway. * * *

Frequently the industrial line develops new traffic, and shippers other than the owning industry locate on its rails, whereupon the owning industry or its stockholders separately incorporate the railway, which thereupon files tariffs with the Commission, claims thenceforth to be wholly separate and distinct from the owning industry, and thereafter holds itself out to serve the owning industry and its other shippers impartially. Assuming the newly made carrier to be under the law a common carrier in all respects such as it represents itself to be, *it is evident that allowances under section 15 of the act can no longer be made to the owning industry as for services rendered by the shipper,* as the railway is no longer a part of or in law connected with the latter which is "the owner of the property transported," to *whom alone,* under that section of the statute, allowances may be made, but is in the contemplation of the act in the same position as it would be if it had been constructed and was being operated by parties having no interest whatever in the owning industry. * * * [Italics supplied.]

In *In Re Allowances to Kanawha etc. Ry. Co.*, 41 I. C. C. 53, the Commission said (p. 59):

> The argument frequently is made and is made here that this provision [Commodities Clause] conflicts with the provision of section 15 of the act relative to the compensation of shippers by railroads for assisting them in the service of transportation or for furnishing facilities for such service and that industrial railroads and tap lines are therefore beyond the purview of the commodities clause. The argument is fallacious. Section 15 recognizes the common-law right of railroads to perform their public duties through agents and by means of hired facilities and merely provided that the Commission may regulate the compensation paid to the agent employed or to the owner of the facility hired if the agent or owner of the facility is also a shipper.

Appellees may, however, renew their argument made below that the Commission has impliedly and repeatedly sanctioned both South Buffalo's relationship in particular and other similar situations generally. The Commission has frequently had before it inquiries as to whether industrial common carriers might participate in joint through rates with line haul carriers. South Buffalo has specifically been held entitled to such participation. *Lackawanna Steel Co.* v. *South*

Buffalo Railway, 56 I. C. C. 684; *Jones & Laughlin Steel Co.* v. *Pittsburgh & Lake Erie R. Co.*, 91 I. C. C. 300. Similar holdings in respect of other industrial railroads are many.[37]

But the Commission has recognized that it has no original jurisdiction to enforce the Commodities Clause. *Construction of Line by Jefferson Southwestern*, 86 I. C. C. 796. At times when the issue before it concerned the character of service rendered by an industrial railroad, the Commission has warned that its inquiry had nothing to do with the Commodities Clause and that its action was not to be regarded as sanctioning relations violative of that clause. *Industrial Railway Case*, 32 I. C. C. 129, 133. But silence upon collateral and unrelated issues may not be tortured into sanction of law violations.

D. *There Is No Burden on the Government to Prove Discriminatory Practices by South Buffalo.*—At the trial appellees called a number of witnesses who were officials of companies whose plants were served by South Buffalo. They were permitted by the district court, over the continuing objection of the Government (R. 513), to testify generally that the service provided by South Buffalo was satisfactory and had kept pace with their needs (e. g., R. 519, 565). There was no shipper, however, for which South Buffalo

[37] See, e. g., *Indiana Northern Ry.* case, 37 I. C. C. 491; *National Tube Co.* v. *Lake Terminal R. Co.*, 55 I. C. C. 469.

provided a service in any way comparable to that provided for the Steel Company. In no case did South Buffalo perform intra-plant switching for its other customers of any comparable scope,[58] nor did it own and operate trackage within the plant enclosures of other customers.[59]

Obviously the character of service provided to other shippers was not material to the issues of this case. In view of the purpose and general applicability of the Commodities Clause, it has always been recognized that "the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers." *Delaware, Lackawanna & Western R. Co.* v. *United States*, 231 U. S. 363, 370. The sole fact that control of both carrier and producer by the same interest makes "rebates, discriminations, attempts to monopolize and other abuse of carrier power, easy, and their detection and punishment difficult" has been recognized as the primary consideration which underlies the Commodities Clause. Mr. Justice Stone, dissenting in *United*

[58] Usually South Buffalo does no intra-plant switching for its other customers (R. 518, 544–545, 550, 566, 585). A limited type of what may be described as intraplant switching is done for some (R. 528, 555, 578–579). Thus, the Maritime Milling Company owns four tracks, two paralleling the north side, and two paralleling the south side, of its plant, South Buffalo at times moves a car from one track to another (R. 528).

[59] R. 522, 533–534, 544, 557, 565–566, 572, 579, 585.

States v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 506.

The Government in the trial of this case made no effort to show that South Buffalo had in fact discriminated against other customers in favor of the Steel Company, or that its ownership had been utilized by its co-appellees to bargain for and obtain discriminatory rates from line-haul carriers.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 198

THE UNITED STATES OF AMERICA,
Appellant

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY AND BETHLEHEM STEEL CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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January 26, 1948

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA,
Appellant

v.

SOUTH BUFFALO RAILWAY COMPANY, BETHLEHEM STEEL COMPANY AND BETHLEHEM STEEL CORPORATION

No. 198

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Opinion Below

The opinion of the District Court is reported: 69 F. Supp. 456.

Jurisdiction

This is an action in equity, brought by the United States[1] under the Commodities Clause of the Act of June 29, 1906, as amended (34 Stat. 585; 36 Stat. 547; 49 U. S. C. Sec. 1(8)), to enjoin the appellee, South Buffalo

[1]The action was brought in the District Court of the United States for the Western District of New York on June 4, 1943.

Railway Company,[2] from transporting commodities of the appellee, Bethlehem Steel Company, and of the appellee, Bethlehem Steel Corporation and its subsidiaries, in alleged violation of said Clause. Final judgment dismissing the action upon the merits was entered on March 28, 1947 (R. 923). Petition for leave to appeal to this Court was filed and allowed on May 26, 1947 (R. 927). This Court noted probable jurisdiction on October 13, 1947 (R. 931).

Jurisdiction to review by direct appeal the judgment so entered is conferred upon this Court by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, 49 U. S. C. Sec. 45) and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. Sec. 345).

Questions Presented

This appeal presents three questions:

1. Whether ownership by the Holding Company of all the stock of the South Buffalo and all the stock of the Steel Company and the Holding Company's exercise of rights normally incident to such stock ownership necessarily produce a union of production and transportation of the kind forbidden by the Commodities Clause.

2. Whether the Trial Court's findings and determination that the Holding Company and the Steel Company do not dominate or control the South Buffalo or threaten to do

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[2]In this brief we shall generally refer to the appellee, South Buffalo Railway Company, as the South Buffalo; to the appellee, Bethlehem Steel Company, as the Steel Company; and to the appellee, Bethlehem Steel Corporation, as the Holding Company.

so, and that they have not done so since 1939, are supported by substantial evidence, and whether, in view of such findings and determination, the Trial Court's dismissal of the action upon the merits was proper.

3. Whether, assuming that for any reason a union of production and transportation has been proven to exist (presumably in the Holding Company), the case is one in which a "railroad company" transports, from one state to another, commodities "manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have an interest, direct or indirect", within the meaning of the Commodities Clause; or whether, on the other hand, the case is one in which the Holding Company or the Steel Company, as an "owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein," within the meaning and under the explicit sanction of the Shippers Allowance Clause, section 4 of the Act of June 29, 1906, as amended (34 Stat. 590; 36 Stat. 553; 41 Stat. 488; 54 Stat. 912; 49 U. S. C. sec. 15(13).

Statutes Involved

The Commodities Clause (49 U. S. C. § 1, par. (8)):

> "§ 1, par. (8) *Transportation of commodity manufactured or produced by railroad forbidden.* It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufac-

tured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The Shippers Allowance Clause (49 U. S. C., § 15(13):

"§ 15, par. (13) *Allowance for service or facilities furnished by shipper.* If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Statement of the Case

The Holding Company owns all or a majority of the shares of some 57 corporations engaged, for the most part, in the production of steel and the manufacture of products made of steel. The Steel Company is its principal steel manufacturing subsidiary.

The Steel Company owns and operates plants at various strategic points throughout the United States, including

plants at Buffalo, Lackawanna and Hamburg, New York. The South Buffalo performs terminal switching and inter-plant and intra-plant services for the Steel Company at Buffalo, Lackawanna and Hamburg.

The South Buffalo is a small terminal switching road,[3] situated and operating entirely within the Buffalo Switching District, where it performs terminal switching services for the Steel Company and for some 27 other industrial plants, not related to the appellees, which are located upon its lines. It does not perform any services of any sort except such terminal switching and inter-plant and intra-plant services, and it does not perform any services beyond the limits of the Buffalo Switching District. It files tariffs, which cover its switching services, with the Interstate Commerce Commission, and also with the Public Service Commission of New York. It does not participate with any line-haul railroad in any through interstate route or joint interstate rate, or receive any division of such joint or through rate[4] (R. 606-609; 344-348; Def. Ex. 1 through 8, R. 863-880). The Interstate Commerce Commission classifies it as an "S1" carrier, which the Commission defines

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[3]The South Buffalo is situated and operates entirely within a strip of land in Erie County, New York, less than six miles in length and three in breadth. It does not own any locomotives except switching locomotives nor does it own any cars, except a few used exclusively for repair work upon its own lines. None of its equipment is used by the line-haul railroads or passes beyond its point of interchange with them.

[4]The Government's statement at page 104 of its brief that South Buffalo receives "a division with line-haul carriers" and so "may exact and conceal discriminatory rates" is not supported by any record reference and is overwhelmingly disproven by all the relevant evidence. This is the first time that such a claim has been made.

as "Exclusively Switching".[5] All its stock is owned by the Holding Company.

The Government claims that the Holding Company so dominates and controls the affairs of the Steel Company and of the South Buffalo at Buffalo, Lackawanna and Hamburg, New York, that they are in reality and substance a single organization, consisting on the one hand of a steel producing branch and on the other of a railroad common carrier branch, both wholly owned and completely dominated by the Holding Company.[6]

This case differs from any heretofore brought under the Commodities Clause in two major respects:

First, no other case has ever been brought against a terminal switching road. In no other case did the railroad interest involved bulk so small, both in terms of size and character and by comparison with the manufacturing and producing interests involved. The most comparable case is *United States* v. *Elgin, Joliet & Eastern Ry. Co.*,[7] 298 U. S. 492. That defendant was and is a Class 1 railroad[8] engaged in general freight transportation, with a main line 195 miles in length (as compared with the six mile "main line" of the South Buffalo) located in two states. It leased

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[5]Interstate Commerce Commission, 58th Annual Report on the Statistics of Railways in the United States (1944), pp. 547, 550; 59th Annual Report (1945) pp. 577, 580. This is the Commission's most recent published Report on the Statistics of Railways in the United States. The complete definition is as follows: "S1—This class of companies includes all those performing switching services only, whether for joint account or for revenue."

[6]Amended Complaint, par. 21; R. 12.

[7]Referred to in this brief as the *E. J. & E.* case.

[8]That fact was disclosed by the record to this Court. See also 59th Annual Report of the Interstate Commerce Commission (1945) on Statistics of Railways in the United States, p. 555.

and operated the Chicago, Lake Shore & Eastern Railway, a terminal railroad substantially larger than the South Buffalo, which was owned by one of the E. J. & E.'s co-subsidiaries. The Chicago, Lake Shore & Eastern Railway was not made a defendant in that case, and its operations were not criticized by the Government.

Second, in all prior cases under the Clause the alleged acts of domination complained of were carried out consciously and intentionally by the parent corporation—the owner of the subsidiary's stock—and represented a major policy of the parent. That was true not only in the cases in which the Government was successful but in those—as for example in the *E. J. & E.* case—in which the Government was defeated. That is not true in the present case. Although this case, like its predecessor cases which dealt with the Commodities Clause, theoretically involves the Holding Company's domination of the South Buffalo, and although the Trial Court in this case found that "the Holding Company and the Steel Company" (but never that the Holding Company alone) had dominated the South Buffalo prior to December, 1939 (FF. 26, R. 914), substantially the entire record consists of proof concerning transactions involving not the Holding Company but the Steel Company. Substantially all those transactions were concerned with the business and operating relations between the Steel Company's plants at Buffalo, Lackawanna and Hamburg and the South Buffalo. Substantially all of them involved plant officials and employees of the Steel Company at Lackawanna. None of those officials or employees was associated with the Holding Company. With the possible exception of two capital contributions which the Holding Company made to the South Buffalo in 1936, for the purpose of composing tax problems under the undistributed profits

surtax provisions of the Federal Revenue Act of 1936, § 14 (FF. 25, R. 914; see 69 F. Supp. 464)—problems in which the Holding Company was interested equally with the South Buffalo—not one of the Trial Court's findings bearing upon the alleged domination of the South Buffalo in and before 1939 (FF. 26, 27, 28) involve transactions or practices to which the Holding Company was a party.[9] The record discloses the following, and only the following, transactions or matters, involving the South Buffalo, in which the Holding Company participated:

In 1933 the Holding Company sponsored the election of a single group of executive officers (other than the vice president-superintendent and the secretary-treasurer) for its seven terminal railroad companies. The purpose was to provide top-flight executives at a minimum cost to each company. The Trial Court did not find, and the evidence does not show, that the purpose or the effect thereof was to integrate the activities of the railroads with the activities of the steel-producing subsidiaries, or to subject the railroads to the supervision or control of the Holding Company.

In 1936 the Holding Company made the two capital contributions to the South Buffalo to which we have referred. The Trial Court said that "the fact of the contributions is not criticized", but that "the railroad does not

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[9] In the Trial Court's opinion (R. 900; 69 F. Supp., at p. 463) it is stated that the Comptroller of the Holding Company approved for entry a journal voucher of the South Buffalo relating to its lease of track within the plant enclosures of the Steel Company. The individual signing the voucher was an officer both of the Holding Company and of the lessor corporation. There is no evidence that he acted for the Holding Company. When that fact was pointed out to the Trial Judge, he omitted the statement from the findings of fact.

appear to have been consulted."[10] The opinion, but not the findings, states that such non-consultation indicates domination. The amended complaint, however, did not charge that the South Buffalo was not consulted concerning such contributions (R. 10), and the appellees, not being advised that any such issue was in the case, did not offer proof directed to it. They believe, moreover, that the evidence does not support the charge of non-consultation.

In 1939 the Holding Company, following an investigation, changed the South Buffalo's management and took other steps to bring to an end whatever domination or supervision of the South Buffalo had theretofore existed. The Trial Court found that the purpose was to terminate, not to continue, domination and that the steps taken were appropriate and lawful. The subject is briefed at length later.

At all times the South Buffalo has filed with the Holding Company reports necessary to permit the latter to issue consolidated balance sheets and reports to its stockholders and to public authorities. The only proven transaction of any kind between the Holding Company and the South Buffalo subsequent to 1939 relates to that subject, and consists of two letters apparently settling a disagreement between them as to what accounting data the South Buffalo need supply. The Trial Court declared the furnishing of such reports to be usual and legal, and the data called for by the letters to be appropriate.[11]

This case is not one involving common directors, or a common management. None of the directors, officers or employees of the Holding Company was ever a director,

[10] 69 F. Supp., at p. 464; compare finding No. 25, R. 914.
[11] See R. 903; 69 F. Supp., at p. 465.

officer or employee of the South Buffalo. Nor is the case one in which the Holding Company has ever attempted in any manner to control or supervise the general corporate, financial or operating policies or activities of the South Buffalo. In those respects, as the Trial Court pointed out, "far less domination or control appears than was shown in the Elgin case."[12] In fact, there is no evidence whatever in the record that the Holding Company ever dominated or supervised the activities of the South Buffalo. And there is no evidence whatever that it ever authorized or even suggested that the Steel Company do so.

Thus, if domination in fact be assumed, it is domination not by the parent and stockholder—the Holding Company—but by the co-subsidiary Steel Company, carried out, for the most part, by minor officials and employees of the Steel Company at its plants at Lackawanna. As pointed out to the Interstate Commerce Commission (at whose direction this action was brought) in the first report rendered to the Commission by its trial examiners:[13]

> "So far as the record shows, since October 1922 the Delaware corporation[14] and its predecessors, as holding companies of the South Buffalo's stock, have not demonstrated an interest greater than may be expected from a controlling stockholder for the purpose of a bona fide separate administration of the carrier's affairs. However, consideration should be given to the fact that the Delaware corporation and

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[12]69 F. Supp., at p. 463; R. 900.

[13]Report, Sheet 82; R. 69. It was upon this report that the Commission submitted the matter to the Attorney General for action. There has since been a second report of trial examiners which—doubtless because of the pendency of this action—omits all reference to the question of domination. The matter is still pending before the Commission, undetermined.

[14]The "Delaware corporation" is the Holding Company.

its predecessors also have been the holding companies of the stock of the steel company, raising the question as to whether the latter may be regarded as the agent through which is being done by indirection that which the commodities clause prohibits."

The Trial Court found (FF. 30; R. 916) that, after this Court's decision in the *E. J. & E.* case[15] was brought to the attention of the officers of the Holding Company, it "entered into an investigation" of the relations existing between the South Buffalo and the Steel Company and "ascertained" that the Steel Company "was then exercising a degree of interest in, supervision and domination over South Buffalo." The Trial Court found, further, that "the Holding Company then took steps * * * to preclude the continuation and the exercise of any degree of interest, supervision or domination over South Buffalo by the Steel Company"; that those steps were effective; that there has been no degree of domination or interference in the South Buffalo's operations or affairs since that time; and it concluded that there is not now "any threatened domination of South Buffalo * * * and * * * no probability or present danger of any recurrence of the exercise of control or domination by the Holding Company or the Steel Company over the affairs of the South Buffalo."[16]

The changes in the South Buffalo's management, brought about at that time (December 5, 1939) and continued since, consisted of the election of seven new directors to its board composed of nine members, the demotion of its former president to the position of first vice president and the election as president of an experienced electrical engi-

[15]The decision was rendered May 25, 1936; 298 U. S. 492.
[16]Trial Court's Conclusion of Law No. 9; R. 922-923.

neer, qualified to give it top-flight administrative and engineering guidance. Of the seven new directors, five were qualified Buffalo business men, none of whom previously had been associated with any Bethlehem-owned corporation, and none of whom thereafter became associated with any Bethlehem-owned corporation other than South Buffalo. The Trial Court determined, upon convincing evidence, that they have given South Buffalo competent, informed and independent management (R. 907).

In addition to the change of management thus brought about, the Holding Company advised the Steel Company that thereafter it should not intervene in the South Buffalo's affairs in any way (FF. 30; R. 916).

Concerning the period since the change of management, Government counsel were compelled to concede in the trial court "that there is 'very little tangible evidence of domination * * * subsequent to the reorganization'."[17] Actually the record does not contain any such evidence.

With respect to the relations existing between the South Buffalo and the Steel Company prior to December, 1939, the evidence is confusing, the situation is obscure, and a detailed briefing of it will not be attempted at this point. However, three facts should be noted.

First, evidence relating to that period is almost wholly documentary, consisting of about 100 letters and memoranda written during a period of over 17 years, which were collected by the Government's representatives from the files of the three appellees. They were old—all the important ones written prior to 1934. In most cases they were fragmentary. They were concerned with detailed and com-

[17] 69 F. Supp., at p. 465; R. 904.

plex transactions and relations between the South Buffalo and the Steel Company at Lackawanna years before the action. It is seldom possible to determine from them with any degree of precision what the situations were which the writers were discussing. With trivial exceptions, they were not supplemented or explained by testimony. They could not be, because in every important instance the writer was dead and no one now associated with the appellees participated in or could recall them.[18]

Second, the instances of alleged domination progressively decreased with the years, both in number and importance. Few, if any, occurred after 1933, when a single group of executive officers was elected to manage the affairs of the seven terminal railroads. To quote the opinion below:[19]

> "* * * Referring to the Elgin case, the government says 'a material part of the instances stressed by the government had taken place years ago, * * *.' That is largely so here."

Third, in spite of the lapse of time, it was generally possible to show that the incidents and situations to which the documents refer were appropriate, and that they were not evidence of domination. Again to quote the opinion below:[20]

> "* * * These Exhibits number altogether something a little upwards of 100. There is a considerable number of these which on their face do not tend to show control or are shown by their connec-

[18] As will be shown, transactions allegedly participated in by Gross, the Steel Company's general traffic manager, were actually carried out by Kemmerer (now deceased), one of his assistants.

[19] 69 F. Supp., at p. 465; R. 904.

[20] 69 F. Supp., at p. 463; R. 901.

tion to relate to conduct or acts entirely consistent with independent operations. * * *"

It may be that in a few instances, individual representatives of the Steel Company did overstep their authority, or that individual representatives of the South Buffalo looked too much to the employees of the Steel Company for advice. The organizations in which such instances would never occur in the course of 18 years would, to say the least, be unusual. But those instances, alone, do not constitute domination. They represent domination only when, by reason of their character and frequency, they evidence a policy and purpose to dominate, imposed by the parent upon the subsidiary. A comparison of the instances and examples of domination found in this case with those proven in *United States* v. *Reading Co.*, 253 U. S. 26, and *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255, and even in the *E. I. & E.* case, shows how far the present proof falls below the standards set by other cases.

From the standpoint of quality and character of the proof, we may compare the evidence upon which the Trial Court found that there had been no domination since 1939 with the evidence relating to the prior period, which is discussed in the preceding paragraphs. All but one[21] of the South Buffalo's nine present directors, among whom were included its president and both vice presidents (one of whom is its general superintendent) appeared and testified in open court, as did also its general agent, its assistant secretary-treasurer, its assistant general superintendent, several employees in charge of its operating, accounting and statistical departments, representatives from the traffic

[21]Sellers, Secretary-Treasurer and a director.

departments of the railroads with which it connects, and representatives of its most important customers other than the Steel Company, some of whom were competitors of the Steel Company. In addition, depositions of the Holding Company's vice president in charge of financial and legal matters, of the Steel Company's vice president in charge of traffic, of the Steel Company's general traffic manager, of the general manager, the assistant to the general manager of the Steel Company's plants at Buffalo, Lackawanna and Hamburg, and of the South Buffalo's auditor were read into the record. Every charge and contention was completely explored. The determination that domination had not existed since 1939 was in the fullest sense upon the evidence, and upon the merits.

The statement of alleged facts in the Government's brief constantly overstates, and at times completely misstates the substance of the Trial Court's findings, and of the evidence. At times that result is accomplished by formulating a statement, part of which is based upon a finding, while the balance is based upon evidence—often including evidence which the Trial Court did not accept as true—and citing such finding and such evidence as though each supported the entire statement. At other times such statement is a complete distortion of the evidence and is entirely unsupported by the finding.

A statement of the latter sort appears at page 5 of the Government's brief. The statement is that the Holding Company "*supervises and integrates* the activities of all [the Holding Company's subsidiaries] for the ultimate purpose of producing steel and steel products." No record reference follows, but at the end of the paragraph the Trial

Court's 5th and 19th findings are cited, as though supporting the entire statement. For purposes of comparison we quote in the margin those two findings.[22] They do not lend the slightest support to the statement that the Holding Company "supervises and integrates" the activities of its subsidiaries.

Again, at pages 8 and 9 of its brief, the Government states that "When the Holding Company felt it necessary to put a man in charge of railroad activities in 1931 or 1932, Kemmerer was made president of each of its seven railroad subsidiaries." The statement seems to imply that Kemmerer was placed in charge of not only the seven terminal railroads but also of the railroad plant facilities of the Holding Company's steel-producing subsidiaries. Such is not the fact. The Trial Court correctly found that "Kemmerer was president of all of the railroad companies * * *" (FF. 20; R. 913), but he also correctly pointed out that "no officer or director of Holding Corporation or Steel

[22]The findings (R. 910, 912) are as follows:

"5. The defendant Bethlehem Steel Corporation (hereinafter called the 'Holding Company') is a corporation duly organized and existing under the laws of the State of Delaware. The Holding Company owns and holds all or substantially all the stock of approximately 57 corporations."

"19. Among the Holding Company's wholly owned subsidiaries are those engaged in producing basic raw materials, such as iron ore and coal, in various states of this Country and in South America, and those engaged in transporting raw materials and finished products in oceangoing commerce and in inland waters. Production by the subsidiaries ranges from ingots and slabs of raw steel to finished products, such as ships and railway cars. The activities of the subsidiaries are primarily undertaken for the ultimate purpose of the production of steel and steel products, chiefly by the Steel Company, and the sale thereof."

Company was ever an officer or director of South Buffalo" (R. 898); and, we may add, the proof shows without contradiction that while Kemmemer was president of the subsidiary railways he was not connected in any capacity with any other Bethlehem company.

Two other facts should be noted in connection with the Bethlehem scheme of executive management.

First, the Holding Company's vice president, Mr. McMath, testified (R. 152):

> "* * * Our system of management has been, so far as the Corporation is concerned, largely to select people whom we believe to be competent to manage the activities of the various subsidiary companies, and then to let them manage them."

Second, the scheme of central control by a single executive officer in charge of a given type of activity is completely at variance with the major theory of the Government's case, which is that the local plant managers of the Steel Company's plants controlled and operated the railroad subsidiaries in the interest of, and as part of the activities of the steel plants. After these many years of investigation the Government still does not know which scheme of control it believes to have been in operation.

The Government repeats the charge, which it made also in the District Court, that (Br., p. 11) "The intermingling of trackage within the Lackawanna plant enclosure[23] was brought about by the common corporate predecessor of the Holding Company and the Steel Company on the day it acquired the properties." The Trial Court, in its opinion, states the facts as follows (R. 899-900):

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[23]The Government refers to the area west of the Hamburg Turnpike.

> "The government asserts that immediately on the acquisition of South Buffalo in 1922 Bethlehem interests began the radical rearrangement of the properties between South Buffalo and Bethlehem and a change in the set-up of the South Buffalo organization with the intermingling of the steel and railroad operations. We do not find these to be the facts though Bethlehem interests were placed in a position to control. The record discloses that prior to 1922 the South Buffalo operated tracks west of the Hamburg Turnpike under a lease from Lackawanna Steel Company. (See Industrial Railways case, 29 I. C. C. 212, decided in 1914.) How long it was so operated does not appear. However, we do know it was not in effect in 1920. The maps in evidence show the same general line-up of the railroad within the plant before and after 1922; * * *"

The Government refers to the approximately 100 letters which passed between South Buffalo and Steel Company officials between October, 1922, and 1940. To avoid duplication, we defer seriatim discussion of those letters to Point II. We would point out, however, first that during that period the South Buffalo did receive from the Steel Company, and paid it for, advice and assistance on technical problems, mainly related to engineering; second, that during such period the Steel Company performed and was paid for electrical and other construction work; and third, that much of the South Buffalo's track and some of its buildings were upon land within the Steel Company's plants,[24] which

[24]The Government incorrectly assumes (Brief, p. 10) that all the plants of the Steel Company were within the 1027 acre tract west of the Hamburg Turnpike. Such is not the fact. The Steel Company owned and operated plants and land at many other points along the South Buffalo's right-of-way; as, see plants formerly owned by Seneca Iron & Steel Company (R. 915).

it leased from the Steel Company. When the alteration or relocation of tracks or buildings within such plant areas was undertaken the Steel Company's consent was necessarily first obtained, because the preemption of additional land belonging to it was involved. While it is often difficult to determine from the Government's exhibits relating to new construction where the land involved was located it is clear that most of such land, and it is probable that all of it, belonged to the Steel Company. With the foregoing facts in mind, the meaning and the propriety of most of the Government's exhibits are apparent upon their face.

The Government makes much of the fact that Petty, president of the South Buffalo after 1939, was an engineer and not a railroad man. In doing so it entirely overlooks the physical and operational differences between a switching road operating a specialized service entirely within a small, congested, industrial area less than six miles in length and three in breadth, and a line-haul railroad, operating a freight and passenger service over a right-of-way several hundred miles in length. We believe South Buffalo's three ranking executives constitute a perfectly balanced team. Petty, an experienced engineer, by reason of his training and his experience with terminal railroad equipment largely acquired prior to his association with South Buffalo, possesses expert knowledge of the mechanical problems facing such a road (R. 236). Trageser, first vice-president, had for many years been associated with the Baltimore & Ohio Railroad prior to his employment by Bethlehem interests. He is an expert on traffic matters (R. 177, 178). Dullenkopf, second vice-president, had spent 11 years in the employ of terminal railroads before his association with South Buffalo (R. 319). He is an expert in terminal railroad management.

POINT I

OWNERSHIP BY THE HOLDING COMPANY OF ALL THE STOCK OF THE SOUTH BUFFALO AND ALL THE STOCK OF THE STEEL COMPANY, AND THE HOLDING COMPANY'S EXERCISE OF RIGHTS NORMALLY INCIDENT TO SUCH OWNERSHIP, DO NOT PRODUCE A UNION OF PRODUCTION AND TRANSPORTATION OF THE KIND FORBIDDEN BY THE COMMODITIES CLAUSE.

In the Transportation Act of 1940 Congress stated with precision the situations in which stock ownership, and the degree of corporate control which normally results from such ownership, shall be deemed to constitute control of a corporation for purposes of the Interstate Commerce Act. It did not include the Commodities Clause among them. It enacted that (49 U. S. C. § 1 (3) (b)):

> "(b) For the purposes of Sections 5, 12(1), 20, 304 (a) (7), 310, 320, 904 (b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

At the same time the Senate rejected a proposed amendment of the Commodities Clause under which its provisions would have been so extended as to apply to the transportation, by any "carrier by railroad and, after January 1, 1941,

* * * any carrier, other than a carrier by air", of commodities owned or produced "by or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or * * * in which such carrier, subsidiary, affiliate or controlling person has any interest, direct or indirect, legal or equitable, * * *."[1] The Senate Committee on Interstate Commerce in its report to accompany the bill, said concerning this provision: "The rewritten Commodities Clause was considered far too drastic and the subcommittee early decided against any change therein."[2] In the bill as passed by the Senate, and later by the House of Representatives, the language of the Commodities Clause remained unchanged, as it has ever since.

Situations in which stock ownership is treated as control under the Transportation Act of 1940 bear no resemblance to situations to which the Commodities Clause applies. Section 1 (3) (b) of that Act specifies nine other sections or parts thereof in which stock ownership is deemed to constitute control. First are those relating to the investigatory powers of the Interstate Commerce Commission: sections 12 (1), 20, 304 (a) (7), 320, 904 (b) and 913.

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[1]S. 2009, pp. 44-45, 76th Congress, First Session, introduced in the Senate March 30, 1939, 84th Cong. R. 3509; see also Confidential Committee Prints No. 2, dated March 18, 1939, p. 50, and No. 3, dated March 28, 1939, pp. 44-45, Sec. 12. It is set forth in full at page 100, *infra*.

[2]Senate Report No. 433, 76th Congress, First Session, May 16, 1939, to accompany S. 2009, at p. 15. The statement in its entirety is as follows:

> "Section 12. Commodities Clause.—This provision retains the Commodities Clause (Sec. 1 (8) of Interstate Commerce Act), now applicable only to railroads, in its present form. The rewritten Commodities Clause was considered far too drastic and the subcommittee early decided against any change therein."

Second are those relating to combinations and consolidations of carriers and pooling of their services and earnings: sections 5, 310 and 910. It will be observed of the three sections last named: first that they relate to the union of carrier with carrier, not of carrier with shipper; and second that they represent a policy of control by the Commission in the public interest, not of prohibition.

The Transportation Act of 1940 represents the final word and decision of Congress as to the meaning, and the scope of application of the Commodities Clause. It constitutes an explicit rejection, by Congress—with full knowledge of this Court's decisions as to the meaning of the Clause and the effect of stock ownership under its provisions—of contentions with respect to it which the Government is now urging this Court to accept.

Repeatedly since the enactment of the Commodities Clause in 1906, the Government has attempted, by recommendations to Congress for its amendment, so to extend its scope and coverage as to bring within its control situations in which transportation companies and producing companies are related through stock ownership. The attempt has never succeeded.

The Government, also, has repeatedly presented to this Court the question whether mere stock ownership produces, or results in a violation of the Clause. The Court has invariably held that it does not. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366 (decided in 1909); *United States* v. *Lehigh Valley Railroad Company*, 220 U. S. 257, and *United States* v. *Erie Railroad Company*, 220 U. S. 275 (decided in 1911); *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516 (decided in 1915); *United States* v. *Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492 (decided in 1936).

Even in those cases in which the Government has had judgment the Court has affirmed the view that stock ownership alone does not produce such a union of production and transportation as the Clause forbids. It said in the *Reading* case,[3] that: "the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company * * *." The grounds of that decision are to be found in the proven purpose of that holding company (the Reading Company) to dominate its two subsidiaries, and the completeness with which that purpose was carried out. The Court said:

> "* * * The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire conduct of their affairs. * * *"

The same situation prevailed in *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255. That case involved a Railroad Company, a Coal Company and a Sales Company, all united through stock ownership. The Sales Company was the exclusive agent to sell the coal produced by the Coal Company under a contract which, in effect, left ownership and control of the coal with the Coal Company until the Sales Company had finally disposed of it, and so, until its transportation by the Railroad Company had been completed. This Court said that (p. 263): "the Coal Com-

[3] *United States* v. *Reading Co.*, 253 U. S. 26, 62.

pany was organized and conducted as a mere agency or instrumentality of the Railroad Company", that this was so to such an extent that concededly (p. 263) "the assets of the Coal Company are the assets of the Railroad Company", and that (p. 270) "the contract between the Coal Company and the Sales Company was a mere device to evade the Commodities Clause of the Interstate Commerce Act and therefore void * * *." *United States* v. *Delaware, Lackawanna & Western Railroad Co.*, 238 U. S. 516, involved a similiar contract-agency relation, the coal in that case being mined by the railroad and prior to transportation transferred to a subsidiary coal company under a contract which, the Court held, left in the railroad company both a property interest in, and control over the coal until its sale to third parties following its transportation. In that case also this Court said[4] that "mere stock ownership by a Railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier." The relief granted in the *Delaware, Lackawanna & Western Railroad* case was not directed against stock ownership, but only against "further transporting coal sold under the provisions of the contract" referred to (p. 537), and the same is true of the *Lehigh Valley Railroad* case in so far as it was based upon the Commodities Clause (pp. 270, 271).[5]

The dissenting opinion in the *E. J. & E.* case[6] also recognizes the law to be that mere stock ownership is not a

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[4]238 U. S., at p. 526.

[5]The *Lehigh Valley Railroad* case was brought and was decided primarily under the Sherman Act.

[6]The dissenting opinion in the *E. J. & E.* case is the source of the Government's contention that a carrier may have an indirect

test to determine the right of a railroad company to transport the commodities of an affiliated company, for it says (p. 505):

> "The only question for our decision is whether the complete power of the United States Steel Corporation, through stock ownership, to dominate both appellee and certain shippers over its lines, *has been exercised* sufficiently to exemplify the evil which the commodities clause was intended to prevent, and so to bring appellee within its condemnation. * * *" (Emphasis supplied).

That opinion states that the Commodities Clause (p. 506):

> "* * * is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest *through the exercise* of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult." (Emphasis supplied).

Thus in an undeviating line of decisions this Court has determined that inter-corporate stock relations standing alone do not bring about that union of production and transportation which the Commodities Clause forbids.

Nothing to the contrary was determined in *North American Company* v. *Securities & Exchange Commis-*

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interest in the commodities of a corporation affiliated with it under a common holding company. In support of that contention the dissenting opinion cites the *Reading* case. The *Reading* case, however, does not support the contention, for it says (253 U. S. at p. 61): "without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same 'authority' that transported it over the railroad."

sion, 327 U. S. 686. The Public Utility Holding Company Act of 1935 (49 Stat. 803), unlike the Interstate Commerce Act (except as provided in § 1(3)(b)) and the Commodities Clause, explicitly states that a corporation's ownership of more than a stated per cent[7] of the stock of another corporation is, prima facie, sufficient to bring the provisions of that Act into operation. To argue that the same standards of so-called control are to be applied under both statutes is in effect to deny the power of Congress, by appropriate legislation, to draw distinctions between various types of businesses or corporations and to apply prohibitions or presumptions to some which it does not apply to others. In the Public Utility Holding Company Act, Congress provided that the mere power of one corporation to control another through stock ownership was unlawful.[8] The Commodities Clause does not so provide. Basically, the argument that the same standards or degree of control must be (or, in this case, should be) applied under both statutes is the very one which in the *North American Company* case this Court rejected.

What has been said above applies particularly to the Government's argument that effective domination of a subsidiary may be achieved by staffing it with an executive personnel whose background, previously developed loyalty,

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[7] 10% of the stock under that statute.

[8] In the *North American Company* case this Court said concerning that Act (327 U. S., at pp. 710-711):

> "But if evils disclosed themselves which entitled Congress to legislate as it did, Congress has power to legislate generally, unlimited by proof of the existence of the evils in each particular situation. Section 11(b)(1) is not designed to punish past offenders but to remove what Congress considered to be potential if not actual sources of evil."

and hope of future reward assure their primary devotion to the holding company, and their operation of the railroad in its interests.[9] A holding company, of course, might achieve those results even more effectively by staffing its subsidiary with directors or officers of the holding company. Section 1(3)(b) of the Act, however, provides that "common directors, officers or stockholders, * * * a holding * * * company * * * or * * * any other direct or indirect means" shall be deemed to constitute control only for purposes of the nine sections of the Act which are enumerated in said section 1(3)(b). The most that could be said concerning the staffing of South Buffalo with an executive personnel having a Steel Company background[10] would be that it might represent an "indirect means" of exercising control.[11]

Similar considerations apply to the Government's argument that the holding-company form of inter-corporate stock relation here involved brings into play elements of actual or probable illegality which would not be present, if the stock relation had run directly between the Steel Company and the South Buffalo. Holding companies are named in section 1(3)(b). The stock relation between them and their subsidiaries represents, at most, only a "direct or indirect" means of exercising control.

The argument is open to other objections. The contention is that a holding company exists for the very purpose of exercising whatever control over its subsidiaries may be

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[9]Gov't Br., pp. 79 *et seq.*

[10]No director, officer or employee of the Holding Company was ever associated with the South Buffalo.

[11]The argument also ignores the fact that the actual power to control is vested in the South Buffalo's directors, the majority of whom do not have any Bethlehem background.

necessary to weld them into a cohesive enterprise.[12] The assumption that such a purpose is more probable when a holding company owns the stock of a producing company and of a railway than when the producing company owns the stock of the railway, or the railway owns the stock of the producing company, is obviously fallacious. Moreover, that argument, in its entirety was presented to this Court in the *E. J. & E.* case and was rejected, the Court pointing out that (pp. 500, 501):

> "* * * Evidently, this is entirely out of harmony with the reasoning advanced to support the construction of the Act adopted in *United States* v. *Delaware & Hudson Co., supra;* also in direct conflict with the above quoted language from *United States* v. *Delaware, L. & W. R. Co.*
>
> "Considering former rulings, it is impossible for us now to declare as matter of law that every company all of whose shares are owned by a holding company necessarily becomes an agent, instrumentality, or department of the latter. *Whether such intimate relation exists is a question of fact to be determined upon evidence.*" (Italics ours)

The "above quoted" language from the *Delaware, Lackawanna & Western Railway* case is as follows:[13]

> "'But mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. * * * For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was

[12] Gov't Br. p. 45.

[13] 298 U. S. at p. 500, quoting from 238 U. S., at pp. 526, 527.

held by those who owned the stock of the railroad company.'"

Both arguments which the Government thus presents involve the same view of the law, namely, that "the power to exercise control" which always inheres in the ownership of stock is alone sufficient to produce a violation of the Commodities Clause, because the unlawful exercise of such power will be conclusively presumed.

In the case of the subsidiary corporation staffed by an executive personnel drawn from the ranks of its parent,[14] or of its co-subsidiary, the argument is that the executives' background, their previously developed loyalty and their hope of future reward is such as to assure their operation of the subsidiary in the parent's interest, because their primary devotion is to the parent. It is argued, in conformity with this Court's decision in the *North American Company* case, that in such a situation "lack of intervention is indecisive," because "historical ties * * * can on occasion serve as a potent substitute for the more obvious modes of control."[15] Thus the position, squarely presented, is that proof of actual intervention, being "indecisive," is unnecessary,[16] and that the method of staffing the subsidiary creates a presumption which takes the place of proof. In this case the argument assumes that such presumption is sufficiently conclusive to override the finding of the Trial Judge that there was no domination.

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[14]In the present case none of the South Buffalo's executive personnel or other employees was ever associated with the Holding Company.

[15]327 U.S., at p. 693.

[16]As has been stated, that was true in the *North American Company* case because of the provisions of the statute under which the case was decided.

Similarly, in the case of the holding company form of corporate organization, the argument is that such form of organization is intended to weld the subsidiaries into a cohesive organization. Thus again that assumed purpose is made to take the place of proof, as a presumption of domination which, as we have pointed out, must here be sufficiently conclusive to override the Trial Court's contrary determination upon the evidence.

In each case the presumption necessarily assumes—again contrary to the findings and determination of the Trial Court—that the parent desires to dominate and control its subsidiary; that such desire is sufficient to induce it to violate the law and incur the risk of the consequences of such violation; that it attempts to dominate its subsidiary; that the subsidiary's executive officers are sufficiently venal to acquiesce; and that an independent board of directors—which has nothing to gain from that course—is either acquiescent or deceived. In this case, such presumption is that the Holding Company's interest in the South Buffalo is not satisfied by the plain fact that the South Buffalo makes available to the Steel Company vital access to all the trunk line railroads entering Buffalo, that it performs efficient plant services for the Steel Company, and that its stock has developed into a valuable income-producing investment.

This Court's decision in the *North American Company* case does not justify any such assumptions. It holds merely that the holding company form of corporate organization "*can on occasion* serve as a potent substitute for more obvious modes of control", and that under the explicit provisions of the statute involved, and considering the circumstances of that case "the Commission was justified in treating North American as possessing domination over its sub-

sidiaries *or the power* to dominate them *when and if necessary*.[17] The decision and the language used are addressed wholly to the statute under review and the purpose which it expresses. In view of the language, the legislative history and the construction heretofore placed upon the Commodities Clause, they are without bearing in this case.

It is clear that Congress has never intended that stock ownership in any form shall bring the Commodities Clause into operation. Specifically, it is clear that Congress did not intend that the common ownership of the stock of a railroad company and of a producing company shall have that effect. When the Clause was under debate in the Senate,[18] Senator Tillman pointed out that its provisions "would not touch the ownership of railroads by coal companies or the common ownership of railroads and coal companies," and offered an amendment designed to obviate that supposed defect. His proposed amendment was rejected.[19] Senator Tillman then proposed a second amendment, which would have introduced into the Clause, after the words "any interest direct or indirect", the phrase "by partnership, *stock ownership*, or by any arrangement whatsoever", and that amendment, also, was rejected.[20] When, in *United States v. Delaware & Hudson Co.* (*supra*), the Commodities

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[17] 327 U. S., at p. 693.

[18] The Commodities Clause came into the law in 1906, as an amendment to the Hepburn Bill amending the Interstate Commerce Act. The Bill had been drafted and was sponsored by the Interstate Commerce Commission. The Commodities Clause was framed by the Senate and was introduced into the Hepburn Bill as an amendment, after that Bill in its first form had been passed by the House of Representatives. All the debate upon the Commodities Clause took place in the Senate.

[19] 40 Cong. R., 7011, 7012.

[20] 40 Cong. R., p. 7014.

Clause first came before this Court, it said concerning those two amendments:[21]

> "* * * Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 1906, 40 Cong. Rec. pt. 7, pp. 7012-7014. And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since *it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included.* * * *" (Italics ours)

Two subsequent decisions of this Court: *United States v. Delaware, Lackawanna & Western R. Co.*, 238 U. S., at page 526, and the *E. J. & E.* case, 298 U. S., at page 500, refer to the proposed amendments so rejected and reiterate, in substance, the views which, in the *Delaware & Hudson Co.* case, the Court so expressed.

Immediately after this Court had rendered its decision in the *Delaware & Hudson* case (May, 1909) the Attorney General began and thereafter, for 20 years carried on before Congress an attack upon the Commodities Clause as so

[21] 213 U. S., at p. 414.

construed, with the purpose of so broadening its provisions by amendment as to bring corporations connected by stock ownership within its control. In many respects that attack parallels his attempts before this Court—including his attempt in the present case—to bring stock ownership within the control of the Clause by construction. We may take as an example the following from his Annual Report to Congress dated December 5, 1927 (pp. 26-27):

> "In recent years industrial and manufacturing corporations have acquired ownership or control of numerous railroads, comparatively small in size, but important, nevertheless, because of their strategic locations and the large volume of interstate traffic hauled by them. While operating as and enjoying all the privileges and powers of common carriers, generally speaking, these roads are but mere departments of the industrial corporations which own or control them and whose traffic is transported by them. *The statute does not forbid the ownership of the roads by corporations*, yet the evils of discrimination and preference resulting from such ownership are equally detrimental as when the carrier owns the manufacturing or producing company." (Emphasis supplied.)

That contention, which Congress did not accept, is identical in substance with contentions which the Government now makes to this Court. It is perfectly clear that the Attorney General who submitted that Report did not believe that the Commodities Clause was open to the construction for which his successor now argues.

The attempts of the Attorney General before Congress to obtain such an amendment of the Clause, like his attempts before this Court to obtain such a construction of it, were unsuccessful.

In seven of his Annual Reports to Congress between 1908 and 1928 the Attorney General attacked the Clause, as construed by this Court, upon the ground that is was ineffectual, and recommended its amendment.

In his Report dated December 10, 1909 (pp. 3, 4) after summarizing the Court's conclusions in the *Delaware & Hudson* case, he stated that under that construction the application of the Clause could be avoided by transferring mining or producing property "to a corporation, all of whose stock shall be owned or controlled by the carrier", and recommended that "Congress should amend the statute so as to make it an effectual and not an illusory prohibition or else repeal it." When the Mann-Elkins Act of 1910 was under consideration by Congress four proposals to amend the Commodities Clause to comply with that recommendation were submitted. They were not enacted.[22]

The Attorney General renewed his recommendation in his Report dated December 10, 1910 (pp. 6-7), and a bill to effectuate such amendment was introduced in the House of Representatives.[23] It failed to be enacted.

Thereafter four Annual Reports dated, respectively, December 7, 1914 (pp. 5-6), December 6, 1915 (pp. 7-8), December 4, 1916 (pp. 7-8) and December 4, 1917 (pp. 7-8) contained the recommendation, in identical language, that the Clause be amended to forbid transportation of commodities of a railroad company "or any corporation controlled by it or affiliated with it by having the same controlling stockholders. * * * On December 31, 1914, a bill designed to carry out that proposal (the Adamson Bill)

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[22]45 Cong. R. 5590-5591; 5594-5595; 7207-7208, 7218, 7251-7252 (1910).

[23]H. R. 26983, 61st Cong., 2nd Session (1910).

was submitted in the House of Representatives.[24] Upon that bill the Committee on Interstate and Foreign Commerce of the House of Representatives held a hearing, at which the Assistant Attorney General appeared and gave testimony[25] as to "why the present law does not separate transportation from production", two of the three reasons being:

> "The second reason is that it has been held that a railroad company has no interest, direct or indirect, in an article owned by a coal company whose stock in turn is owned by the railroad company, unless the railroad company has in the particular case so exerted its stock control over the coal company, so commingled the affairs of the two as to make the coal company a mere department of the railroad company. The third deficiency is that under existing law, by its terms at least, a producing or manufacturing company is not prohibited from owning and operating a railroad company. *Of course, I take it that no one desires to prohibit a manufacturing company from owning a railroad company as a mere plant facility. What I mean is that under existing law there is nothing to prevent a manufacturing company from owning what is virtually a trunk-line railroad company.*" (Italics ours)

No further action was taken upon the bill.

Again in his Report dated December 5, 1927, to which we have referred, the Attorney General renewed his recommendation.

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[24]H. R. 20470, 63rd Cong., 3rd Session (1914). A similar bill, S. 7150, was introduced in the Senate.

[25]Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 20470, 63rd Cong., 3d Sess., January 15, 1915, pp. 9-10. U. S. Senate Library Hearings, Volume 96, No. 5 (1915).

No amending legislation ever resulted.

The Government argues that the proposed amending legislation to which we have referred would have rendered transportation unlawful if there existed any stock relation, however small, between the railroad company and the producing company whose commodity the railroad company transported, and that Congress rejected such proposed legislation for that reason. The Government says, also[26], that "the attention of the Senate was not focused on the situation where the shipper was a wholly owned subsidiary of the railroad, or *vice versa*, or where shipper and railroad were wholly owned subsidiaries of a common parent." Neither statement is true.

Immediately before Senator Tillman offered his second proposed amendment to the Elkins Amendment (the proposed Commodities Clause which was adopted), to which the Government refers above, he had pointed out to the Senate[27]:

> "* * * that this amendment [the Elkins Amendment] would not prevent the ownership of coal properties by the ownership of stock in coal companies; that it would not prevent the control of coal companies by officials of railway companies; that it would not touch the ownership of railroads by coal companies or the common ownership of railroad companies and coal companies. * * *"

Congress has been kept constantly aware of those facts ever since, as we have shown.

Nor is it generally true that the proposed amending legislation might have rendered transportation unlawful

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[26]Gov't Brief: pp. 57-58.
[27]40 Cong. R. 7011-7012.

where any stock relation existed between carrier and shipper. For example, the Adamson Bill[28] would have forbidden the transportation only of commodities owned or produced by a railroad company or:

> "* * * by any person, firm, or corporation subject to its control, or to whose control it is subject through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as it has or is otherwise subject to the same control."

And the proposed Section 12[29] of the Transportation Act of 1940, likewise, would have forbidden transportation only of commodities:

> "* * * manufactured, mined, or produced by or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or any such article or commodity in which such carrier, subsidiary, affiliate, or controlling person has any interest, direct or indirect, legal or equitable, * * *"

It is futile to argue that such proposed statutes would have applied to transportation where the only relation between carrier and producer or owner consisted of a minority stock interest falling short of actual control or, in view of the reports made to Congress and the debates in Congress, that Congress rejected them on any such ground.

Thus in the *E. J. & E.* case, when the Court was urged to change its construction of the Clause respecting the

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[28] H. R. 20470 and S. 7150, 63rd Cong., 3rd Session.

[29] S. 2009 as introduced in the Senate, March 30, 1939, pp. 44-45. The proposed Section 12 is set out in full at page 100, *infra*.

effect of stock ownership because a holding company was involved, it justifiably said (298 U. S., at p. 500):

> "Notwithstanding the intent imputed to Congress by this opinion,[30] announced in 1915, no amendment has been made to the Commodities Clause. We must, therefore, conclude that the interpretation of the Act then accepted has legislative approval."

Moreover, Congress was kept fully informed of the pendency, the progress through the courts and the ultimate disposition of the *E. J. & E.* case. Each of the Reports of the Interstate Commerce Commission to Congress, beginning with the Report for 1931 and concluding with the Report for 1936[31] comments upon the case, and the last report (for 1936) clearly states the substance of this Court's decision.[32]

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[30]The Court's opinion in the *Delaware, Lackawanna & Western Railway* case, 238 U. S. 516, is referred to. The opinion states (p. 526) "that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock", and that "For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company."

[31]Interstate Commerce Commission, 45th Annual Report (1931), pp. 15-16; 46th Annual Report (1932), p. 51; 47th Annual Report (1933), p. 44; 48th Annual Report (1934), p. 46; 49th Annual Report (1935), p. 53; 50th Annual Report (1936), p. 50.

[32]That Report (the 50th Annual Report) states concerning the decision (p. 50): "The Supreme Court held that (1) it was impossible for it to declare as matter of law that every company, all of whose shares are owned by a holding company, necessarily becomes an agent, instrumentality, or department of the latter; (2) whether such intimate relation exists between the two corporations is a question of fact to be determined upon evidence; and (3) the evidence failed to support the claim of the Government that the carrier must be regarded as the alter ego of its sole stockholder."

Hence in 1939, when the Transportation Act of 1940 was before Congress, that body was fully informed concerning the construction which this Court had placed upon the Commodities Clause, and concerning all the grounds, legal and economic, upon which the Government, in the present case, criticises the Clause as so construed. As shown by the reports to Congress, and more particularly by the provisions of section 1(3)(b) of the Act, Congress knew that the power of one corporation to control another through stock ownership was not sufficient to bring the Clause into operation, and that the ownership by a holding company of all the stock of a producing company and all the stock of a railroad company was likewise not sufficient to bring the Clause into operation. None the less Congress rejected as "far too drastic", an amendment of the Clause which would have placed corporations so connected through such stock inter-relations within its scope, and provided that stock ownership and the exercise of rights normally incident to such ownership should be treated as actual control only for the limited purposes specified in section 1(3)(b). In view of that fact, and of the uniformly similar history of all prior attempts to amend the Clause, the intent of Congress not to place corporations related merely through stock ownership within its control is clear by every standard available for the ascertainment of such intent. This Court, we submit, cannot now abandon a construction of the Clause so repeatedly stated in its decisions, so long maintained by it and so unmistakably approved by Congress.

Faced with such legislative, judicial and administrative history, the Government rests substantially the entire burden of its case upon the contention that "* * * Congress, in

enacting the Commodities Clause, sought to achieve genuine divorcement of the functions of interstate railroad transportation and production."[33] Only that contention gives any semblance of merit to the argument that the South Buffalo, as an owned and a completely dominated instrumentality of the Holding Company or of the Steel Company, has an "interest, direct or indirect"[34] in the commodities of those two appellees, or that the Holding Company or the Steel Company is a "railroad company" which transports such commodities from one state or territory to another.[35]

The argument that the purpose of the Commodities Clause was to bring about "a genuine divorcement of the functions of interstate transportation and production" faces many objections, particularly, where a railroad company transports the commodities of the industrial owner of its stock. It was repudiated by the three-judge District Court in the *E. J. & E.* case,[36] and the brief to this Court of the appellee in that case presents a convincing argument against it. It has been questioned, if not repudiated, by prior Attorneys General on more than one occasion. But however valid that argument may be when applied to interstate line-haul transportation, it clearly is not true in the case of terminal switching and related terminal services. For Congress, when it enacted the Commodities Clause, also enacted, in the Shippers' Allowance Clause, that "if the owner of property transported under this Act directly or indirectly renders any service connected with such trans-

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[33]Gov't Br. p. 29.

[34]Such "interest, direct or indirect" means a property interest in the commodity. *United States* v. *Delaware & Hudson Co.*, *supra*; 213 U. S., at pp. 413, 415.

[35]This subject matter is briefed at length in Point III.

[36]See *infra*, p. 100.

portation, or furnishes any instrumentality used therein," such owner shall be paid reasonable compensation by the railroad carrier for which such service is performed. Thus, it is clear that at the level of terminal services, Congress explicitly sanctioned the union of production and transportation. The legislative, the judicial and the administrative history of the Shippers' Allowance Clause all make clear that it was intended to apply to terminal services, including terminal switching, when performed by a terminal switching road owned by a shipper or consignee.[37] Hence, at least for purposes of this action and appeal, the argument based upon such supposed legislative purpose to divorce production from transportation, far from supporting the Government's case, is actually an overwhelming argument against it.

[37]Briefed, *infra*, pp. 92 *et seq.*

POINT II

THE TRIAL COURT'S DETERMINATION THAT THE HOLDING COMPANY AND THE STEEL COMPANY DO NOT DOMINATE OR CONTROL THE SOUTH BUFFALO OR THREATEN TO DO SO, AND THAT THEY HAVE NOT DONE SO SINCE 1939, IS SUPPORTED BY SUBSTANTIAL EVIDENCE. IN VIEW OF THAT DETERMINATION, THE TRIAL COURT'S DISMISSAL OF THE ACTION UPON THE MERITS WAS PROPER.

A. The findings support the judgment.

In *Walling* v. *Hardwood Co.*, 325 U. S. 419, 421, this Court said:

> "* * * While 'voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power,' *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43, it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts. Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445. We cannot say, therefore, that the District Court abused its discretion in refusing to enjoin the abandoned method of wage payments."

In the *Walling* case the trial court had found and determined that "the respondent had no apparent intention of resuming" the unlawful practices complained of (p. 421). In the present case the Trial Court made a similar finding and determination. The decision states (R. 922-923):

> "9. Since December 5, 1939, there has not been nor is there now any threatened domination of South

> Buffalo by the Steel Company or the Holding Company, and there is no probability or present danger of any recurrence of the exercise of control or domination by the Holding Company or the Steel Company over the affairs of the South Buffalo."

That determination is supported by important subsidiary findings which, in turn, are supported by convincing and generally uncontroverted evidence.[1]

In the *Walling* case the trial court found that there had been "no willful intention on the part of the respondent to violate the Act" (p. 421). In the present case the vice-president of the Holding Company testified that after the opinion in the *E. J. & E.* case was called to his attention (R. 123) an investigation of the relations between the Steel Company and the South Buffalo was undertaken by the Holding Company, in the course of which it developed that "prior to that time there had been some degree of control or, rather, supervision by the manager of the Steel Plant" at Lackawanna, and that "there were instances where the theory of management had, to some extent, slopped over." The Trial Court found that after the *E. J. & E.* decision came to the attention of the Holding Company's officers, the Holding Company (FF. 30, R. 916):

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[1] As we have pointed out (pages 14, 15, *supra*), the Trial Court's findings of fact relating to the period since December 5, 1939, are based upon the testimony in open court of all but one of its directors and ranking executive officers, of several of its minor executive officers and department heads, and of many other witnesses. Thus the rule applies, that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52(a), Rules of Civil Procedure for the District Courts of the United States.

> "* * * entered into an investigation of the relation and practices existing between South Buffalo and the Steel Company and ascertained that the Steel Company at Lackawanna, New York, was then exercising a degree of interest in supervision and domination over South Buffalo."

The Holding Company's vice-president further testified that, following such investigation the relations between the South Buffalo and the Steel Corporation were reviewed, and (R. 136):

> "* * * The decision reached was to have the railroad company so organized that it would be completely independent of any control or influence by the operating and other departments of the Bethlehem Steel Company, and as far as possible, completely independent of the Bethlehem Steel Corporation itself so far as its management and control went."

Instructions to that effect were given to the officials of the Steel Company at Lackawanna (R. 137, 138). The Trial Court found (FF. 30, R. 916):

> "* * * The Holding Company then took steps with the purpose to preclude the continuation and the exercise of any degree of interest, supervision or domination over South Buffalo by the Steel Company. Instructions were given to the officials of the Steel Company that thereafter no advice, instructions or assistance to the South Buffalo should be given by the Steel Company and there should be no interference by the officials of the Steel Company in the operation or management of the South Buffalo."

Thus the case is not one in which the Holding Company, as an habitual offender, abandoned unlawful practices in the

face of litigation. It is, rather, one in which the Holding Company, following this Court's restatement of the law in the *E. J. & E.* case, reviewed the relations between the Steel Company and the South Buffalo, found that apparently, at times, Steel Company officials had overstepped their authority, and took all steps necessary to eliminate that situation and to bring the corporate relations of the parties into complete conformity with the law as then construed by this Court.[2] Those steps were taken almost 4 years before the commencement of this action. The Trial Court said concerning them (R. 904) that "the evidence supports the conclusion that the reorganization as perfected in 1939 was entered into in good faith * * *."

The steps taken by the Holding Company to prevent further domination of, or interference with the affairs of the South Buffalo were clearly adequate. Both South Buffalo and Steel Company officials[3] were instructed by the Holding Company that thereafter the South Buffalo's affairs were to be conducted without benefit of advice and free from interference by the Steel Company (R. 916). The South Buffalo's executive management was completely

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[2]Thus as the Court said with respect to the Sherman Act in *Maple Flooring Ass'n* v. *United States*, 268 U. S. 563, 577:

> "We think it might be urged, on the basis of this record that the defendants, by their course of conduct, instead of evidencing the purpose of persistent violators of law, had steadily indicated a purpose to keep within the boundaries of legality as rapidly as those boundaries were marked out by the decisions of courts * * *."

[3]Petty was given to understand that he was to run the South Buffalo (R. 244) and later learned that the manager of the Steel Company's plants at Lackawanna had received instructions to keep hands off (R. 243). Petty instructs his subordinates not to consult with Steel Company officials concerning how the South Buffalo shall be run (R. 599).

reorganized. Its former president was demoted to first vice president and a new president, qualified to give it top-flight administrative and engineering guidance, was elected. Seven of its nine directors resigned and were replaced by new directors, of whom five had had no previous or other connection with any other Bethlehem company (R. 904; FF. 33, R. 917). A new chief engineer was elected (R. 597), and also a new secretary-treasurer (R. 696). A short time later Benning, for many years the South Buffalo's vice president and general superintendent and major participant in the alleged acts of domination referred to in the Government's brief, resigned and was replaced (R. 696).[4]

The fact (found by the Trial Court) that at all times since December 5, 1939, a majority of the South Buffalo's board of directors has consisted of local business men, experienced in the management of corporations, who had not had any prior or other connection with any Bethlehem corporation (FF. 33, 34, R. 917), lends strong support to the determination that no domination in the future is threatened or probable. Such outside directors are not open to any of the criticisms or alleged grounds of suspicion asserted against the South Buffalo's officers. And in spite of the contentions of the Government to the contrary[5] it is entirely clear, both in fact and law, that the directors have the power to operate, dominate and control the South Buffalo and that such ultimate power as the Holding Com-

[4] At the time of the trial none of the major participants in the transactions found to represent or to involve domination of the South Buffalo prior to December 5, 1939, and only three of the officials extensively referred to in the testimony relating to that period—Trageser of the South Buffalo and Gross and Entwisle (since deceased) of the Steel Company—were associated with any of the appellees.

[5] Gov't Br., p. 44.

pany may have to control its affairs can be exercised only through the Holding Company's power to name the members of the Board. In this case, that power has been exercised in favor of persons whose circumstances are not such as to render them subject to the Holding Company's domination or influence. The Trial Judge, who saw and heard the testimony of all five outside directors, said concerning them (R. 907; 69 F. Supp.):

> "* * * The outside directors are all of them men of business experience and most of them have been or were connected with business interests of considerable importance and volume. The ability of each member of the Board is clearly demonstrated. The Board met regularly and as is the case usually in the work of any Board of Directors, it considered and acted on all matters presented by its officers. Necessarily they depended to a large extent upon the recommendations of these officials who had direct and immediate charge of operation. Each of these outside directors testified that at no time had he any understanding with the Steel Company or the Holding Company or any of their officers or representatives as to what action should be taken by them. So far as this record discloses, each of the directors has performed his duties in the sole interest of the railroad. * * *"

The Trial Judge clearly was entitled to give substantial weight to those facts in determining whether the purpose of the Holding Company was or was not to dominate the South Buffalo, and whether such domination in the future was or was not contemplated or probable.

Finally, the Trial Judge found, not once only, but repeatedly and in many forms, that there had not been any domination since December 5, 1939 (Findings Nos. 35

through 38; 40; 47; R. 917, 918, 921), and specifically that (R. 921):

> "47. Since December 5, 1939, the officers and directors of South Buffalo have operated and carried on the business and management of the South Buffalo Railroad independent of and from the Holding Company and the Steel Company, either or both. * * *"

Thus in this case, as in *United States* v. *United States Steel Corporation*, 251 U. S. 417, 445, which this Court cited and followed on that point in *Walling* v. *Hardwood Co.* (*supra*):

> "* * * There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no 'dangerous probability' of their resumption, the test for which *Swift & Co.* v. *United States*, 196 U. S. 375, 396, is cited. * * *"

The judgment is clearly supported by the findings, and clearly lay within the judicial discretion of the Trial Court.

B. There is no proof that the Holding Company ever dominated the South Buffalo.

The Trial Judge's findings of fact do not make entirely clear his views concerning the relation, if any, between the Steel Company and the Holding Company with respect to the supposed domination of the South Buffalo prior to December 5, 1939. On the one hand as pointed out, he found that after the decision in the *E. J. & E.* case had come to the Holding Company's attention it "entered into an

investigation" of the relations between the South Buffalo and the Steel Company "and ascertained" that the latter was intervening unduly in the former's management, whereupon the Holding Company "took steps * * * to preclude the continuation and the exercise" of such intervention (FF. 30, R. 916). And on the other hand, he found that prior "to about December, 1939, the Holding Company and the Steel Company in numerous ways and on numerous occasions" dominated the South Buffalo, and that "The Holding Company required officials of South Buffalo in certain instances [which the finding then enumerates] to apply to officials of the Steel Company for guidance, advice, and decisions in respect of South Buffalo's" relations to shippers and its internal management (FF. 26, R. 914).

The Trial Judge also found that the two contributions which the Holding Company made to the South Buffalo in 1936 "were decided on by the Holding Company without prior consultation with South Buffalo", that "South Buffalo's journal entry on this matter was approved by the Holding Company" (which is true), and that "South Buffalo took no part in any action leading to this [$1,900,000] contribution * * *." On the other hand, he found that "South Buffalo was advised of the purpose and the proposal" to make the contributions, and that "an officer of the defendant [obviously the South Buffalo] was advised of the general purpose of the Holding Company with respect to" the $1,900,000 contribution (FF. 25, R. 914). His opinion states that "The Holding Company had a right, as creditor and sole stockholder, to initiate the contribution proceedings and to lay down terms, but in ignoring the railroad in them, it indicates the exercise of the power of control over the railroad" (R. 903).

The foregoing are the only findings of fact which in any manner implicate the Holding Company in the alleged domination of the South Buffalo prior to December 5, 1939. Upon the basis of those findings the Trial Judge concluded that "preceding 1939, domination and control of the South Buffalo was so exercised by the Holding Company through its own activities and that [sic] of its subsidiary, the Steel Company, that the South Buffalo became thereby an agent or instrumentality or department of the Holding Company or of its subsidiary, the Steel Company" (R. 922).

Thus the findings contain two identifiable factual charges against the Holding Company:

First that "The Holding Company required officials of South Buffalo" to apply to officials of the Steel Company "for guidance, advice and decisions" in certain instances (FF. 26, R. 914).

Second that in 1936 the Holding Company did not consult South Buffalo concerning the two capital contributions made in that year (f. 25, R. 914).

Neither finding is supported by evidence.

1. *The finding that the Holding Company required the South Buffalo to apply to officials of the Steel Company for guidance and decisions.*

The record does not contain any evidence which supports any such finding.

Except for the testimony of the Holding Company's vice-president, Mr. McMath, the record is barren of evidence concerning the Holding Company's attitude toward the South Buffalo, and concerning the Holding Company's intent or understanding concerning the relations between the Steel Company and the South Buffalo prior to its investigation thereof after the decision in the *E. J. & E.*

case was brought to the attention of its officials. Mr. McMath's testimony concerning those subjects is as follows:

First, he *assumed* that the South Buffalo was receiving technical advice and some assistance, relating mainly to engineering matters, from officials of the Steel Company at Lackawanna. He testified that the South Buffalo's president (R. 123):

> "* * * made use to some considerable extent, possibly, of the organizations which Bethlehem Steel Company had for the operation of their steel plants; those plants had fully developed and well-trained organizations, engineering talent, and I guess capable of doing almost anything, and to some extent in the course of his work where there were operating problems such as the most desirable motive power, things of that kind, they could be and were a real help. * * *".

Second, he understood that the South Buffalo was not required to accept such advice. He testified (R. 126-127):

> "Q. Prior to 1939, you did expect, did you not, South Buffalo Railway Company to observe the wishes, counsel and advice of the Bethlehem Steel Company manager at Lackawanna in dealings between the South Buffalo Railway Company and the Steel Company?
>
> "A. No; no more than you would expect the South Buffalo Railway Company * * * to know and, so far as practicable, conform with the wishes of their customer. * * *"[6]

[6] His testimony has solid support in the testimony of the manager of the Steel Company's plants at Lackawanna that giving advice to South Buffalo was "* * * none of my business * * *" and that "* * * They [the South Buffalo] could follow my advice or not as they saw fit." (R. 820).

Third, he believed that advice given by the Steel Company did not relate to the activities of the South Buffalo as a common carrier, or its relations to its customers. He testified (R. 126):

> "* * * I may say that as far as I know the reliance upon the local plant managers in the case of the South Buffalo Railway and in the case of the other railroads had to do largely, if not solely, with questions relating to the best and most efficient way of doing business. I don't believe that they were consulted on questions relating to the, let's say, the discharge of the duties of the railroad with respect to the public; in other words, any questions of service to the other . . .
>
> "Q. When you say 'to the other', who do you mean?
>
> "A. The other shippers along the line I mean.
>
> "Q. Shippers other than Bethlehem Steel Company?
>
> "A. Other than Bethlehem Steel Company; I would certainly not expect them to have or exercise any control there, and as far as I know, they never did. * * *"

Fourth, it is not the policy of the Holding Company to supervise the activities of its subsidiaries. He testified (R. 152):

> "* * * Our system of management has been, so far as the Corporation is concerned, largely to select people whom we believe to be competent to manage the activities of the various subsidiary companies, and then to let them manage them."

Fifth, his understanding that officials of the Steel Company may have overstepped their authority was based upon

his subsequent investigation of the facts. The Record shows (R. 125):

> "Q. Was it your opinion when you testified in Buffalo in 1943 that prior to the time the instructions were given to the officers of the Bethlehem Steel Company at Lackawanna that the manager of the Steel Company's properties there did exercise some degree of control or supervision over the activities of South Buffalo Railway Company?
>
> "A. Yes.
>
> "Q. On what did you base that feeling or belief or opinion?
>
> "A. I think it was largely questions and answers—investigation, etc.—which did disclose that they had done things up there which were a little bit beyond what was in my mind they were doing, * * *"[7]

None of Mr. McMath's testimony supports the view that the Holding Company issued any instructions prior to December, 1939, concerning the operation of the South

[7]Mr. McMath's answer continues (R. 125):

> "* * * we started in after the E. J. & E. case looking into what had happened and we found that there were certain things which had happened which might possibly be within the language, at least of the minority decision, of the Court in that case, and our counsel said that now that had better come to an end; that if there has been anything of that kind at South Buffalo or anywhere else it should be stopped, and whatever safeguards were necessary should be put in effect so it wouldn't happen again, and that is what I had in mind in answer to your qestion as to the change that occurred in 1939. At that time, however, sensible and wise it may have been from the viewpoint of economy to get the benefit of a trained organization in the steel plant, we were obliged, under the advice of our general counsel, to discontinue it; and that, as I understand it, was done."

Buffalo or its relations to the Steel Company. None of this testimony indicates that the Holding Company was aware of any reliance by the South Buffalo upon the Steel Company except as shown above.

No one else who was ever associated with the Holding Company gave testimony in the case except John M. Gross. His association with it commenced in 1940 (R. 176), after the South Buffalo's executive management had been reorganized. He was not interrogated and did not testify concerning the relations between the Holding Company and the South Buffalo or the Steel Company before December, 1939, nor concerning any instruction or communication by the Holding Company before that date relative to the South Buffalo, nor as to his understanding concerning the policy of the Holding Company with respect to the relations between the South Buffalo and the Steel Company prior to that date, nor concerning any related topic.[8]

No one associated either with the South Buffalo or with the Steel Company was interrogated, or gave any testimony whatever concerning advice, suggestions, instructions or communications of any sort by the Holding Company respecting the Steel Company's control or management of, or its relations to the South Buffalo, except the instruction, in or about December, 1939, that the Steel Company should

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[8]Thus the statement, at page 13 of the Government's brief, that "Testimony of high officials of the Holding Company and Steel Company disclosed the basis upon which South Buffalo's routine problems were resolved for it by the Steel Company" is doubly misleading, first because it indicates that "high officials of the Holding Company" gave testimony, and second because it indicates that the Steel Company not only gave advice but made decisions affecting the South Buffalo, and that it did so with the Holding Company's knowledge and approval.

not intervene in the South Buffalo's affairs. Nor did any person associated with either testify concerning his understanding as to what the Holding Company demanded or expected of either company relative to the South Buffalo's operations or its relations to the Steel Company prior to December, 1939.

Nor does any documentary evidence support such finding of the Trial Court. It is a notable fact that the Government, after extended examinations of the appellees' records, could find only two groups of documents running between the Holding Company and the South Buffalo, and did not find any documentary communication running between the Holding Company and the Steel Company, which it thought worth offering in evidence. Of the two groups of documents referred to, the first, consisting of 13 documents dated late in 1936 and early in 1937, relate to the two contributions that the Holding Company made to the South Buffalo in the autumn of 1936, to which we have referred above (Pl. Ex. 129-141; R. 776-787). The second group consists of two letters, written, respectively, by the Holding Company's Comptroller and the South Buffalo's President, in September, 1943, relating to accounting data required of the South Buffalo by the Holding Company's Comptroller in order to prepare necessary reports for the stockholders of the latter (Exhibits 81, 82; R. 746-750). Neither group of exhibits relates in any way to any requirement imposed or resting upon South Buffalo to apply to any official of the Steel Company for any purpose. Except for a Registration Statement which the Holding Company filed with the Securities and Exchange Commission, parts of which the Government offered in evidence (Pl. Ex. 3 through 11) but which

it has not thought worth printing and which, certainly, is silent upon the question under discussion, the foregoing are the only documents in the record to which the Holding Company was a party, either as writer or as addressee. Certainly if it had been the purpose of the Holding Company to dominate the South Buffalo, or to delegate that function to the Steel Company, some document evidencing that fact would have been uttered by the appellees at some time in the course of the 24 years during which they were affiliated. But such a document cannot be found in the record. Neither the documents described above nor any of the other documents which were received as exhibits in the case refer in any way to any requirement of the Holding Company affecting the relations between the South Buffalo and the Steel Company.

2. *The finding that the Holding Company did not consult the South Buffalo concerning the two contributions to its capital, which the Holding Company made in 1936.*

The Trial Court found that the two contributions which the Holding Company made to the South Buffalo in the autumn of 1936 "were decided on by the Holding Company without prior consultation with the South Buffalo", but that "the South Buffalo was advised of the purpose and the proposal" to make them. The Court also found, with respect to the second ($1,900,000) contribution, that "South Buffalo took no part in any action leading to" that contribution, but that "an officer of the defendant [the South Buffalo] was advised of the general purpose of the Holding Company with respect to" it (FF. 25, R. 914). *The Court did not find that those facts indicate domination.* (Italics ours)

The Trial Court's opinion,[9] however, states that the failure to consult the South Buffalo "indicates the exercise of the power of control over the railroad" (R. 903). When the proposed findings of fact were presented to the Trial Court, counsel for the appellees submitted a brief thereon,[10] which contested that statement, and also contested the statement in the opinion that "The railroad does not appear to have been consulted or to have had any part in" the decision respecting the contributions (R. 903), and pointed out evidence to the contrary which, they believed, the Trial Court had overlooked. When the findings were signed they omitted the statement that failure to consult the South Buffalo indicates the exercise of the power of control, and also the statement that the Sou. Buffalo had not been consulted respecting the contributions, and added the statement that South Buffalo had been "advised of the purpose and the proposal" to make the contributions, and also the statement that one of its officers "was advised of the general purpose of the Holding Company with respect to" the second contribution.

Thus it seems clear that the statement in the Trial Court's opinion that the course pursued by the Holding Company "indicates" domination was found by the Court to have been unwarranted upon further study of the record. It cannot reasonably be argued that a debtor-subsidiary which had been "advised of the purpose and the proposal" of its creditor-parent to make contributions to its capital in

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[9]The opinion precedes the findings by more than two months (R. 2).

[10]The brief, dated January 7, 1947, was mailed from New York direct to Judge Knight. It apparently was not entered in the Clerk's Docket (R. 2).

order to eliminate the debt and place it upon a dividend-paying basis was so ignored or slighted as to warrant a finding of domination, simply because such creditor-stockholder "decided on" the means by which to eliminate the debt "without prior cousultation" with it. Indeed, considering the kind of question presented and the clear legal rights vested in the Holding Company, both as creditor and as stockholder, the distinction, attempted to be drawn by the Trial Court, between prior notification of the purpose and the proposal and prior consultation concerning it appears to be a distinction without a difference. In any event the record does not show that a prior consultation was not had. That issue was not injected into the case until after the trial had been concluded. All the testimony cited as bearing upon it was actually directed to other issues.

The amended complaint did not allege that the Holding Company had not consulted the South Buffalo concerning the contributions. What it did allege concerning them was that "No shares of stock or other corporate securities or legal obligations were ever delivered or issued by the South Buffalo to the Holding Company" in connection with them, and that they were not "noted, recorded or audited as a loan, nor was any interest ever paid" upon them (Am. Compl't, par. 18, subds. (f) and (g); R. 10). Upon that issue extensive testimony was taken and the grounds and purposes of the contributions were explained (R. 121, 128-132; 134-135; 148; 198-200) so thoroughly that that the close of the trial, as noted by the Court's opinion, "The fact of the contributions is not criticised" (R. 903; 69 F. Supp. at p. 465).

The South Buffalo's indebtedness to the Holding Company had been a matter of concern to its officers and direc-

tors, and had been under discussion between them and representatives of the Holding Company for some time before the contributions were made (Pl. Ex. 129, R. 776-779). The Holding Company's first contribution to the South Buffalo was made pursuant to a resolution of the Holding Company's Board of Directors (Pl. Ex. 130, R. 779-780). The contribution was received by South Buffalo as representing an additional investment in its stock, and South Buffalo's journal voucher to that effect was approved by the Assistant Comptroller of the Holding Company (Pl. Ex. 140; R. 787).

The Government's brief (p. 17) comments (apparently with adverse implications) upon the fact that the deficit which this first contribution was intended to eliminate was shown upon the South Buffalo's books as being in amount, $46,163, while upon the Holding Company's books it was shown to be $211,616, and that the contribution made was in the latter amount. The reason for the difference in amount was that the Treasury Department, for tax purposes, permitted depreciation upon the South Buffalo's roadbed at a higher rate than was permitted by the Interstate Commerce Commission (R. 128-129). Under the circumstances the determination that the contribution should be in the larger amount is too obviously appropriate to require comment.[11] The Trial Court did not, and indeed could not, hold that such course indicated domination.

The Holding Company's second contribution was originally intended by it to be, and was accepted by South Buffalo as representing a purchase of South Buffalo's stock

[11]Under Section 664 of the New York Penal Law, payment of dividends when capital is impaired subjects directors to criminal liability.

(Pl. Ex. 131, 132; R. 780-782), but it later developed that the sale of such stock was not practicable because the stock, if issued, would have been required to be pledged under the provisions of an outstanding mortgage (Pl. Ex. 133, 134; R. 782-734). The parties therefore agreed that the second contribution should be made and received as a contribution to South Buffalo's capital (Pl. Ex. 135; R. 784-785). South Buffalo's journal vouchers show that the second contribution was first received as representing a subscription for stock, but that those vouchers were canceled (Pl. Ex. 136, 139; R. 785, 786) and new vouchers made out, which recited that the contribution represented an additional investment in South Buffalo's stock (Pl. Ex. 137, 138; R. 785, 786). The purpose of the approval of the journal entries by a representative of the Holding Company was to insure uniform treatment of the contributions in the accounts of the two corporations.[12] It is not claimed that in any other instance the Holding Company supervised the South Buffalo's records. And these were the only contributions which the Holding Company ever made to the South Buffalo.

The testimony cited by counsel for the Government to the Trial Court in support of the view that the South Buffalo was not consulted concerning the making of these contributions consisted of a single question and answer taken from a long examination of Mr. Trageser, vice president (and former president) of the South Buffalo, the obvious purpose of which was to support the Government's original contention that the making of the cont " .tions was not justified by the circumstances (R. 196-201). In

[12]Such correspondence between journal entries was particularly necessary for purposes of the Holding Company's consolidated balance sheets and reports to its stockholders.

the course of that examination, he was asked whether the South Buffalo's creditors were pressing it for payment, and replied that they were not. He was then questioned as follows, and gave the following answers (R. 198):

> "Q. What can you tell us concerning the circumstances surrounding *the making* of those contributions to South Buffalo Railway by the Bethlehem Steel Corporation?
>
> "A. Only that I was advised that there was a tax problem, and a problem concerning undistributed profits, and that with respect to those problems it was thought advisable for the South Buffalo Railway Company to liquidate its indebtedness to Bethlehem Steel Corporation, and that the Corporation was agreeable to making an additional investment in the capital stock of the Railway, *and there were discussions with regard to the issuance of that stock and the liquidation of the indebtedness in that way.*
>
> * * * * * * * *
>
> "Q. Was the South Buffalo Railway agreeable to the issuance of stock?
>
> "A. Yes." (Emphasis supplied)

He also testified that (R. 198):

> "A, * * * the matter ran along until into December, and I was advised that it was necessary to conclude it before the end of 1936, and the proposition of issuing stock was abandoned and the liquidation took the form of a contribution—as a gift—from the stockholder, Bethlehem Steel Corporation, to its subsidiary, South Buffalo Railway Company."

He consulted with counsel concerning the propriety of that arrangement (R. 200) and upon being advised that it was appropriate, signed an agreement modifying the

prior agreement. Thus the proof, though not directed to that issue, clearly discloses that the South Buffalo was not ignored when the contributions were planned and made, and that a different finding would have been contrary to the evidence.

Those two contributions are the only business or financial transactions between the Holding Company and the South Buffalo during the entire 24 years of their association as parent and subsidiary concerning which proof was offered. Aside from them the only action, shown by the Record,[13] taken by the Holding Company and affecting the South Buffalo is, we repeat:

The sponsoring of a single executive management for the seven subsidiary railroads in 1933;

The election of a new executive management for South Buffalo in 1939;

The agreement in 1943 concerning accounting data to be furnished by South Buffalo to the Holding Company's comptroller to enable him to prepare the required reports and balance sheets for the stockholders of the latter.

Thus the evidence clearly shows that the Holding Company did not "ascertain" that the Steel Company was unduly interfering in the South Buffalo's affairs until its investigation in 1939 (R. 916). That finding is neither consistent nor reconcilable with the finding of fact (if the Trial

[13] The record shows or indicates that the South Buffalo submitted accounting reports to the Holding Company and at times paid dividends to it, that the Holding Company had in some manner advanced to the South Buffalo the funds representing the indebtedness which was cancelled by means of the contributions, and that the Holding Company regularly elected the South Buffalo's directors, but except to the extent noted the Record is silent concerning those subjects.

Court so intended it) that the Holding Company "so dominated" the South Buffalo "as to effect a commingling of the identity and community of interest [sic] among" the three appellees, and that the Holding Company "required" South Buffalo officials to apply to Steel Company officials for guidance. The latter "finding" is actually a conclusion of law, is not supported either by other findings (compare *Interstate Circuit* v. *United States*, 304 U. S. 55) or by any evidence, and cannot be regarded as overruling or conflicting with the Court's explicit finding as to the time and manner of the Holding Company's ascertainment of the relations and practices existing between the other two appellees, to which we have referred.

The Government, in an attempt to show that in fact the Holding Company directly or indirectly dominated the South Buffalo, advances four grounds upon which, it contends, such a finding of actual domination may rest. One ground is that the Holding Company's two contributions to the South Buffalo in 1936 represent such domination (Br. p. 74). That question has been fully presented, and since the Government's argument throws no new light upon it we shall not brief it further. The other grounds are as follows:

First, the Government contends that "The domination of South Buffalo (in the interest of its producing sister-subsidiary) flowed directly from the management theories of the Holding Company." (Br., p. 64; see also pp. 65-67; 73). The Court will observe that the "management theories" thus referred to are completely at variance with the theory of management concerning which Mr. McMath testified. His testimony showed, in substance, that stated activities were assigned to stated persons and that, pursu-

ant to such theory Messrs. Kemmerer, Trageser and Petty were elected, consecutively, as presidents of the seven subsidiary railways. The "management theory" for which the Government now contends is entirely different. Under that theory all activities in a given plant area, regardless of the character of such activities, are under the control of the plant manager. No evidence in the record supports any such "management theory."

The Government's Brief next points out that prior to 1940 the South Buffalo and the Steel Company had offices in the same buildings at Bethlehem and at Lackawanna, and states that at Lackawanna "South Buffalo and the Steel Company were represented by resident managers" (p. 64). If that statement means that the South Buffalo always maintained a vice-president and general superintendent at Lackawanna (first Benning, then Royer, and now Dullenkopf), and that the Steel Company likewise always maintained a manager of its plants at Lackawanna (first Burns and thereafter Entwisle) it is true, though its bearing upon the Government's argument is not apparent. If the statement implies that the two companies had common offices or common executive officers it is not true, and is not even remotely borne out by the record reference which the Brief gives.

The only other evidence offered by the Government in favor of its supposed "theories of management", or theory of domination, is the following. First, Mr. McMath testified that in his personal opinion it would have been good judgment for the South Buffalo to have obtained advice from the Steel Company's experts on technical matters, and generally, to have acted upon such advice. He did not testify that he had ever expressed such view to, or had

heard such view expressed by, representatives of the South Buffalo, or of the Steel Company, or by any one else. Second, Mr. McMath testified that he had ascertained, in the course of investigations and hearings before the Interstate Commerce Commission, that the Steel Company's officials at Lackawanna at times may have overstepped their authority. That testimony has been referred to. Third, Mr. Entwisle, General Manager of the Steel Company's plants at Lackawanna, testified that (R. 819):

> "* * * If you mean did I assume that I had authority to make a final decision on what the South Buffalo Railway Company should do or not do, no; I never exercised any such supervision. I did exercise supervision to the extent that I felt entirely free to offer such advice and counsel to the superintendent of the South Buffalo Railway from the standpoint that both of us were companies owned by the Bethlehem Steel Corporation. I had an organization which was much larger than the South Buffalo Railway. I had a lot of highly qualified and highly paid talent in it, and I felt entirely free to offer suggestion for improving the mechanics of the operation of the railroad."

Assuming for purposes of argument that such course represented domination, the record does not contain any evidence that any officer or representative of the Holding Company, or even that any other executive of the Steel Company had directed or was aware of the fact that Entwisle was following any such course.

Thus the argument relating to "the management theories of the Holding Company" is without any value as evidence associating that Company with the alleged domination of the South Buffalo.

As a second ground to support its claim of domination by the Holding Company, the Government argues that (Br. p. 50):

> "* * * the inevitable domination of South Buffalo by its co-appellees is sharpened by the type of arguments advanced by them below. Instances of domination of South Buffalo by the Holding Company were repeatedly dismissed as 'necessarily involved in the holding company form of corporate management.' * * *".

Continuing and applying the same line of thought, the Government argues that in 1939, when the Holding Company took steps to render impossible any future domination of the South Buffalo it was guilty of domination, which domination consisted of (1) sponsoring the election of a new group of Executive officers and (2) directing *the Steel Company* not to intervene further in the South Buffalo's affairs (Br. pp. 78-79).

We believe it to be the right of stockholders to sponsor the election of competent executives, to initiate and control proceedings for the recapitalization of their corporation when it is in unsatisfactory financial condition, and to take action on its behalf when a situation of extreme emergency faces it. We believe that the appropriate exercise of such rights is not domination.[14] A determination to the contrary would necessarily conflict with all the decisions, under the

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[14] In our brief in the District Court we said (pp. 34-36):

> "* * * It is appropriate for the holding company, as stockholder, to elect the directors of its subsidiaries. * * *. It was appropriate also for the Parent Corporation as stockholder, when its executives discovered a situation which in their opinion threatened the security of the Railway's operations, to take means to eliminate that situation. * * *

Commodities Clause, upholding the right of a railroad company to transport the commodities of a producing company related to it through stock ownership as well as with all the decisions defining domination under the general law.

The third ground advanced by the Government as supporting its claim of domination by the Holding Company consists of its incentive compensation plan, which the Government calls "A persuasive inducement for Holding Company officials to exert supervision over its subsidiaries" (Br., p. 96), and its relief and pension plans, which the Government says, fortify the conclusion "that the Bethlehem organization is operated as an integrated whole" (Br., p. 97). The Government concedes that plans of both sorts were proven in the *E. J. & E.* case. Their bearing upon the charge of domination is not apparent. Indeed, the Trial Court points out that (R. 903):

> "With reference to the employees' benefit plans, requiring filing of detailed reports with the Holding Company and common counsel and occupancy of adjacent offices by South Buffalo and the Steel Company, the Government says: 'These matters, heavily relied on by the Government in the Elgin case, have not been stressed in this case.' * * *".

"It was also appropriate for the Parent Corporation as the owner of the stock of the Railway to fix the general range of compensation of its officers. * * *

"It has always been appropriate and is now necessary for a holding company to publish consolidated reports and balance sheets, in order that its stockholders and the public authorities may be properly apprised of the operations and financial position of the corporation and its subsidiaries as a whole.

"It was for the Parent Corporation as stockholder to determine whether and how the Railway was to be refinanced and the exercise of that power and the performance of that duty cannot properly be challenged."

It was proven that South Buffalo officers, directors and employees did not receive and were not entitled to receive compensation from the incentive compensation funds of the Holding Company (R. 132, 133). There is no evidence that any of such plans was ever used as a means of domination nor, under the circumstances, is it apparent how any of them could have been so used. The Trial Court found that they do not evidence domination (FF. 21, 22; R. 913). Such findings clearly are correct.

Thus the Government has signally and uniquely failed to show any evidence which in any manner implicates the Holding Company in the alleged domination of the South Buffalo at any time. If it was the intent of the Trial Court to find as a fact that such domination ever existed that finding must be set aside or ignored as unsupported by any evidence whatever.

C. The findings of the Trial Court that neither the Holding Company nor the Steel Company has dominated the South Buffalo since December 5, 1939, are supported by the overwhelming weight of the evidence.

As has been pointed out, the Trial Court found that (R. 921):

> "47. Since December 5, 1939, the officers and directors of South Buffalo have operated and carried on the business and management of the South Buffalo Railroad independent of and from the Holding Company and the Steel Company, either or both. The South Buffalo does not subsordinate and since December 5, 1939 has not subordinated railroad policy to the industrial policy of the Steel Company. * * *"

The Trial Court also found, repeatedly and in various forms, that since December 5, 1939, the relations among

the three appellees have been such that transportation by the South Buffalo of commodities of the Steel Company did not and does not violate the Commodities Clause (FF. 37, 38, 39, 40; R. 917-918; Findings 44, 47; R. 920, 921; Conclusions 6, 7, 8, 9; R. 922).

Those findings of fact may not be set aside unless clearly erroneous. In reviewing them, due regard must be given to the opportunity of the Trial Court to judge of the credibility of the witnesses, including South Buffalo's directors and principal executive officers, all of whom except one[15] appeared and testified. *Warren* v. *Keep*, 155 U. S. 265; Rule 52(a), Rules of Civil Procedure for the District Courts; compare *Kaeser & Blair, Inc.* v. *Merchants' Ass'n.*, 64 F. (2d) 575 (C. C. A. 6).

The findings are not erroneous. They are supported by substantial evidence. All five of South Buffalo's outside directors testified that, except that they had been requested by representatives of one or other of the appellees to become members of the South Buffalo's board of directors, no representative of the Holding Company or of the Steel Company had ever discussed the South Buffalo or its affairs with them[16] (R. 456; 471; 488; 492-493; 502-503). As has been pointed out, the South Buffalo's president, who was also a director, testified that no one representing the Holding Company or the Steel Company had ever attempted to influence his action as an officer or a director of the South Buffalo (R. 598-599). The Holding Company's vice presi-

[15]Sellers, Secretary-Treasurer and a director.

[16]In some cases they testified that they were acquainted with one of the Steel Company's plant executives but in all such cases added that, so far as they knew, such executives were not aware that they were directors of South Buffalo (see record references *supra*).

dent testified to the same effect (R. 147-151). Their testimony was not contradicted in any way, either by evidence contradicting the testimony outlined above or by evidence that either the Holding Company or the Steel Company had intervened or attempted to intervene in the South Buffalo's management or operation. As has been pointed out, also, the Government was obliged to concede in its brief to the Trial Court "that there is 'very little tangible evidence of domination'" since 1939 (69 F. Supp. at p. 465). That statement by Government counsel was both a concession of failure of proof on its part and a masterpiece of understatement.

We have said that the immediate and actual power to control the South Buffalo lay in its board of directors. The Trial Court's opinion states that (R. 907; 69 F. Supp., at p. 467):

> "* * * The ability of each member of the Board is clearly demonstrated. The Board met regularly and as is the case usually in the work of any Board of Directors, it considered and acted on all matters presented by its officers. * * * So far as this record discloses, each of the directors has performed his duties in the sole interest of the railroad. * * *"

The record discloses without contradiction that the board met four or five times yearly (R. 485; 498; 489; 479; 447); that the members were regular in their attendance (R. 158; 485; 491; 504); that full and accurate minutes of meetings were kept and were read to the directors (R. 455; 472; 495; 505); that reports, balance sheets, blueprints, etc. were sent to the directors at regular monthly intervals (R. 458; 473; 496; 497; 504); that they were taken upon inspection trips over the South Buffalo's property at least annually

and that at that time contemplated or new construction and the like were pointed out to them (R. 458; 472; 485; 494); that matters brought to their attention by the officers were fully explained and discussed before being acted upon (R. 448; 458; 485; 503-4); that the board always authorized and approved in advance all important contracts, expenditures, new construction, matters of policy and the like[17] (R. 460; 473; 487; 496; 507); that the directors were always placed in a position to act with full understanding upon the questions presented (R. 458; 495; 503-504); and that from all those standpoints the South Buffalo's corporate procedures were all that could be desired. In their testimony they described and discussed the principal matters which had come before them for action, including all the matters which the Government sought to question at the trial (R. 461-464; 474-478; 485-487; 496-497; 505-507).

Faced with this convincing evidence of competent management and supervision of South Buffalo's affairs by its directors the Government can raise only one objection, namely, that except upon the matter of dividends as to which, on occasion, the management's suggestions have not been followed[18] (R. 457; 471-2; 495; 504), the board has always approved the recommendations of its executive officers. If the Government could point out even one instance in which the board should not have so acted the objection might carry some weight. As the case stands, however, the Government criticizes the directors for fail-

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[17]That corporate procedure may be compared with the procedure in the *E. J. & E.* case, in which transactions were ratified by the directors, often long after their occurrence (298 U. S., at p. 509).

[18]Gov't Br. p. 87.

ing to vote against measures, fully described in the testimony, the wisdom of which the Government itself does not question. Thus the argument seems to be that disagreement solely for disagreement's sake is a badge or prerequisite of independence. That view is hardly consistent with the fiduciary character of a director's obligation.

The entire argument of the Government rests upon the premise that the Holding Company desires to dominate, and to control the operations of the South Buffalo. That premise was not accepted by the Trial Judge, who said that the Holding Company's reorganization of the South Buffalo's executive management in December, 1939, "was entered into in good faith" (69 F. Supp., at p. 465), and is not supported by any evidence. Not only is such a purpose unproven, but the Government fails even to point out what purpose or benefit the Holding Company might hope to achieve through such domination. In both respects the proof is in sharp contrast with *United States* v. *Reading Co.*, *United States* v. *Lehigh Valley R. Co.*, and *United States* v. *Delaware, Lackawanna & Western R. Co.*, in each of which the purpose of the defendant railroad to monopolize the production and transportation of coal in the anthracite-producing areas which it served was clearly proven, and in all of which the underlying motive was obvious. In this case the testimony of the South Buffalo's customers other than the Steel Company, some of which were competitors of the Steel Company, that they received good service and fair treatment, contradicts the view that the South Buffalo was employed as a means of discrimination. Moreover, the proof does not show that the South Buffalo is employed as a means of diverting railway company income to the Steel Company. While some

of the South Buffalo's practices were claimed by the Government to be for the Steel Company's benefit, others—as for example, its methods of charging and billing the Steel Company—by their nature could benefit only the South Buffalo. That situation prevailed to such an extent that the Government was finally compelled to argue that the appellees did not care into whose pocket the income went (R. 393),[19] and it so argues in this Court.[20] Assuming that to be true, it fails to uncover any comprehensible purpose on the Holding Company's part, to provide a motive for domination. From whatever angle the case is approached the fact remains clear that some real purpose, on the Holding Company's part, to dominate the South Buffalo is absolutely essential to all the Government's arguments and that the Government has completely failed to prove any such purpose.

The extent to which such a purpose to dominate the South Buffalo is essential to the Government's case is shown by a review of the principal argument which it advances to overthrow the Trial Court's findings and determination that no domination exists, and the practices and incidents by which it claims that domination is shown.

The principal argument advanced by the Government is the one based upon the staffing of the South Buffalo with former Steel Company officials, whose background, previously developed loyalty and hope of future reward, it is claimed, assure their primary devotion to the Holding Company. Concededly, those alleged facts will not result in domination—indeed, will preclude domination—unless

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[19]The subject matter there under discussion was the Steel Company's payment of demurrage charges to the South Buffalo.

[20]See Gov't Br., pp. 92-95.

the Holding Company desires it.[21] That principal argument is supported by two other arguments—that the South Buffalo's directors (except as to dividends) follow the suggestions of its executive officers; and that the South Buffalo's president has not had any prior experience in railroading. Clearly, those arguments do not have any content or significance unless a purpose to dominate is assumed.

As has been pointed out, if such arguments are to be accepted, the Court must hold either that neither a purpose to dominate nor acts of domination are necessary (since none have been found or proven in this case) or else that the relations of the parties (stock ownership and staffing the South Buffalo with former Steel Company employees) gives rise to a presumption of such a purpose and such acts, so conclusive as to override the contrary findings of the Trial Court, upon the evidence. And as we have said, in view of the provisions of the Transportation Act, the legislative history of the Commodities Clause and the cases construing the Clause, such a presumption can not be found to exist.

A review of the practices and incidents by which domination is claimed to be proven also demonstrates the extent to which the Government rests upon the unproven assumption of an intent to dominate to prove its case. The Government's principal contention is that the services which the South Buffalo performs for the Steel Company in the area west of the Hamburg Turnpike in some way indicate domination. Those services clearly are such as any switching

[21] An interesting sidelight is thrown upon the argument by the fact that the central figure in all the alleged acts of domination prior to 1939 was the South Buffalo's former vice-president and general superintendent, Benning. He had no prior or other connection with any other Bethlehem company.

carrier, whether or not affiliated with the industry, would gladly perform for compensation (R. 631-641). By their very nature they require integration of activities. Many other switching carriers perform like services (R. 687-688). Line-haul carriers also perform such services (R. 643-686; see *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156; *United States* v. *Wabash R. Co.*, 321 U. S. 403).

The South Buffalo has been performing substantially identical services in substantially the same way—all with the knowledge of the Interstate Commerce Commission—for more than 40 years, and for more than 20 years before Bethlehem interests acquired the Lackawanna plants and the South Buffalo's stock. *Industrial Railways Case*, 29 I. C. C. 212, 258 through 264 and 363 through 371, discussing the South Buffalo and its services at the Lackawanna Steel Company plants. Upon those facts the Trial Court rightly and necessarily found and determined that those practices and relations are lawful, are usual, and are not proof of domination (R. 920, 69 F. Supp. at pp. 462, 463, 466, 467). Particularly in view of the existence of the Second World War and the pressure which it placed upon the Steel Company's plants and the South Buffalo at the time, trivial incidents claimed to show South Buffalo's abnormal subservience to the Steel Company[22] obviously are without significance except as they show the length to which the Government has been compelled to go to make out even

[22] See Gov't Br., pp. 92-95.

the semblance of a case. The same is true with respect to the various business transactions involving the South Buffalo and the Steel Company. All were normal, reasonable, appropriate, and without evidentiary value as proof of domination. The Trial Court correctly so found (R. 918-921). Only the suspicion that those practices, acts and relations in some undisclosed way must have involved domination because the parties were affiliated gives those transactions any significance, or renders them worthy of notice. Intrinsically they are not evidence of domination.

As evidencing the utter baselessness of the Government's claim of actual domination of the South Buffalo after the "reorganization" of 1939, we list below the circumstances and the occurrences to which its brief refers as proof of domination.

First is the argument that such domination "has been primarily the result of the 'penetration of its management' previously effected." (Br. pp. 88-89). The point has been fully briefed.

Second is the argument based on the trackage arrangements and the character of the South Buffalo's services within the plants of the Steel Company at Lackawanna (Br. pp. 89-91). It will be observed, of course, that such services are purely intrastate, that they are not within the control of the Interstate Commerce Act, and that their only significance in the case is as supposed evidence of actual Steel Company control of the South Buffalo. The Government asserts, in substance, that it is unusual for a switching road to perform such services under such circumstances. But the Government did not submit any proof in support of that contention. The only supposed supporting evidence to which the Government's brief refers is evidence that the switching

services performed by the South Buffalo for its other industrial customers is less extensive than the services which it performs for the Steel Company although it did show that the South Buffalo performs for such others all the services which they require. On the other hand, repeated decisions by the Interstate Commerce Commission show that services and physical relations such as those existing between the South Buffalo and the Steel Company at Lackawanna are not unusual (*Industrial Railways Case*, 29 I. C. C. 212; *Manufacturers Ry. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93); the president of the American Short Line Railroad Association testified that he personally was acquainted with at least 25 switching and terminal roads which performed similar services under similar conditions (R. 687-688); and qualified representatives of six line-haul railroads[23] and of one switching railroad serving Buffalo testified that they perform and are prepared to perform similar services under similar conditions. The argument that the willingness of any railroad company to perform services involving integration of activities with a plant in return for adequate compensation from the industry is evidence of domination is so obviously unsound that nothing more than a statement of it seems necessary. The concept that a railroad should perform all its services at its own operating convenience[24] stems wholly from decisions determining where interstate transportation begins or ends (as, see *Propriety of Operating Practices—Terminal Allow-*

[23]The Delaware, Lackawanna & Western R. R. Co. (R. 643), the Erie Railroad (R. 652), the Baltimore & Ohio Railroad (R. 658), the Lehigh Valley Railroad (R. 666), the New York Central Railroad (R. 674) and the Pennsylvania Railroad (R. 682).

[24]All of the services of the South Buffalo, regardless of their character, are performed at its operating convenience.

ances, 209 I. C. C. 11; *United States* v. *American Sheet & Tin Plate Company*, 301 U. S. 402)—a question not involved in the present case, nor relevant to it.

Third, the Government in support of its claim of domination, refers to various practices relating to the preparing and rendering of bills and the assessing of charges against the Steel Company, including the "forcing" of R-115's for switching movements not specifically ordered by the Steel Company but necesarily performed for it, the rendering of a comparatively simple form of bill to the Steel Company, and the alleged incorrect assessment of demurrage charges upon its cars (Br. pp. 92-95). Those alleged practices, in the aggregate, definitely favored the South Buffalo, thus rebutting the view that they were employed as a means of assessing excessive charges against interstate transportation, or against other shippers. That line of proof, in the main, was introduced in an unsuccessful attempt to show that "South Buffalo has performed * * * switching services for the Steel Company without lawful compensation" (Am. Compl't. par. 18(c); R. 10). The Government has yet to show either that any of the practices described were improper or that they indicate domination. The Trial Court correctly found that they did not.

Fourth, the Government in support of its claim, refers (Br. p. 95) to the failure of the South Buffalo to attempt to induce its other industrial customers to apply for coal consigned to the Steel Company at the time of the so-called "Coal Freeze Order" in June, 1943. The Steel Company was the most important war industry on the South Buffalo's lines, and one of the most important in the United States. Diversion of coal consigned to it would have been a National disservice as well as an infringement of the purpose of the Order, the terms of which the Government completely

misstates by saying that it "permitted the delivering of coal" to others than the consignees.[25] The Government refers to the incident as "of striking significance". It is—as evidence of the Government's point of view, and of the quality of its case.

Finally the Government refers (Br. p. 92) to a number of minor charges, all of which were denied by the appellees, and none of which resulted in findings in the Government's favor. It refers to the fact that at one time a South Buffalo locomotive and crew "stood by" at the Steel Company's shipping yard. The South Buffalo's superintendent testified that the crew was loafing (R. 322). The Trial Court thus describes the incident (R. 906):

> "When South Buffalo's General Superintendent learned of some unnecessary delays in the operations of its locomotives, he promptly took steps to stop them."

The Government refers, also, to the holding of loaded cars for the Steel Company. The record shows the following (R. 816):

> "Q. During June of 1943, was the new Bar Mill always able to take the billets being moved to it from the billet plant?
>
> A. They were not.
>
> Q. Why not?
>
> A. When the Bar Mill was designed, it was designed to take care of our normal peacetime distribution of business.
>
> With the increase in shell steel tonnage, which required preparation prior to shipment, the facilities at the Bar Mill billet yard were not ample to take

[25] The Government tried but failed to prove that prior to 1940, the South Buffalo attempted to hold on its rails a 3 days' supply of coal for the Steel Company. See Gov't. Br., p. 96; R. 378-385.

care of the large increase in tonnage, which required surface preparation.

Q. And what is the result of that situation? What happened to the billets on the way to the Bar Mill?

A. The result was the billets had to stand on cars until we were in a position to unload them."

Another of such charges was that in 1941 the South Buffalo "was still consulting" the Steel Company concerning types of locomotives to be purchased. The record shows that the South Buffalo intended to purchase a new type of diesel locomotive whose power to dump the Steel Company's ladle cars was thought to be inadequate. The point discussed was not whether such engines should be bought, but as to possible mechanical means of improving their dumping power after purchase (R. 753). Lastly, the Government refers to testimony of an Interstate Commerce Commission employee who observed South Buffalo's operations in 1943 and concluded that in certain instances they were integrated with operations of the Steel Company; as for example, that when a furnace was about to cast, it was neccessary to have ladles (which were mounted on cars) available to receive the hot metal and to move them to destination before the metal cooled. The Trial Court, after reviewing the evidence concerning such operations, found (FF. 44, R. 920) that they did not disclose "any abnormal condition or coordination showing domination or control * * *". It is incredible that any one should suggest to the contrary.

The trivial incidents and the commonplaces of industrial practice outlined above constitute the Government's entire case in support of actual domination since 1939. We believe that, even if entirely uncontradicted and unexplained, they

would be insufficient to support an inference of domination. That, however, is not the question for decision. The appellees have submitted convincing proof that domination does not exist and has not since 1939, and the Trial Court has so found and decided. Such findings and decision are clearly supported by the evidence.

D. Relations between the South Buffalo and the Steel Company prior to December 5, 1939.

We do not concede that the Steel Company dominated the South Buffalo prior to December 5, 1939. We believe that the relation between them was correctly described by Mr. Entwisle—the only witness having actual knowledge of such relations who gave testimony concerning them—as follows (R. 819):

> "If you mean did I assume that I had authority to make a final decision on what the South Buffalo Railway Company should do or not do, no; I never exercised any such supervision. I did exercise supervision to the extent that I felt entirely free to offer such advice and counsel to the superintendent of the South Buffalo Railway from the standpoint that both of us were companies owned by the Bethlehem Steel Corporation. I had an organization which was much larger than the South Buffalo Railway. I had a lot of highly qualified and highly paid talent in it, and I felt entirely free to offer suggestion for improving the mechanics of the operation of the railroad."

Upon that point the decision of the Trial Court is against us. That Court has found (FF. 26; R. 914-915) that during such period officials of the South Buffalo were required "in certain instances to apply to officials of the

Steel Company for guidance, advice and decisions in respect to South Buffalo's service to other shippers, and in respect of such of South Buffalo's internal affairs as personnel and wage policies, engineering problems, purchases of equipment and construction of additions and betterments", and that such domination is demonstrated by three designated groups of transactions which occurred, respectively, in 1934,[26] 1926[27] and 1931[28] and in connection with such internal management problems as the purchase of locomotives, the construction and enlargement of buildings, the location of a flood light and the propriety of forms of shippers' orders used by the South Buffalo. The matter of the flood light arose in 1938[29] and of the shippers' order forms in 1925.[30]

The Trial Court found, also, that between 1923 and 1939 letters were written by South Buffalo officials to officials of the Steel Company who were addressed as officials of the South Buffalo and that letters were written by John M. Gross, general traffic manager, vice president and a director of the Steel Company, on South Buffalo stationery and were signed by him as an official of South Buffalo (R. 27; R. 915). Finally, the Trial Court found that the Steel Company had "exercised some control with respect to the employment of certain personnel of South Buffalo", and that South Buffalo officials also conferred with Steel Com-

[26]Republic Steel Company transaction; Pl. ex. 48, 49; R. 720-721.

[27]Seneca Iron & Steel Company transaction; Pl. ex. 29-32; R. 703-707.

[28]Buffalo Sintering Corporation matter; Pl. ex. 34-39; R. 707-712.

[29]Pl. ex. 75; R. 742.

[30]Pl. ex. 27; R. 702.

pany officials with respect to rates of pay to be adopted by South Buffalo (FF. 28; R. 916).[31]

In view of the Trial Court's findings with respect to the period after December 5, 1939, including the findings that no domination had existed during that period, it is not important that we attack the findings with respect to the period prior to that date. Although several of the exhibits specified in finding 26 will be referred to later, it is impossible in a brief of any reasonable length to state the detail necessary to render understandable all the exhibits to which the Trial Court or the Government refers. Indeed the Government itself has attempted little or no analysis of them, but has simply quoted occasional phrases which seem to support its argument. However, the Trial Court's 27th and 28th findings relate to important matters of general corporate procedure and also, in the case of the 27th finding, to an important official of the Steel Company, and they require analysis.

The claim that officials of the Steel Company were addressed as officials of the South Buffalo rests wholly upon 27 letters, all written by Benning, vice president and general superintendent of the South Buffalo, during the 16 year period from 1922 to 1938.[32] In those letters the second or third line of the address was "South Buffalo Railway Company". Neither the name nor the corporate title of the person addressed ever appeared upon that line. As a physical fact, "South Buffalo Railway" was simply a

[31]This last finding is apparently a particularization of the statement in finding 26 that South Buffalo officials had sought "guidance, advice and decisions" from Steel Company officials, in certain instances, "concerning personnel and wage policies."

[32]Plaintiff's Exhibits 26, 30, 33, 34, 36, 37, 38, 39, 40, 42, 46, 50, 53, 54, 55, 56. 60, 61, 62, 63, 64, 65, 67, 68, 70, 72, 76.

part of the address. No person at any time associated with South Buffalo except Benning ever used such form of address. Steel Company officials, in responding to Benning, did not purport to speak or sign as South Buffalo officials.[33] Moreover, not all of Benning's letters to Steel Company officials used "South Buffalo Railway" as part of the address.[34] Benning, who was not a former Bethlehem man,[35] and who had been manager of the South Buffalo before Bethlehem interests acquired its stock, may have adopted such method of addressing letters while South Buffalo was under Lackawanna Steel Company ownership, since he was using it in the early 1920's.[36] However that may be, at least it is clear that no one except Benning ever used such form of address, and that the Government's contention now under consideration rests solely upon such use.

The Government's contention that Steel Company officials "addressed letters written on South Buffalo stationery both to South Buffalo officials and other officials of the Steel Company" rests wholly upon 8 exhibits, of which 2, both written in January, 1923 (and so, less than three months after Bethlehem interests acquired South Buffalo's stock) and a third, written in March, 1926, were written to South Buffalo officials, while the remaining 5, all written in the early 1930's, were addressed to other Steel Company officials.[37]

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[33] In certain instances letters otherwise appropriate were written by Kemmerer, then employed by the Steel Company, on South Buffalo stationery.

[34] Plaintiff's Exhibits 33, 41, 59, 69, 71, 77, 78.

[35] Pl. Ex. 20; R. 696.

[36] Pl. Ex. 26 (R. 700); Pl. Ex. 30 (R. 705).

[37] See Gov't Br., p. 68, and footnote 34. Exhibits 21, 23 and 31, claimed to be addressed to South Buffalo officials were written in January, 1923 (R. 697, 698 and March, 1926 (R. 705). The other exhibits are Nos. 121, 122, 124, 125 and 127.

The Government argues that John M. Gross, general traffic manager and a vice president and director of the Steel Company, wrote those letters (Br., p. 68). The Trial Court so found. Such finding and argument are contrary to the stipulation under which the letters were received in evidence namely "that these letters were signed *on behalf of* Mr. Gross" (R. 182).[38] Generally, the initials of Kemmerer, who was then employed by the Steel Company, appear upon them. Gross's initials do not appear. The Trial Court's opinion thus summarizes the parties' contentions (R. 902):

> "* * * They are written on South Buffalo stationery. Gross has denied all knowledge of these letters. One K. A. Kemmerer, until some time in 1932 when he became President of all subsidiary railroads, was an employee of the Steel Company. The letters purport to have been dictated by 'K. A. K.' The initials evidently refer to Kemmerer. There is also a letter purporting to have been written by Gross on South Buffalo stationery directed to James, Chief Engineer, and Burns, General Manager. James was Chief Engineer of the Steel Company. Kemmerer is now deceased. Whether Gross signed or authorized the signing of his name to the letters is of importance because he was an Executive officer of the Steel Company. The evidence justifies the conclusion that the Steel Company officials were knowing to the contemplated purchase of the land. * * *"

In the court below, the Government's argument that Gross must have signed the letters rested wholly upon the fact that counsel for the appellees permitted them to be

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[38] They were signed by Mr. Kemmerer. Mr. Gross testified that he had no recollection of them (R. 181, 182).

introduced in evidence under a stipulation without objection. That argument, apparently, was accepted by the Trial Court.[39] Considering that they apparently were written by Kemmerer and were taken from the appellee's files, counsel did not have any ground for an objection. Nor is the Trial Court's statement—obviously correct—that Steel Company officials were knowing of the subject-matter discussed in some of the letters,[40] of any moment, because those letters are entirely appropriate and are significant only because written on South Buffalo's stationery.

Why Kemmerer used South Buffalo stationery in writing the foregoing letters is a matter of conjecture,[41] as also, is the reason why Benning used the expression "South Buffalo Railway" in addressing his 27 letters. We submit, however, that such evidence is not a substantial or a sufficient ground for the finding or the argument that Steel Company officials regarded themselves, or were regarded, as South Buffalo officials.

The relation between the South Buffalo and the Steel Company with respect to the employment of South Buffalo personnel and rates of pay to such personnel were as follows.

Until 1941, when the South Buffalo constructed its present office building, the Steel Company acted somewhat as an employment agency for it in connection with the hiring of unskilled and semi-skilled labor,[42] Before 1939

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[39]Opinion; R. 901.

[40]Exhibits 121, 122, 124, 125, 127.

[41]The fact that the letters were upon South Buffalo's Lackawanna stationery may indicate that they were written at the South Buffalo's office following a tour of inspection by railroad over the property which the letters discuss.

[42]For such service it was paid by the South Buffalo (R. 192-194, Pl. Ex. 150).

the prospective employees of the South Buffalo were first interviewed and screened by the Steel Company's employment department, and were then interviewed by South Buffalo's foremen, who determined whether to hire them (Pl. Ex. 150). After 1939 and until sometime in 1941, applicants were first interviewed by South Buffalo's foremen. In both cases the Steel Company prepared records upon, and gave physical examinations, to such applicants.[43] It did not fix their rates of pay. It did not hire and had nothing to do with discharging any South Buffalo employes.[44] The Trial Court found (R. 916):

> "28. Prior to December 5, 1939, Steel Company exercised some control with respect to the employment of certain personnel of South Buffalo. Under the then customary procedure South Buffalo would transmit a requisition for the employment of men to the Steel Company's supervisor of employment who would interview applicants for jobs and pass on their fitness. * * *"

Concerning rates of pay the situation was as follows. Both the South Buffalo and the Steel Company had in their employ locomotive engineers, firemen, trainmen and unskilled and also semi-skilled laborers. Generally, employees of both companies were represented by the same unions. In such cases, Mr. Benning of the South Buffalo and Mr. Entwisle of the Steel Company generally consulted and acted together upon matters such as rates of pay.[45] Mr.

[43] R. 842-847.

[44] R. 192, 845.

[45] R. 822, 823. Plaintiff's exhibit 56 (R. 728), referred to at p. 72 of the Government's brief, is a case in which, in fixing rates of pay to locomotive firemen, "it is necessary to have a conference with the representatives of the enginemen's group."

Entwisle, however, did not control the wages paid by South Buffalo. He testified (R. 823):

> "Q. As a matter of fact, Mr. Entwisle, isn't it true that concerning the rate of pay to the employees of the South Buffalo Mr. Benning was not empowered to act without your approval?
>
> "A. Yes; he was. I think Mr. Benning—as a matter of fact I knew then and I know now that the Railway Company and Mr. Benning as its representative could follow my advice or not with respect to rates or anything else."

The Trial Court found (R. 916):

> "* * * South Buffalo officials also conferred with Steel Company officials with respect to rates of pay to be adopted by South Buffalo. Since December 5, 1940, this practice has been abandoned."

The fact that prior to 1941 the South Buffalo and the Steel Company had their offices at Bethlehem and at Lackawanna in the same buildings, which were owned by the Steel Company, played no significant part in the determination of the case. The Trial Court pointed out (Opinion, R. 903) that as to "occupancy of adjacent offices by South Buffalo and the Steel Company, the Government says: 'these matters * * * have not been stressed in this case'."

Of the nine letters specified in the Government's brief, most of which are referred to in finding 26, one (Ex. 27; R. 702), written in 1925, is a complaint concerning an error by the Steel Company's printing office in preparing South Buffalo's shippers orders, and is entirely appropriate and unimportant. Two others (Pl. ex. 55; R. 727, and Pl. ex. 63; R. 733), written, respectively, in 1936 and 1937, relate to structural changes to a grade crossing and a repair

shop ("flue shop"), respectively, both located on Steel Company land.[46] Another of such letters (Pl. ex. 64; R. 734) relates to the negotiations carried on by the South Buffalo and the Steel Company, over a period of years, to acquire the land over which ran the South Buffalo's track connecting its main property with its track at Seneca. The Trial Court dealt with the entire subject in finding 41 (R. 918-919). He found that no domination was involved. Still another of such letters (Pl. ex. 56; R. 728), written in 1936, has to do with rates of pay to oil-electric locomotive firemen, concerning which a conference was necessary "with the representatives of the enginemen's group." Since both the South Buffalo and the Steel Company owned and operated that kind of locomotives and had such employees working in proximity to one another, this was a common problem involving employee relations, upon which it was only prudent that they act together.

The question raised by plaintiff's exhibit 48 (R. 720), written in 1924, was whether it would be wise for South Buffalo to sell to Republic Steel Company swamp land which Republic wished to fill by dumping slag upon it. The effect of filling the land would be greatly to increase taxes upon it. Burns, to whom (together with the South Buffalo's president) the question was presented, passed it along to the Steel Company's Manager of Real Estate for an opinion (Pl. ex. 49; R. 721).

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[46]It appears probable that the repair shop (flue shop) itself belonged to the Steel Company, which generally performed major repair work to South Buffalo locomotives. An examination of the maps, plaintiff's exhibits 1 and 2 (not printed) will show both the flue shop and the Lakeview Avenue crossing west of the Hamburg Turnpike, all of which area is owned by the Steel Company.

Plaintiff's exhibit 36 (R. 709), written in 1931, is one of several (Pl. ex. 34-39; R. 707-712) relating to the encroachment of Buffalo Sintering Corporation's thaw house on South Buffalo land, and an attempt to determine upon a track layout which would permit the Sintering Corporation's locomotive to service the thaw house without fouling the South Buffalo's main track (R. 708). The thaw house had been constructed "in order to handle frozen flue dust and ore coming from the Bethlehem Steel Co." (R. 707) Parts of the letters indicate that it was proposed to use, in part, Steel Company land, for the new track layout, and that the Steel Company assumed a part or all of the expense. The correspondence in the record is not complete, however, and it is impossible to determine just what the situation was.

Plaintiff's exhibit 25 (R. 699) was a complaint written in 1924 by Burns, Manager of the Steel Company's plants at Lackawanna, that his transportation costs were too high. Part of those costs, obviously, consisted of rates paid the South Buffalo for switching and other plant services. Benning replied (pl. ex. 26) in substance, placing the blame on the Steel Company's own plant railroad (R. 700) and defending South Buffalo's charges as reasonable (R. 701-702). It is precisely such a letter as any independent carrier would write under the circumstances.

Plaintiff's exhibit 29 (R. 703), written in 1926, is one of several (exhibits 29 through 32; R. 703-707) relating to the application of Seneca Iron & Steel Company for a reduction of the rate charged by South Buffalo for intra-plant switching, because the switching movement involved was a simple operation. The question presented was whether a special rate should be given to Seneca, in which case, it was pointed out, applications by other customers for special rates could

be expected (R. 705). It was pointed out also that all trunk lines assessed a single uniform charge for all intra-plant switching movements (R. 704), as did also South Buffalo (R. 706). The determination reached was that it would be "impossible to set up a line of rates for all the varying conditions of our service in place of the group plan" (R. pp. 706-707). We concede that the submission of such a question to the Steel Company was inappropriate. However, the question presented was as to a method of assessing charges, and the decision reached affected all the South Buffalo's customers, including the Steel Company, in the same way. This is the only instance in the record in which any question affecting rates or services to shippers or consignees was submitted to the Steel Company.

However the exhibits and the other proof briefed above be regarded they clearly are not of such character as to warrant a finding that the reorganization of the South Buffalo's management which was carried out in December, 1939, was not undertaken in good faith, or that domination has existed since that time, or that there is any probability or danger of its recurrence.

POINT III

IF FOR ANY REASON A UNION OF PRODUCTION AND TRANSPORTATION HAS BEEN PROVEN TO EXIST, THE CASE IS NOT ONE IN WHICH A RAILROAD COMPANY TRANSPORTS COMMODITIES OWNED OR PRODUCED BY IT, OR UNDER ITS AUTHORITY, WITHIN THE MEANING OF THE COMMODITIES CLAUSE, BUT IS ONE IN WHICH THE OWNER OF PROPERTY DIRECTLY OR INDIRECTLY RENDERS SERVICES OR FURNISHES INSTRUMENTALITIES USED IN CONNECTION WITH ITS TRANSPORTATION, WITHIN THE MEANING AND UNDER THE SANCTION OF THE SHIPPERS' ALLOWANCE CLAUSE.

A. Purpose of the Shippers' Allowance Clause.

The purpose of the Shippers' Allowance Clause, §15(13) of the Interstate Commerce Act, was to empower the Interstate Commerce Commission to determine whether allowances paid by the line-haul railroads to shippers and consignees for rendering terminal services, and for providing instrumentalities used in connection with transportation, were reasonable. The legislative history of that Clause makes clear that terminal switching railroads owned by such shippers and consignees were intended to be within its control.

The enactment of the Hepburn Amendment, and of the Shippers' Allowance Clause as a part of it,[1] was the result

[1]The Commodities Clause was not a part of the Bill (H. R. 12987, 59th Congress, 1st Session) as originally introduced, or as sponsored by the Commission. It was introduced as an amendment to that Bill in the Senate, after the Bill had been passed by the House of Representatives. See, generally, 40 Cong. R. 6455-6461, 6494-6501, 6502-6514, 6551-6570.

of recommendations to Congress by President Theodore Roosevelt and by the Interstate Commerce Commission.

President Roosvelt, in his message to the 59th Congress, first session, submitted December 5, 1905, said:[2]

> "All private-car lines, industrial roads, refrigerator charges, and the like should be expressly put under the supervision of the Interstate Commerce Commission or some similar body so far as rates, and agreements practically affecting rates, are concerned. The private-car owners and the owners of industrial railroads are entitled to a fair and reasonable compensation on their investment, but neither private cars nor industrial railroads nor spur tracks should be utilized as devices for securing preferential rates. A rebate in icing charges, or in mileage, or in a division of the rate for refrigerating charges is just as pernicious as a rebate in any other way."

The Interstate Commerce Commission drafted and submitted to Congress the proposed statute which became the Hepburn Amendment.[3] The Shippers' Allowance Clause, in substantially the form and language in which it was enacted, was a part of that proposed statute. The statute, as so drafted and as enacted, contained three provisions which supplement and tend to clarify the meaning of the Shippers'

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[2]40 Cong. R. 92 (1905).

[3]See the Commission's 19th Annual Report (1905), at pp. 5-13; letter dated November 28, 1905, from Chairman Knapp of the Commission to Senator Elkins, Chairman of the Senate Committee on Interstate Commerce, a copy of which appears in the compilation of legislative materials on the Hepburn Bill prepared by the acting librarian of the Commission in 1908, with the notation that it was taken from the General Letter Book, No. 55, 1905-1906, p. 52; the proposed bill is printed as Appendix E to the Commission's 19th Annual Report, at pp. 177-183. The proposed Shipper's Allowance Clause is at page 179.

Allowance Clause. First, it defined "railroad" and "transportation" in such a way as to bring all terminal facilities within the control of the Act (34 Stat. 584; 49 U. S. C. § 1(3)). Second, it required any common carrier railroad subject to the Act to construct and maintain switch connections "upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation * * *" (34 Stat. 585; 49 U. S. C. § 1(9)). Third, it provided that "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, in connection therewith, shall be just and reasonable * * *" (34 Stat. 584; 49 U. S. C. § 1(5)).

The Shippers' Allowance Clause rounds out those provisions by bringing within the Commission's control all allowances paid to the "owner of property transported", when such owner "renders any service connected with such transportation, or furnishes any instrumentality used therein * * *" (34 Stat. 590). The Commission, in its Report to Congress sponsoring the legislation, said concerning that provision (19th Annual Report (1905) at p. 10):

> "Terminal Roads, Elevator Charges, and Private Cars."
>
> "There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an

excessive division to a terminal road owned by the shipper; the payment of an excessive elevator charge to the owner of the grain; the payment of ... excessive mileage upon the private car which conveys the the property of the owner of the car. * * *"

The Commission rejected the view that the railroads should be forbidden to employ any agency or facility of an owner of property in connection with the transportation thereof. Its Report states (pp. 10-11):

> "It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that. * * *
>
> "We do think, however, that the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which should not be exceeded in the payment made therefor. * * *"

This Court has pointed out in at least three decisions that the rendering of services by a shipper or a consignee in connection with the transportation of his own commodities is expressly sanctioned by the Shippers' Allowance Clause. In *Union Pacific R.R. v. Updike Grain Co.*, 222 U. S. 215, 219, it ruled that "The statute must be taken as a legislative recognition of the long continued practice * * *"[4]

[4]The Court said also (222 U. S., at pp. 218-219): "The act recognized that the shipper himself might own the elevator or other facility included within the definition of transportation. For § 4 (34 Stat. 590) provides that 'if the owner . . . renders any service connected with such transportation, or furnishes any

of shippers to render such services. In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, it ruled that "if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them." And in *United States* v. *Baltimore & Ohio Railroad Company*, 231 U. S. 274, it repeated that statement, and applied it to a terminal railroad directly owned and operated by a shipper.

B. The Commodities Clause has never been applied to a terminal switching railroad.

When the Interstate Commerce Commission requested the Attorney General to institute this action, it abandoned a construction of the Commodities Clause and of the Shippers' Allowance Clause which it had theretofore maintained ever since the enactment of the Hepburn Amendment in 1906.

In only one case has the argument ever been made that the Commodities Clause may apply to a terminal switching railroad: *United States* v. *Baltimore & Ohio Railroad Company*, 231 U. S. 274, *supra*, decided in 1913. In that case the Court declined to consider the point because the order under review had not been based upon the Commodities Clause, and the argument based upon the Commodities Clause had not been presented below (p. 297). It ruled unanimously, however, that Arbuckle Brothers, sugar refiners, were entitled to an allowance, under the Shippers' Allowance Clause, for moving their sugar by means of their

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instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable,' the Commission being authorized to determine what was reasonable."

Jay Street terminal railroad[5] and lighterage service from their warehouses in Brooklyn to the freight terminal of the Baltimore & Ohio Railroad in New Jersey. Such terminal railroad and lighterage service (the Jay Street terminal) was operated by Arbuckle Brothers, under contract, as a union freight terminal on the Brooklyn water front for the Baltimore & Ohio and several other railroads. This Court, ruling that Arbuckle Brothers were entitled to an allowance under those circumstances, quoted from its prior decision in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, as follows (231 U. S. at p. 293):

> "'. . . the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it.'"

The appeal in the *Baltimore & Ohio Railroad* case involved the legality of an order of the Interstate Commerce Commission enjoining the payment of such allowance to

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[5]The Interstate Commerce Commission's 59th Annual Report on the Statistics of Railways (for 1945) and prior Annual Reports classify "Jay Street Terminal and Arbuckle Brothers," as S-3 (p. 586) which the Commission defines as "Both switching and terminal" (p. 577).

Arbuckle Brothers,[6] on the ground that such payment involved an unlawful discrimination against competing sugar refiners. The Commission, which filed a brief in this Court, made no claim that the Commodities Clause was or might be involved. However, the Attorney General argued in this Court that if the service rendered by the Arbuckles through their Jay Street Terminal were held to be a part of the interstate transportation service, a violation of the Commodities Clause would necessarily result, since in that view Arbuckle Brothers would be common carriers by railroad engaged in interstate transportation. This Court said (p. 297):

> "* * * There is nothing in the record showing that such a contention was pressed upon the Commission, considered by that body, or that the order rendered was in any respect based upon the commodity clause. Indeed, the order permitted the continuance of the Jay Street Terminal and the business there conducted, providing only that like rights and allowances were made to the Federal Sugar Refining Company. The order, therefore, cannot be assumed to have contemplated that the Jay Street Terminal business was a violation of the commodity clause, since under that hypothesis the conclusion would be inevitable that the Commission by its order gave sanction to and permitted the continuance of the wrong which its powers were exerted to suppress. * * *"

Decisions construing the Commodities Clause do not throw any light upon the point presented. As has been noted,

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[6] Arbuckle Brothers were permitted to intervene in the action, to file pleadings, to join in the motion on which judgment was rendered, and to submit a brief in this Court.

all of them involved Class I railroads performing general transportation. No terminal switching road was a party to any of them. In two of those cases, arguments were presented which bear a superficial resemblance to the present argument. In neither case, however, was the argument made that the character of the defendant or of its services and instrumentalities was such as to render the Commodities Clause inapplicable, or to render the Shippers' Allowance Clause controlling. Such an argument could not have been made in those cases because those defendants were line-haul railroads performing general transportation.

The first case is *United States* v. *Delaware & Hudson Co.* (*supra*). The Delaware & Hudson Company argued that since it had been organized in 1823 to own and operate coal mines and a canal it was a producing company and not a railroad company: 213 U. S., at pp. 387-389. The Court held to the contrary: pp. 417-418. In view of the character and extent of that defendant's railroad transportation services and properties as an interstate Class I railroad,[1] the decision could hardly have been otherwise.

The second case is the *E. J. & E.* case. There the argument was made that although, in view of the Commodities Clause, a railroad company might not lawfully transport its own commodities, it might lawfully transport the commodities of the industry which owned its stock. Such argument was based expressly upon the provisions and the legis-

[1] The 34th Annual Report of the Interstate Commerce Commission, entitled Statistics of Railways in the United States, for the year 1920 (p. 413), classifies the Delaware & Hudson as Class I, and states that it operated 880 miles of railroad. The Commission's 58th Annual Report, for 1944, gives substantially identical data: p. 514. Its railroad was situated in two states: 213 U. S. 163, footnote.

lative history of the Shippers' Allowance Clause. The District Court accepted that argument as correct.[8] This Court, affirming the judgment on other grounds, did not refer to it. As has been pointed out, the E. J. & E. was a Class I railroad with its lines extending into two states: 298 U. S. at p. 497[9].

The Government argues that the mere ownership by an industry of the stock of an industrial switching railroad which serves it, or the mere affiliation of such a railroad and an industry, through a holding company owning the stock of both, is sufficient to bring such a railroad within the control of the Commodities Clause. But even before the enactment of the Clause, the Commission knew, and the Government was chargeable with the knowledge that many industries owned the stock of terminal switching railroads which served them in precisely the same manner in which the South Buffalo serves the Steel Company at Buffalo, Lackawanna and Hamburg.[10] In the *Industrial Railways Case*, 29 I. C. C. 212, decided in 1913, the Commission

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[8]The trial Court's opinion does not refer to the question, but its decision contains the following conclusion of law (Record in that case, p. 449):

> "3. The transportation in interstate commerce by a railroad corporation whose stock is owned by an industrial corporation, of commodities produced or owned by such industrial corporation, is not a violation of said Commodities Clause of said Interstate Commerce Act, but is sanctioned by, and subject to regulation under Section 15(13) of said Interstate Commerce Act."

[9]The Interstate Commerce Commission's 50th Annual Report on Statistics of Railways in the United States, for 1936, at p. 227, classifies the E. J. & E. as Class I, and as owning 185 miles and operating 435 miles of railroad.

[10]*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Union Pacific Railroad Co.* v. *Updike Grain Co.*, 222 U. S. 215; and see this brief, pp. 101-103, *infra*.

reviewed at length the relations between some 20 such railroads serving the principal steel industries in the East and the industrial owners of their stock. The appellee South Buffalo,[11] and the Lackawanna Steel Company, which then owned its stock, and also the appellee Steel Company and the other terminal railroads whose stock is owned by the appellee Holding Company, were among the corporations named and referred to in that proceeding. Since then, repeatedly, the Commission has reviewed the relations between such companies. All its Annual Reports on the Statistics of Railways in the United States since as early as 1920 have named industrial railways serving industries directly or indirectly related to them through stock ownership, including, specifically, the South Buffalo. As will be shown, both the Attorney General[12] and Congress have been regularly and repeatedly advised of that relation, and have taken cognizance of it.

The character of such ownership and the extent to which such inter-corporate stock relations are prevalent in the United States is shown by the Commission's most recent published Report on the Statistics of Railways in the United States (the 59th Annual Report for 1945). At pages 577 through 580 it names and classifies terminal switching roads (under the caption: "Switching and Terminal Companies")[13] in the Eastern Territory of the United States,

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[11] See also *Industrial Railways Case*, second decision, 32 I. C. C. 129, *Lackawanna Steel Company* v. *South Buffalo Railway et al.*, 56 I. C. C. 684, and *Jones & Laughlin Steel Co.* v. *Pittsburgh & Lake Erie, etc.*, 91 I. C. C. 301, 307, in all of which the appellee, South Buffalo, was a party.

[12] See *supra*, p. 32.

[13] The title of the Section, in full, is "Table Showing Mileage and Intercorporate Relation of Switching and Terminal Companies on December 31, 1945." (p. 575).

and reports the "Intercorporate Relation", that is, the ownership of such roads. There are 106 such railroads in that territory, of which 44[14] are owned by industries which

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[14]In four cases the terminal road is owned outright. In 26 cases there is complete, and in 14 others there is majority, stock ownership. The 44 industrially-owned terminal railroads as named are:

Aliquippa and Southern Railroad Company.
Oliver Iron & Steel Corporation's R. R.
Alton and Southern Railroad.
The Chicago, Peoria and Western Railway Company.
Benwood and Wheeling Connecting Railway Company.
Berlin Mills Railway.
Brooklyn Eastern District Terminal.
Canton Railroad Company.
Chicago and Calumet River Railroad Company.
Chicago, West Pullman & Southern Railroad Company.
Conemaugh & Black Lick Railroad Company.
The Cuyahoga Valley Railway Company.
Delray Connecting Railroad Company.
Dexter & Northern Railroad Co.
Donora Southern Railroad Company.
East Erie Commercial Railroad.
East Jersey Railroad and Terminal Company.
Etna and Montrose Railroad Company.
The Euclid Railroad Company.
Fore River Railroad Corporation.
Indiana Northern Railway Company.
Johnstown and Stony Creek Rail Road Company.
The Lake Terminal Railroad Company.
The Lorain and Southern Railroad Company.
The Massena Terminal Railroad Company.
McKeesport Connecting Railroad Company.
Monessen Southwestern Railway Company.
The Monongahela Connecting Railroad Company.
New Haven & Dunbar Railroad Company.
The Newburgh and South Shore Railway Company.
Patapsco & Back Rivers Railroad Company.
Philadelphia, Bethlehem and New England Railroad Company.
Pittsburgh and Ohio Valley Railway Company.

they serve, either directly, or through the ownership of all or a majority of the outstanding stock of the terminal railroad. Industrial owners, in addition to the appellee Holding Company, include such concerns as United States Steel Corporation, Jones & Laughlin Steel Corporation, International Harvester Company, Tidewater Oil Corporation, Aluminum Company of America, General Electric Company, Allied Chemical & Dye Corporation, a stone quarry, a coal company and a paper company. The Report shows that other terminal roads are owned, directly or through stock ownership, by terminal companies, by stockyard companies and by other corporations under such circumstances as to make clear that the railroads carry the owners' commodities, and that they were organized or acquired for that purpose. Still other terminal roads are owned and operated by the line-haul railroads. Only a small minority are without stock affiliation of some sort.

Thus it is too plain for argument that, if the view now advanced by the Government were accepted, nationwide industrial relations which have existed, unquestioned, for a half century, would be disrupted, that under that view both the Commission and the Government during that entire period, "gave sanction to and permitted the continuance

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Pittsburgh, Allegheny & McKees Rocks Railroad Company.
Pullman Railroad Company.
The River Terminal Railway Company.
South Buffalo Railway Company.
The Springfield Terminal Railway Company.
Steelton & Highspire Railroad Company.
Union Railroad Company.
Upper Merion and Plymouth Railroad Company.
Wyandotte Southern Railroad Company.
Wyandotte Terminal Railroad Company.
The Youngstown and Northern Railroad Company.

of the wrong which its powers were exerted to suppress",[15] and that by their attitude and action they have established an administrative construction of the Commodities Clause and the Shippers' Allowance Clause which is now binding upon them. *New York, Chicago & St. Louis R. Co.* v. *Frank,* 314 U. S. 360; *United States* v. *Chicago North Shore R. Co.,* 288 U. S. 1.

C. The Commodities Clause and the Shippers' Allowance Clause apply to different parts of the interstate railroad transportation service.

By enacting the Commodities Clause and the Shippers' Allowance Clause as parts of the Hepburn Amendment of June 29, 1906, Congress divided all interstate railroad transportation services, facilities and instrumentalities within the control of the Interstate Commerce Act into two parts, one governed by the Commodities Clause, and the other by the Shippers' Allowance Clause. To hold otherwise would be to bring the two statutes into direct and irreconcilable conflict.

The Commodities Clause and the Shippers' Allowance Clause apply to interstate transportation by railroad only as parts of, and within the limits fixed by the Interstate Commerce Act. Neither of them can apply to any transportation service, facility or instrumentality to which the Act does not apply. The Shippers' Allowance Clause is expressly concerned with and expressly applies to "property transported under this chapter." The "service connected with such transportation, or * * * instrumentality used therein" which falls within its provisions must necessarily

[15] *Baltimore & Ohio Railroad case,* 231 U. S., at p. 297.

be a part of that interstate railroad transportation service which is within the control of the chapter.[16] This Court has held repeatedly, in construing and applying the Shippers' Allowance Clause, that terminal switching services and services related thereto which are not a part of the interstate railroad transportation service, customarily performed by line-haul railroads and covered by the line-haul rate, are not within the scope and coverage of the Shippers' Allowance Clause by reason of that fact: *United States* v. *American Sheet & Tin Plate Company*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156; *United States* v. *Wabash R. Co.*, 321 U. S. 403; *Hanna Furnace Corporation* v. *United States*, 323 U. S. 667. Such, also, is the construction always-placed upon this Clause by the Interstate Commerce Commission; *Propriety of Operating Practices-Terminal Services*, 209 I. C. C. 11; *Industrial Railways Case*, 29 I. C. C. 212; 32 I. C. C. 129.

It cannot be contended that both the Commodities Clause and the Shippers' Allowance Clause apply to the same interstate transportation services and instrumentalities. Otherwise, the Commodities Clause would forbid the owner of property transported to render the very services and provide the very instrumentalities which the Shippers' Allowance Clause contemplates, and for which it expressly provides that such owner shall be paid. Clearly this Court, and the Interstate Commerce Commission, in rendering the

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[16] In 49 U. S. C., § 15(13) the word "Act" is substituted for the word "Chapter". The provision reads: "If the owner of property transported under this *Act* directly or indirectly renders" etc.

decisions cited in the preceding paragraph, did not assume that the services there under consideration would have been unlawful under the Commodities Clause, if they had been a part of the interstate railroad transportation service, nor did this Court or the Commission suggest that terminal switching services, which are the very end-terms of such transportation service, were within the control of that Clause. Such a construction of the Commodities Clause, in effect, would have written the Shippers' Allowance Clause out of the Act.[17] The Shippers' Allowance Clause, however, embodies a national transportation policy. While the Commodities Clause has been strictly limited by Congress to its original field of operation and never extended,[18] the provisions of the Shippers' Allowance Clause have been extended to motor carriers (49 U. S. C. § 324a; 54 Stat. 928) and water carriers (49 U. S. C. § 914; 54 Stat. 945; both enacted in 1940). It is entitled to a construction consonant with those facts.

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[17] A construction of those statutes which would deprive the Shippers' Allowance Clause of any possible application or significance might be justifiable only if the language and history of the two statutes left no alternative course available (*McDonald* v. *Thompson*, 305 U. S. 263; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204; *Ex parte Public Bank*, 278 U. S. 101; see also *Illinois Steel Co.* v. *Baltimore & Ohio Railroad Co.*, 320 U. S. 508, 513, 514), which is not the case, as both the language and the history of the two statutes show (see *infra*, p. 112 *et seq*; 126 *et seq*; *supra*, pp. 92 *et seq*). Repeal by implication is never favored (*United States* v. *Borden Co.*, 308 U. S. 188).

[18] As shown in this brief (*infra*, pp. 128 *et seq.*) repeated attempts to amend the Commodities Clause in such a manner as to make it applicable to all common carriers have been defeated in Congress.

D. Under views of the law and of the facts which are essential to the Government's cause of action this case is one in which an industrial enterprise directly or indirectly renders services in connection with the transportation of its own commodities.

The essential requirements of the Government's case necessitate a union of transportation and production or ownership in, or under the control of a single corporation. The necessity for such a union is established by the provisions of the Commodities Clause, by all the decisions construing it, and by all the judicial opinions, both majority and dissenting, which discuss it.

The position assumed by the Government in its amended complaint and in the Court below is the traditional one that, by reason of domination—either actual or implied from stock ownership—the South Buffalo and the Steel Company are mere departments of the Holding Company. The amended complaint alleges that by reason of such stock ownership and of the character and extent of the services which the South Buffalo renders to the Steel Company and of the degree of integration necessarily involved in such services, and of various other facts, actual or alleged, "the affairs of said three companies have been and are in fact so commingled and the identity and community of interest between them is such that in substance and reality they are one and the same organization at Buffalo, Lackawanna and Hamburg, New York, consisting on the one hand of a steel producing branch and on the other of a transporting railroad common carrier branch, both wholly owned and completely dominated by the same financial interest, the Holding Company", and that "both the South Buffalo and the Steel Company" are "mere adjuncts, branches, or depart-

ments of the same enterprise or business, * * *" (Am. Complt., pars. 21, 22(1); R. 12).

In this Court the Government suggests that the Commodities Clause may have been violated even though no active domination is proven, and even though the separate corporate entity of the South Buffalo be fully recognized. The argument is that even under those circumstances the commodities of the Steel Company, when in transit over the South Buffalo's railroad, "were and are in reality in truth and fact manufactured, produced, and transported by and under the direction of the same authority; * * *" (R. 13; Am. Complt., par. 22(2)). The quoted language was suggested by the Court's opinion in the *Reading* case (253 U. S., at p. 61). In that case it is not clear whether the "authority" which the Court had in mind was the Reading Company (the holding company) as stockholder, or consisted of the officers and directors in common of the three defendant Reading corporations. Since no director or officer of the South Buffalo has ever been a director or officer of the Holding Company or of the Steel Company, the "authority" referred to in the present case must necessarily be that of the Holding Company as owner of the stock of the other two appellees. In that view, the Holding Company's ownership of the stock of the Steel Company would constitute an interest, direct or indirect, in the commodities of that Company,[19] and would also constitute control, direct or indirect, over the production and the transportation thereof.

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[19]That view was rejected in the *Delaware & Hudson* case, 213 U. S., at pp. 413-415, and in every case since then. It was not accepted by the minority opinion in the *E. J. & E. case;* 298 U. S. at p. 512.

But whichever view be accepted, and however the argument be stated, the question still remains—is the corporation which owns and transports the property, or in which transportation and production or ownership are in some degree united, a "railroad company", which transports commodities manufactured, mined or produced by it or under its authority, or which it owns, in whole or in part, or in which it has an interest, direct or indirect, within the meaning of the Commodities Clause? Or on the contrary, is the case one in which the owner of property transported directly or indirectly renders services connected with its transportation or furnishes instrumentalities used therein, within the meaning of the Shippers' Allowance Clause? To those questions, we submit, there is only one possible answer. Every fact in the case, and every theory which can be applied to it brings it within the terms of the Shippers' Allowance Clause and prevents the Commodities Clause from applying to it.

The case is clearly one in which "the owner of [the] property transported under this chapter" is a steel company and not a "railroad company". That is clearly the fact. It is also the Government's theory. The amended complaint alleges (R. 8):

> "18. (a) South Buffalo is a unit in the organization operated by the Holding Company, largely through the Steel Company, for the manufacture of steel and of products made of steel in whole or in part. The Holding Company and the Steel Company are not interested in the operations of the South Buffalo as an independent railroad corporation but are interested in it only as a unit in the larger organization."

In point of fact the Steel Company owns the property transported. If the Steel Company and the Holding Company are to be regarded as being or representing the same entity, then the Holding Company is such owner. If the stock interest of the Holding Company be regarded either as ownership or as an interest, direct or indirect, in the commodities produced by the Steel Company, any such property interest necessarily vests in the Holding Company, which to that extent must be deemed to be "the owner of [the] property transported under this chapter." Upon either of those views, moreover, the case is one in which such an owner "directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein," as provided in the Shippers' Allowance Clause. If by reason of domination the Holding Company and the South Buffalo be deemed to be the same entity, the Holding Company, being that entity, "directly" renders the service and provides the instrumentality. If on the other hand the separate identity of the South Buffalo is recognized, but the Holding Company's stock ownership, or its election of officers or directors supposedly subservient to it, or some other proven or assumed fact be deemed to involve some degree of control over the South Buffalo, the case is one in which the Holding Company "indirectly" renders the service and provides the instrumentality.

Further, the case is one in which, as provided in that Clause, the Interstate Commerce Commission has on occasion[20] determined "what is a reasonable charge as the

[20] As, see *Jones & Laughlin Steel Co.* v. *Pittsburgh & Lake Erie R. R. Co.*, 91 I. C. C. 300, in which the Commission held South Buffalo and certain other terminal roads entitled to compensation not exceeding 10 cents per ton or the amount fixed in their filed tariffs, upon carload shipments (pp. 307, 308); see also Pl. Ex. 154, R. 852-854.

maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished", and in which "the charge and allowance therefor" are "published in tariffs or schedules filed in the manner provided in this chapter * * *". The South Buffalo files such tariffs with the Commission (Def. Ex. D-1, D-5, D-7, D-8; R. 863-864; 878-881; Adm. R. 511) as do also the line-haul railroads with which it has rail connections. Those tariffs provide for terminal switching services to be be performed by the South Buffalo for such railroads.[21] The South Buffalo receives a switching allowance from those railroads for such services, which it renders for them within the Buffalo Switching District (R. 352). The South Buffalo performs no other services and receives no other compensation in connection either with the transportation of commodities moving interstate, or with line-haul transportation of any sort (R. 606-609; 344-348).

Thus every factual element of the case and every theory which is or can be advanced by the Government with respect to such facts, and the effect of domination or stock ownership, conforms exactly to the language of the Shippers' Allowance Clause, as that language was understood in 1906, when the Hepburn Amendment was enacted, and as it has been understood ever since.

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[21] We do not contend that South Buffalo's charges were fixed or paid by authority of the Shippers' Allowance Clause. They could not have been, since the South Buffalo and the Holding Company and the Steel Company have always been regarded as separate entities, as they are in fact. However, if such separate entity were to be disregarded, the procedure followed with respect to allowances would harmonize exactly with the provisions of the Shippers' Allowance Clause.

E. The case is not within the language of the Commodities Clause.

The Commodities Clause and the Shippers' Allowance Clause supplement each other. The latter Clause represents the basic policy of the Interstate Commerce Act—the regulation of rates by the Commission. We are therefore clearly entitled to a construction of the Commodities Clause which is based upon the reasonable meaning of the words in which it is expressed, and which does not nullify the Shippers' Allowance Clause.[22] No normal, technical or reasonable construction of the language of the Commodities Clause can bring that language and the proven facts into harmony.

It is not a fact that the commodities of the Steel Company were produced by, or under the authority of, the South Buffalo (R. 610). The Trial Judge's conclusion with respect to the period prior to December 5, 1939, was exactly the opposite: "the South Buffalo became * * * an agent or instrumentality or department of the Holding Company or its subsidiary, the Steel Company" (R. 922). It cannot be argued that the expression "which it may own in whole or in part, or in which it may have any interest direct or indirect" fairly or reasonably represents any property relation which the South Buffalo bears or ever bore to the commodities of the Steel Company. If such an in-

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[22] "* * * Both sections are parts of important general statutes and their principal language should be construed in the light of the purposes which led to the enactment of the entire legislation. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 542. The words of the sections under consideration are, however, basic data from which to draw the sections' meaning. * * *". *Southland Co.* v. *Bayley*, 319 U. S. 44, 47.

terest were to be found, it would exist solely by reason of the stock relation of those two corporations, through the Holding Company. But, while there are reasons for the view that stock ownership represents an indirect interest in the property of the corporation whose stock is owned, no one has ever suggested, and certainly it is not the law, that such corporation has any such interest in the property of its stockholders, or in the property of other corporations in which such stockholders may own stock. Such a notion would run counter to the current of all judicial and economic thinking. Any such construction of the expressions "which it [the South Buffalo] may own * * * or in which it may have any interest" would reverse their normal meaning. It would not represent that "'plain, obvious and rational meaning of a statute'" which "'is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case * * * would discover.'" *Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U. S. 552, 559-560, quoting *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370. As the Court said in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 617:

> "We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. * * *"

The Government disagrees with the view expressed above. It argues (Br. p. 40) that "in the light of the statutory purpose, it would seem to be obvious that the 'interest' referred to is a sufficient financial interest of the railroad *in the fortunes of the shipper* to constitute an inducement to discriminate in favor of the shipper." (Italics ours). The argument ignores the plain language of the statute, which provides that a railroad company shall not transport "*any article* or commodity * * * which it may own in whole or in part, or *in which it may have any interest*, direct or indirect * * *." The attempt to transform the interest which that clause forbids from an interest in a commodity to an interest in an affiliated corporation completely abandons and, indeed, contradicts the language used, first, because under such view the "interest" forbidden would be in a corporation and not in a commodity, and, second, because such "interest" would not be an interest in the nature of ownership, even in such affiliated corporation. Yet the grouping of the words used by the Commodities Clause clearly shows that a property interest was intended: "which it may own in whole or in part, or in which it may have any interest, direct or indirect * * *." All prior decisions of this Court have recognized, and several have expressly stated, that the forbidden interest is a property interest; as, see *Delaware & Hudson* case, 213 U. S., at pages 413-415[23]; *United States* v. *Lehigh*

[23]The decision states (213 U. S., at p. 415):

> "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the

Valley R. Co., 220 U. S. at page 266; *United States* v. *Delaware, Lackawanna & Western R. Co.*, 238 U. S., at pages 529, 536; *E. J. & E.* case, 298 U. S., at page 499.

So far as we have been able to ascertain, the only support in the authorities for the Government's interpretation of the expression "interest, direct or indirect" is the following passage from the dissenting opinion in the *E. J. & E.* case (298 U. S., at pp. 504-505):

> "It is not denied that the 'indirect' interest of the carrier in the commodity transported, at which the statute strikes, may be effected through the instrumentality of a holding company which owns the stock both of the carrier and the company which manufactures and ships the commodity. This was definitely established by the decision in *United States* v. *Reading Co., supra*, where it was held that the power of control through holding company ownership of all the capital stock both of an interstate rail carrier and a shipper producing the commodity carried, plus an active exercise of that control, are enough to make the transportation unlawful."

But this Court in the *Reading Company* case based its decision not upon the "interest, direct or indirect" provision of the Commodities Clause, but upon the provision respecting control. The Court said (253 U. S., at p. 61):

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time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported in whole or in part; (c) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

> "Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same 'authority' that transported it over the railroad. * * *"

It is true that in the *Reading Company* case the Court stated "The real question" to be (p. 60):

> "* * * whether combining in a single corporation the ownership of all of the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act."

But it then proceeded to point out the significance of that statement (p. 61):

> "* * * Plainly in such a case as we have here this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company * * *. Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute."

That question it answered by reference to the provision respecting *control*, and not the provision respecting *interest*. Thus the *Reading Company* case, like the other cases construing the Clause, is adverse to the Government's contentions. It recognizes that, if there existed in that case any union of transportation and interest in the commodity transported, such union would exist in the holding company. It does not support the construction placed upon "interest" by the minority in the *E. J. & E.* case.

Neither the Holding Company nor the Steel Company is a "railroad Company", either in fact or in contemplation of the Commodities Clause, and neither of them transports commodities from one state to another. A determination that they, or one of them, own, operate and control the South Buffalo would not alter that fact. A different conclusion would place every terminal railroad and every railroad plant facility within the control of the Commodities Clause. The legislative history of the Hepburn Amendment makes clear that nothing of the sort was intended.[24]

Not every company operating an interstate railroad is a "railroad company" engaged in interstate transportation within the contemplation of the Interstate Commerce Act: *Pennsylvania Railroad Co.* v. *Public Utilities Comm. of Ohio*, 298 U. S. 170; *Omaha Street Railway* v. *Interstate Commerce Commission*, 230 U. S. 324. The receiver of the Reading Railroad is not to be deemed a "railroad company" within the meaning of a statute: *United States* v. *Harris*, 177 U. S. 305. A construction company operating a construction train is not a railroad company: *Griggs* v. *Houston*, 104 U. S. 553; *Beeson* v. *Busenbark*, 25 Pac. 48 (S. C. Kan.). A lumber company operating a plant railroad is not a railroad company: *Williams* v. *Norther Lumber Co.*, 113 Fed. 382 (C. C. W. D. Minn.); *Sisk* v. *White Oak Lumber Co.*, 14 F. 2d 552 (D. C. W. D. Va.); *J. Ray Arnold Lumber Co.* v. *Carter*, 91 Fla. 548, 108 So. 815; *McGivern* v. *Alexander & Edgar Lumber Co.*, 102 N. W. 332 (S. C. Wisc.). A steel company operating a plant railroad is not a railroad company: *Taggart* v. *Republic Iron & Steel Co.*, 141 Fed. 910 (C. C. A. 6); nor is an oil company operating such a railroad a railroad company:

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[24] *Supra*, p. 92.

Humble Oil & Ref. Co. v. *Hamer*, 167 S. W. 2d 272 (Ct. Civ. App. Texas); nor a phosphate company operating such a railroad: *Taylor* v. *Prairie Pebble Phosphate Co.*, 61 Fla. 455, 54 So. 904.

It is at least doubtful whether the South Buffalo itself is a railroad company within the contemplation of the Interstate Commerce Act. Ordinarily at least, that term is applied only to railroads performing general transportation. Thus all the Reports of Statistics of Railways in the United States, published annually by the Interstate Commerce Commission, refer to "steam railways", to "line-haul railways", to "Class I steam railways" etc. in classifying railroad companies engaged in general transportation[25] but have never used that term in classifying switching and terminal roads, which they uniformly characterize as "Switching and terminal companies."[26]

In *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1911), this Court held that while the unification of terminal companies to form the defendant Association[27] might under certain conditions violate the Sherman Act, it was not a combination of competing railroad companies,[28] saying (pp. 401-402):

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[25]As, see 24th Annual Report (for 1911), all page headings, and pages 9, 11, 12; 59th Annual Report (1945), all page headings, pages IX, X.

[26]24th Annual Report, pp. 723, 733, and so classifying South Buffalo (pp. 726, 736); 59th Annual Report (1945), pp. 575, 577, and so classifying South Buffalo, p. 580.

[27]Terminal Railroad Association of St. Louis is a "terminal company", classified "S-3": 59th Annual Report, I. C. C., p. 583.

[28]This Court's decision followed *State* v. *Terminal R. R. Association*, 182 Missouri 284, 81 S. W. 395 (1904), an action against the same defendants under a state statute forbidding the combining of parallel and competing railroads. This Court said concerning that decision:

> "We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. * * *"

A street railway company is ordinarily held not to be a railroad company within the meaning of the statutes: *Omaha Street Railway* v. *Interstate Commerce Commission, supra,* 230 U. S. 324; *Massachusetts Loan & Trust Co.* v. *Hamilton,* 88 Fed. 588; *Williams* v. *City Electric Street Railway Co.,* 41 Fed. 556 (C. C., Ark.). Those decisions, like the decision in the *Terminal Railroad Association of St. Louis* case, are based upon the limited types of services and facilities provided by such companies.

The South Buffalo does not "transport" commodities from one state to another. It does not do so in fact. Its railroad line does not extend beyond the Buffalo Switching District, and its crews and equipment do not move outside such District.[29] Nor does it do so in contemplation of law as, indeed, the Government's own authorities show. The reason is that the South Buffalo, like all terminal switching railroads, performs its services (in so far, at least, as they relate

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> "The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and instrumentalities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reasonable meaning of the statutes forbidding combinations between competing or parallel lines of railroad. * * *"

[29] The Government so concedes, in substance; brief, pp. 9-10.

to interstate transportation) as agent for the line-haul railroads. Terminal railroads do not, and the South Buffalo does not participate in the interstate transportation, though their services relate to it. Nor do such roads, nor does the South Buffalo file or concur in tariffs providing for joint routes or through rates, nor do they, nor does South Buffalo receive a division of the through rate from the line-haul railroads. Its and their tariffs provide only for a fixed sum for terminal switching, which is paid by the line-haul railroads for services rendered to them (*supra*, p. 110-111).

The status of terminal switching roads with respect to the line-haul railroads and to interstate transportation was under consideration by the Commission in *Re Allowances to Kanawha, Glen Jean & Eastern Ry. Co.*, 41 I. C. C. 53, which the Government cites at page 68 of its brief as disclosing "the line of demarcation between the Commodities Clause and the Shippers' Allowance Clause for present purposes * * *". The stock of the Kanawha, Glen Jean & Eastern and the stock of a coal mine which it served[30] was owned by the same persons, members of the same family, and the two companies had the same officers (p. 56). The Commission declared that (p. 59):

> "The Glen Jean has an indirect interest in the coal company coal which it transports, for the reason that the two companies have the same controlling stockholders, the same executive and managing officers, and are conducted with little regard for the legal distinction between them. * * *"

None the less the Commission sanctioned joint rate arrangements between the Glen Jean and two line-haul railroads

[30]It served, also, some coal mines owned by independent interests (p. 56).

(p. 61). In doing so, it commented upon the Commodities Clause and the Shippers Allowance Clause, and their relation to the service in connection with interstate transportation rendered by the Kanawha & Glen Jean as follows (p. 59):

> "The commodities clause forbids common carriers by railroad to transport any articles or commodities, other than timber and the manufactured products thereof and company material, which they own; or in which they have any interest, direct or indirect; or manufactured, mined, or produced by them, or under their authority, from which they have not genuinely dissociated themselves before the act of transportation. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. The argument frequently is made and is made here that this provision conflicts with the provision of section 15 of the act relative to the compensation of shippers by railroads for assisting them in the service of transportation or for furnishing facilities for such service and that industrial railroads and tap lines are therefore beyond the purview of the commodities clause. The argument is fallacious. Section 15 recognizes the common-law right of railroads to perform their public duties through agents and by means of hired facilities and merely provides that the Commission may regulate the compensation paid to the agent employed or to the owner of the facility hired if the agent or the owner of the facility is also a shipper. *A., T. & S. F. Ry. Co.* v. *Kansas City Stock Yards Co.*, 33 I. C. C., 92."

Manufacturers Ry Co. v. *St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93, which the Government cites upon the same point, also expressly sanctions the right of an industry-

owned terminal railroad, acting as agent for a line-haul railroad, to perform terminal switching with respect to the commodities of the owner of the terminal road's stock.

While for reasons stated we do not agree that the Commodities Clause applies to terminal railroads,[31] both decisions recognize that such roads, when performing terminal services as agents for the line-haul railroads, are not within the provisions of the Commodities Clause.

The explanation of the law laid down in the Commission's two decisions, cited above, will be found in the Carmack Amendment to the Interstate Commerce Act which, like the Commodities Clause and the Shippers' Allowance Clause, came into the Act as a part of the Hepburn Bill in June 1906 (34 Stat. 595; 49 U. S. Code § 20(11)), and in the case-law previously existing, which, in large measure, it displaced. Under the law as it stood prior to the Carmack Amendment, a carrier, in the absence of legislation or of an express contract, "is only bound to carry over its own line and then deliver to a connecting carrier," which then became "the agent of the shipper." *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 196,[32] 197. That Amendment, which bears striking resemblance to the Commodities Clause

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[31]The expression used in the opinion is "industrial railroads and tap lines", which may or may not be terminal railroads.

[32]This Court said (219 U. S., at p. 196):

> "Independently of the Carmack amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or, it might elect to carry safely over its own lines only and then deliver to the next carrier, who would then become the agent of the shipper. * * *"

in its language and structure, requires "any common carrier, railroad, or transportation company", subject to the Chapter, receiving property for transportation from one state to another, to issue a receipt or bill of lading therefor, and to be liable to the lawful holder thereof for any damage to such property caused either by it or by any carrier to which it might deliver such property for further transportation.[23] By a subsequent amendment, such liability was extended to "any common carrier, railroad or transportation company delivering said property so received and transported * * *." In *Galveston, H. S. & A. Ry. Co.* v. *Wallace*, 223 U. S. 481, 491-492, this Court said concerning the Amendment, as enacted in 1906:

> "Under the Carmack amendment, as already construed in the *Riverside Mills Case*, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another State, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. * * *"

But terminal railroads are not within the Carmack amendment. They are not required to issue receipts or bills

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[23]The relevant provisions of 49 U. S. C. § 20(11) as enacted in 1906, 34 Stat. 595, are as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass * * *."

of lading, and in most cases do not do so.[34] Further, this Court has held that even a line-haul railroad, if it performs only terminal switching for another line-haul railroad in delivering a particular shipment is not the delivering carrier with respect to such shipment, but that the last railroad company performing line-haul transportation with respect to such shipment is the railroad company delivering said property, within the meaning of that Amendment. *Missouri Pacific* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366.[35]

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[34] So, for example, in the *Industrial Railways Case*, 29 I. C. C. 212, decided in 1914, involving some 20 incorporated industrial railroads including the South Buffalo, the Commission notes (p. 227) that "only one issues bills of lading * * *." In *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296 (decided 1918), the opinion points out (p. 302) that the Terminal does not issue its bill of lading. In *United States* v. *Union Stockyard and Chicago Junction Railway*, 226 U. S. 286 (decided 1912), this Court comments (p. 304) "that neither the Junction Company nor the Stock Yard Company issues through bills of lading". Testimony in the present case shows that the Buffalo Creek Railroad issues no bills of lading (R. 640). All of these terminal roads were incorporated common carrier railroad companies.

[35] The Court said (pp. 368-369, unanimous):

> "The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad and Steamship Company as the initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extent to the consignee's warehouse. It employed the Saint Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such."

The Carmack Amendment is important in this action for two reasons. First, as a statutory provision which, like the Commodities Clause, came into the law as a part of the Hepburn Amendment, and which is substantially identical in its provisions with the Commodities Clause, the construction placed upon it must apply also to the Commodities Clause. The Carmack Amendment does not reach terminal switching, whether performed by a line-haul railroad or by a terminal railroad. Second, the history of the Carmack Amendment and the construction placed upon it show that terminal switching services are not "transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country * * *" (Carmack Amendment), but are a "service connected with such transportation" (Shippers' Allowance Clause).

Except for the foregoing construction of the law the decisions of the Interstate Commerce Commission respecting the Commodities Clause and the Shippers' Allowance Clause would be incomprehensible. The Commission had never held, or intimated prior to the present case, that switching services rendered by a terminal road were within the Commodities Clause. On the contrary, for upwards of 40 years it had held that they were not, by ruling that such railroads were entitled to receive allowances from the line-haul railroads for services connected with interstate transportation: *National Malleable Castings Co.* v. *Pittsburgh & Lake Erie Railroad Company*, 51 I. C. C. 537.

Thus upon the facts shown, if the Holding Company or the Steel Company, acting directly or through the South Buffalo, renders terminal switching services for the line-

haul railroads those services fall within the express provisions of the Shippers' Allowance Clause, and exactly within the construction placed upon it by this Court in the *Baltimore & Ohio Railroad* case and by the Commission in *National Malleable Castings Co.* v. *Pittsburgh & Lake Erie Railroad Company, supra,* 51 I. C. C. 537.[36] And if, on the other hand, the South Buffalo performs such terminal switching services for the line-haul railroads those services are lawfully performed within the Commission's decisions cited in the preceding paragraphs, including those cited by the Government, and within the very interpretation which the Government places upon the two statutes. In either view the service is lawful, and the Commodities Clause does not apply to it.

The entire history of Commodities Clause legislation before Congress evidences the intent of that body to limit its operation to railroad companies, engaged in general interstate transportation.

When the proposed Clause was under debate in the Senate in 1906, its purpose was stated by Senator Elkins, its sponsor, to be "to prohibit interstate roads, carriers of

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[36] In *National Malleable Castings Co.* v. *Pittsburgh & Lake Erie Railroad Company et al.*, 51 I. C. C. 537, the Commission, after referring to this Court's affirmance of the Commission's determination that points within the Los Angeles switching district upon industrial spur tracks, up to seven miles from the main tracks of the line-haul railroads, were properly regarded as part of such railroads' terminal facilities, said (p. 541):

> "In numerous cases subsequently decided we have fixed reasonable allowances for switching to and from the tracks of the line-haul carriers performed by the industry itself either directly or through a common-carrier industrial line and in many instances the character of the switching was similar to that performed by the present complainant. * * *"

interstate commerce, from engaging in or doing any other business than the transportation of freight and passengers".[37] In the debate which ensued objections were made to it by senators who feared that its aplication to short line roads, pipe lines and water carriers would unnecessarily disrupt industry and retard national development. It was pointed out repeatedly in the course of the debate that industry-owned short line railroads were essential in the case of coal industries, iron, steel and copper industries, lumber industries and many others[38] to enable such industries to reach the trunk line railroads, that most of those small railroads performed some general carrier business for the public, and that there was no evidence that their operation had produced the injuries which the Clause was intended to remedy. It was pointed out without contradiction during the debate that the proposed Clause "would not touch the

[37] 40 Cong. R. 6456.

[38] 40 Cong. R. 6460, 6496, 6499, 6563-6565, 6567, 7012-7013. Senator Fulton said (40 Cong. R. 6567):

> "It is my conviction that legislation of this character should be directed against those transportation lines only that are engaged principally in carrying interstate commerce, and with which mining or other enterprises are merely incidental. It ought not to be applicable to those carriers with whom railroading is merely incidental to the business of their mills or mines. * * *"

And Senator McLaurin, a member of the Committee on Interstate Commerce, later stated the same thought as seeming to be the desire of the Senate (40 Cong. R. 7013):

> "It seems to be the desire of the Senate to prohibit common carriers, whose principal business is common carrying, from engaging in the business of mining, but not to prohibit producers from providing their own means of transportation for their own freight when they make the transportation business incidental to their main business. * * *"

ownership of railroads by coal companies or the common ownership of railroad companies and coal companies."[39] Almost the last statement made by Senator Elkins in the course of the debate was that "if these logging roads are owned by lumber companies and incidental to their business the law would not apply to them; or, * * * if these are intrastate logging roads or private roads they do not come under the operation of the law. * * *"[40] That statement was made prior to the time that the exception in the Commodities Clause with respect to timber and the manufactured products thereof was proposed and adopted by the Senate.[41]

When the proposed Clause was first passed by the Senate as an amendment to the Hepburn Bill it did not contain the quoted expression "railroad company", but, instead, the expression "common carrier."[42] The House of Representatives, however, refused to agree to the proposed amendment (the Commodities Clause) so long as that expression ("common carrier") remained in it. The Bill was twice sent to conference because, *inter alia*, of such disagreement.[43] Finally, the Senate agreed to the substitution of "railroad company" for "common carrier"[44] and the Bill, with the

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[39]40 Cong. R. 7011-7012. As we have pointed out (*supra*, p. 31 *et-seq.*) two amendments intended to eliminate that objection were defeated.

[40]40 Cong. R. 7013.

[41]See 40 Cong. R. 7015.

[42]40 Cong. R. 6561, 6569-6570, 7088.

[43]House Report 5003; Amendment numbered 5; House Report 5076, Amendment numbered 5: all 59th Cong., 1st Session; 40 Cong. R. 9577. The bill was sent to conference three times in all. The reports of the first conference recommended some changes in the Commodities Clause adopted by the Senate but did not refer to the expression, "common carrier"—see Senate Document 476 and House Report 4659, Amendment numbered 5, both 59th Congress, 1st Session.

[44]40 Cong. R. 9641, 9655.

Commodities Clause in that form, was passed and approved, and became law.

When the proposed Water Carrier Act, 1935 (now substantially Interstate Commerce Act, Part III) was submitted to Congress by Federal Coordinator of Transportation Eastman, it contained a proposed commodities clause.[45] Hearings were held on the resulting Bill (S. 1632, 74th Congress, 1st Session) by the Committee on Interstate Commerce of the Senate, in the course of which so much opposition developed to such extension of the Commodities Clause that it was dropped when the Bill was reported out of Committee.[46] The proposed Motor Carrier Act, 1935, submitted to Congress at the same time by Coordinator Eastman contained no Commodities Clause and none was added in the course of its passage by Congress.[47]

Again when the bill which was to become the Transportation Act of 1940 was under consideration by Congress the proposal was made, both in the Senate and in the House

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[45]See Report of Federal Coordinator of Transportation dated March 10, 1934, being Senate Document 152, 73rd Congress, 2nd Session, Appendix F, Sec. 214, and Report of Federal Coordinator of Transportation dated January 21, 1935, being House Document 89, 74th Congress, 1st Session, Appendix VI, Sec. 214.

[46]Testimony of Commissioner Eastman, Hearings in April, 1939, before the Committee on Interstate Commerce of the Senate on S. 2009, 76th Congress, 1st Session, entitled Transportation Act of 1939, at page 772; see also Senate Report 925, 74th Congress, 1st Session, p. 3.

[47]Senate Document 152, *supra*, Appendix G. The Coordinator reported that it seemed desirable to await the results of the regulation which he proposed before imposing further restraints upon the transportation of proprietary tonnage. Senate Document 152, p. 49. See also House Document 89, *supra*, Appendix VII. The citation for the Motor Carrier Act, 1935, is 49 Stat. 543.

of Representatives, to amend the language of the Commodities Clause so as to render it applicable to all common carriers. Section 12 (being the proposed revised Commodities Clause) of the Transportation Bill, as drafted by the Committee of Six and submitted to the House Committee on Interstate and Foreign Commerce,[48] and as by that Committee originally submitted to the House of Representatives,[49] provided that "It shall be unlawful for any carrier by railroad and, on and after January 1, 1941, it shall be unlawful for any carrier" to transport its own commodities. Although hearings were held on the Bill through March, 1939,[50] it seems never to have been reported out by the Committee.

The bill originally considered by the Senate Committee on Interstate Commerce, which was the bill proposed by the Committee of Six with certain changes, contained, as Section 12, a proposed Commodities Clause identical with the one submitted in the House of Representatives.[51] Before that Committee the proposed Commodities Clause went through several revisions, applying at one time to "any common carrier subject to the provisions of this Act",[52]

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[48]Committee Print No. 1, pp. 38-39, March 1, 1939, Transportation Bill proposed by the Committee of Six, 76th Congress, 1st Session, House Committee on Interstate and Foreign Commerce.

[49]H. R. 4862 (pp. 39-40), 76th Congress, 1st Session, introduced March 8, 1939, by Chairman Lea of the House Committee on Interstate and Foreign Commerce; 84 Cong. R. 2512.

[50]Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Session, on H. R. 4862, entitled "Omnibus Transportation Bill", Vol. 2, March 7-10, 14-17, 21-24, 26, 29 and 30, 1939.

[51]Confidential Committee Print, March 15, 1939, 76th Congress, 1st Session, p. 47, sec. 12.

[52]Confidential Committee Print No. 2, March 18, 1939, p. 50, sec. 12.

and later to "any carrier by railroad and, on and after January 1, 1941, * * * any carrier, other than a carrier by air",[53] in which latter form it was first introduced in the Senate.[54] It was those proposed revisions which the Committee in its report to the Senate characterized as "far too drastic."[55]

At the hearings held by the Committee on Interstate Commerce of the Senate upon the bill (S. 2009) it was pointed out that one purpose of the redrafted Section 12 (the Commodities Clause)[56] was to avoid the decision of this Court in the *I. C. J. & E.* case.[57] The Clause in its proposed modified form was supported during the earlier

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[53]Confidential Committee Print No. 3, March 28, 1939, pp. 44-45, sec. 12.

[54]S. 2009, pp. 44-45; 76th Congress, 1st Session, March 30, 1939; 84th Cong. R. 3509.

[55]Senate Report 433, 76th Congress, 1st Session, May 16, 1939, p. 15. The record of the hearings held on S. 2009 in April, 1939, indicates that the Committee's objection rested, in part, upon the extension of the proposed Commodities Clause to cover all carriers.

[56]The Clause in the form then under consideration was as follows (see S. 2009, pp. 44-45):

> "Sec. 12. It shall be unlawful for any carrier by railroad and, on and after January 1, 1941, it shall be unlawful for any carrier, other than a carrier by air, to transport, in commerce subject to this Act, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or any such article or commodity in which such carrier, subsidiary, affiliate, or controlling person has any interest, direct or indirect, legal or equitable, except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier."

[57]Committee on Interstate Commerce of the Senate, Hearings on S. 2009 (entitled "Transportation Act of 1939"), p. 309.

hearings, by Senator Reed, but was strongly criticized throughout the hearings by the Chairman of the Committee, Senator Wheeler,[58] who pointed out repeatedly that (in its proposed form) it would require modification to prevent its application to terminal roads,[59] water carriers, motor carriers, pipe line companies, contract carriers and other similar enterprises. At the hearings a great deal of testimony was offered, opposing the proposed extension of the Clause, and specifically, opposing any extension of its provisions which would bring industrial terminal roads within its control.[60] Much such testimony was not received, however,

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[58]No views were expressed by the other members of the Committee.

[59]For example, the Minutes disclose the following (pp. 67-68):

> "The Chairman. Judge, somebody called me on the phone the other day—I do not remember who it was; I think it was some newspaper man—and asked me as to whether or not in my opinion this prevented the steel company, or somebody in that position, from operating their own railroad, where they have a small railroad that they are operating. I did not intend such a result.
>
> * * * * * *
>
> "Senator Reed. I am perfectly willing that it should have that effect.
>
> "The Chairman. Well, I doubt that it should. For instance, a lumber company may own some railroad.
>
> "Senator Reed. You exempt that?
>
> "Mr. Fletcher. You exempt the lumber company?
>
> "The Chairman. Yes.
>
> "Mr. Fletcher. It might not be altogether lumber.
>
> "The Chairman. I was speaking, for instance, of some steel company or some other industrial company which might own a short railroad."

See also pp. 285-286; 427-428; 589-590.

[60]Such testimony was given by, *inter alia*, W. H. Day for the National Industrial Traffic League (pp. 285-286) and by J. M. Hood for the American Short Line Railroad Association. Mr.

because of Senator Wheeler's announcement, early in the course of the hearings, that the Commodities Clause as then enacted would not be changed. As has been pointed out, that decision was incorporated in the Committee's Report to the Senate.

Upon at least two other occasions bills intended to so amend the Commodities Clause as to render it applicable

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Day pointed out that the League had gone on record in 1933 as follows (p. 285):

> "'The development of numerous industries in the United States has been made possible through the acquisition of transportation facilities which otherwise would not have been afforded to such industries. This is peculiarly the situation in the natural-resource industries. Many manufacturing enterprises have found it necessary to acquire transportation facilities in order to enable them to more efficiently and cheaply serve the public. Where such facilities may be availed of by the public, the league believes it to be to the best public interest to permit such services to be rendered. * * *'"

Mr. Hood testified in part (p. 541):

> "It would be impossible for many communities which need rail facilities to develop raw materials or a labor market, or to take advantage of some climatic condition which permits processing of a particular nature, to provide, with the aid of those particularly interested, rail facilities.
>
> "Had this clause been before you in a serious manner I would have gone into detail on behalf of 135 common carriers by railroad, who would be directly affected by the terms of this clause. Their total mileage is 6,310; their investment in rail property is $570,000,000, and they have 31,400 employees.
>
> * * * * * *
>
> "We frequently have railroads incorporated and organized to operate a branch line which has been abandoned by a trunk line. Invariably the investors in that newly organized property are the people whose private businesses are threatened with elimination through the lack of rail facilities."

to "common carriers" were introduced in Congress,[61] but were not enacted.

Thus, it is submitted, the entire history of the Commodities Clause before Congress evidences the intent of that body to confine the application of the Clause strictly to the line-haul railroads, whose attempt to monopolize coal production in the areas which they served had originally brought about its enactment.

F. The opinion below.

Judge Knight overruled the respondent's arguments based upon the Shippers' Allowance Clause, holding that "The South Buffalo is a railroad company within the purview of the Commodities Clause," and that "The Commodities Clause * * * applies, though South Buffalo does not cross a state line, and whether or not it be designated as an industrial or switching railroad" (R. 922).

We have never argued that the Commodities Clause does not apply because the South Buffalo does not cross a state line. That argument was presented below by counsel for the American Short Line Railroad Association. So much of Judge Knight's opinion and of the Government's brief in this Court as relates to that subject is, from our standpoints, irrelevant, and we express no opinion concerning it.

The circumstances under which our argument respecting the Shippers' Allowance Clause was presented to the Trial Court were unforunate. It was outlined briefly in our argument at the opening of the trial (R. 67-68, 70, 75), but was not referred to by the Government. It was not referred to in the Government's first brief following

[61] S. 3079, 61st Congress, 1st Session; S. 4480, 61st Congress, 2nd Session; both 1909.

trial (that being the first brief filed in the case), but was again stated in our brief in answer. In the Government's reply brief, for the first time, it disclosed its position with respect to the argument, stating therein the contentions and authorities which appear in the Trial Court's opinion. No closing argument was had, and the respondents were thus foreclosed of any opportunity either to respond to the Government's contentions or to present their argument with knowledge as to what those contentions would be.

Although Judge Knight's opinion rests upon the law and not upon the facts, his attempt to reconcile his view of the law with the facts proven involved him in substantial difficulties. Thus we find him stating at one time that (R. 896) "The corporate distinction between the two companies (the South Buffalo and the Steel Company) is in no way dissolved, and this is not changed though the physical and operational aspects in a [sic] case may seem to be commingled." Later he speaks of (R. 904) "the commingling of the identity and community of interest between the three" appellees as giving the South Buffalo an interest in the Steel Company's property. Thus it seems that corporate identity was commingled but in no way dissolved, and that while "physical and operational aspects" only seemed commingled under one statute they resulted in "identity and community of interest" under the other. In spite of such "commingling of the identity and community of interest" sufficient to give each appellee an interest in the property of the other two, the Judge thought that "The theory of merger into one entity of the three defendant companies as 'owner of property' * * * is chimerical" (R. 896). The multitudinous and conflicting aspects thus assumed by the same interests and transactions, disclosed by

the same evidence, well illustrates the inconsistencies in which the Judge's theories involved him.

Upon the law, the opinion expresses the following major lines of thought:

That this Court disapproved a somewhat similar argument in the *E. J. & E.* case, and overruled such an argument in the *Delaware & Hudson* case.

That the purpose of the Commodities Clause was to divorce transportation from production, and that its application is as broad as the Interstate Commerce Act.

That the Shippers' Allowance Clause does not apply to a common carrier because, such a carrier being an entity distinct from the owner of its stock, there is no union of transportation and production.

That the South Buffalo is more than a terminal switching railroad because it is more than a railroad plant facility of the Steel Company.

The Judge also referred to the Carmack Amendment, a statute similar to the Commodities Clause, and to the *Kanawha, Glen Jean & Eastern Railroad* case, but without noting that such Amendment did not apply to switching roads and services, and that the Commission, in the *Kanawha* case, did not deem the Commodities Clause applicable to a terminal switching road servicing the commodities of its affiliated coal industry as agent for a line-haul railroad.

We believe that all the grounds stated in the opinion have been refuted. Specifically, we have pointed out that it was not the purpose of Congress in enacting the Hepburn Amendment, or the Commodities Clause as a part of it, to divorce production from transportation at the level of terminal services (pp. 92-96), and largely for that reason, that the Commodities Clause does not apply to all trans-

portation services which are a part of interstate commerce (pp. 104-107). We have shown, also, that our argument was not presented and, in view of the facts, that it could not have been passed upon in the *Delaware & Hudson* case or the *E. J. & E.* case, and that the argument in the latter case to which Judge Knight's opinion refers was accepted by the District Court, and was not referred to by this Court (pp. 98-100). The assumption that this Court, by failing to refer to the District Court's determination, intended to disapprove it,[62] is notable more for its novelty than for its logic.

The view that the South Buffalo is not an industrially owned switching railroad is insupportable. If it is not industrially owned the Commodities Clause cannot apply to it. Repeated classifications by the Interstate Commerce Commission show that it is a terminal switching railroad. The view that it is not a switching railroad because it is "more than a terminal facility" is inconsistent with all the classifications of switching and terminal companies issued by the Commission. The great majority of those companies were separately incorporated common carriers, having all the attributes possessed by the South Buffalo, and all the attributes referred to in Judge Knight's opinion.[63]

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[62]The District Court's determination of the point of law presented, unless disapproved, would constitute *res judicata* as to such point in any future litigation between the parties to that action.

[63]In this connection we note that Judge Knight's view that there are essential differences between the Terminal Railroad Association of St. Louis and the South Buffalo (cf. *United States* v. *Terminal Association*, 224 U. S. 383) is not shared by the Commission, which classifies both as terminal switching companies. The Commission classifies the South Buffalo as S-1, meaning "companies * * * performing switching service only", and the Terminal Railroad Association of St. Louis as S-3, meaning a company performing "both switching and terminal" services."

Judge Knight's statement that "the Shippers' Allowance Clause * * * has no application to a common carrier" because it involves "allowances made to the shipper for services furnished * * * by the shipper" was supported by the Government in the District Court, by the citation of *Manufacturers Railway Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93,[64] which the Judge cites later in his opinion, and which the Government now cites in its brief to this Court upon this point (Br., p. 115). The stock of Manufacturers' Railway was owned by the stockholders of Anheuser-Busch Brewing Company, which was the principal industry served by that Railway. The Commission's opinion discloses that the line-haul railroads were paying allowances to the Railway for switching interstate shipments (p. 100) to and from the Brewery's plant, and had done so for many years. Thus the value of the decision from the Government's standpoint in this case under the Commodities Clause is altogether on the negative side, since that Railway did, without objection from the Commission, precisely what the South Buffalo is doing. The substance of the language from the Commission's opinion, which was quoted to the Court below, and which is quoted to this Court, is that when an industry incorporates a terminal railroad which is thereafter independently operated, a trunk line may not pay the owning industry an allowance under the Shippers' Allowance Clause for service performed by the railway, since the owning industry does not perform those services.[65] The Commission's determina-

---

[64]Reviewed by this Court and affirmed: *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457.

[65]It is not clear that this is true, since the industry might hire and pay the railway to perform the switching as the industry's agent, and recoup the cost from the line-haul road. *Texas & Pacific Ry. Co.*, 288 Fed. 167, 169 (C. C. A. 5).

tion, however, rests upon two assumptions, both of which the Government contradicts in this case: "Assuming the newly made carrier to be under the law a common carrier in all respects such as it represents itself to be," that is, "wholly separate and distinct from the owning industry"; and that "the railway is no longer a part of or in law connected with" the industry (pp. 101-102; see Gov't. Br., p. 116). That, absent those assumptions, the Commission would have reached the opposite conclusion, is clear.

Lastly, Judge Knight, cites *Powell* v. *United States*, 112 F. (2d) 764 (C. C. A. 4) as involving a construction of Section 1 of the Elkins Act, 49 U. S. C., section 41(3), the language of which is stated to be similar to the language of the Commodities Clause. The citation is irrelevant to our contentions, as relating to the Trial Court's determination that the Commodities Clause may apply to a railroad which does not cross state lines. However, the *Powell* case was not decided under paragraph 3 of section 41, but under paragraph 1 thereof,[66] which contains no language bearing any resemblance to the Commodities Clause.

The citation of such grounds and authorities by the Trial Court in overruling our point proves only one fact—that he completely misunderstood it.

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[66] Paragraph 1 is a criminal provision directed against carriers. Paragraph 3 is a civil provision directed against shippers. *Powell* v. *United States* was a criminal case, brought against the receivers of the Seaboard Air Line.

CONCLUSION

For the reasons stated herein it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1947

THE UNITED STATES OF AMERICA,
Appellant,

v.

SOUTH BUFFALO RAILWAY COMPANY,
BETHLEHEM STEEL COMPANY, and
BETHLEHEM STEEL CORPORATION

Appeal from the District Court of the United States for the Western District of New York

---

BRIEF AMICUS CURIAE FOR THE AMERICAN SHORT LINE RAILROAD ASSOCIATION

Part I—ARGUMENT

Part II is History of Commodities Clause

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February 2, 1948

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BRIEF AMICUS CURIAE FOR THE AMERICAN SHORT LINE RAILROAD ASSOCIATION

PART I—ARGUMENT

I

PRELIMINARY STATEMENT

The American Short Line Railroad Association is a voluntary non-profit association of 300 railroads, operating approximately 16,000 miles of railroad in the United States. More than 100 of them are industrially-owned common carriers, performing either road-haul or terminal switching services, or both.

This proceeding is of particular importance to the members of this Association by reason of the fact that one of the issues presented is whether *United States v. Elgin, Joliet and Eastern Ry. Co.*, 298 U. S. 492, 56 Sup. Ct. Rep. 841, 80 L. ed. 1300 (1936) is controlling (R. 925).

The parties to this proceeding have consented to the filing of this Brief *Amicus Curiae*. The Solicitor General consents to the filing of the brief, Parts I and II, on condition that we advise the Court that it is the Government's position that Part II does not contain a complete statement of the legislative history of the Commodities Clause (see Government's brief pp. 109-113).[1]

[1] But, see pages 72-80 of Legislative History.

II

SUMMARY OF ARGUMENT

This Association respectfully submits that:

1. A common carrier by railroad operating a terminal switching line located wholly within the confines of a single State cannot violate the Commodities Clause (Section 1(8) of Interstate Commerce Act, U. S. C. Title 49, Section 1(8)) because it cannot transport a commodity from a point in one State to a point in another State.

2. The Commodities Clause does not, in purpose, language, or effect, prohibit, *ipso facto*, a railroad subsidiary of a holding company from transporting commodities manufactured by a producing subsidiary of that holding company.

3. Congress has repeatedly and consistently refused to amend the Commodities Clause so as to prohibit, *ipso facto*, a railroad subsidiary of a holding company from transporting commodities manufactured by a producing subsidiary of that holding company.

III

ARGUMENT

Point 1.

A Carrier Whose Line of Railroad Is Located Wholly Within a Single State Cannot Violate the Commodities Clause Because It Cannot Transport a Commodity from a Point in One State to a Point in Another State.

The Commodities Clause, by its own terms, makes it unlawful for any railroad company to transport *from any State to any other State* any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

For the ready convenience of the Court, there is submitted herewith, as Part II of this brief, a "Legislative and Judicial History of the Commodities Clause."

That Legislative History clearly demonstrates the intent of the Congress to limit the prohibitions of the Commodities Clause to railroads which cross State lines. This is shown by reference to page 73 of this History. There it is stated that when Senator Elkins proposed the amendment which became the Commodities Clause as a substitute for an earlier amendment he had offered, *Senator Bacon immediately called attention to the fact that the new amendment being proposed would have no effect so long as the transportation was wholly within the confines of a single State.* After Senator Bacon had so clearly pointed this out, the amendment was agreed to. 40 Congressional Record 6568-6570 (1906). The prohibitions of the Commodities Clause are limited to interstate trans-

portation, and not in interstate commerce. In other words, a carrier located wholly within the confines of a single State, engaged in interstate commerce, may transport such articles in *interstate commerce* so long as it does not transport them in interstate *transportation*, i.e., across State lines.

Point 2.

The Commodities Clause Does not, in Purpose, Language, or Effect, Prohibit, ipso facto, a Railroad Subsidiary of a Holding Company from Transporting Commodities Manufactured by a Producing Subsidiary of That Holding Company.

To sustain the proposition that a railroad subsidiary of a holding company violates the Commodities Clause when it transports commodities produced by a producing subsidiary of that holding company, the court must overrule *United States v. Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 56 Sup. Ct. Rep. 841, 80 L. ed. 1300 (1936), and found in the History at pages 283-299, wherein *United States v. Reading Company*, 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64 L. ed. 760 (1920), found in History at pages 234-264, was distinguished.

In addition, the Court would be obliged to find and hold that the ownership by a holding company of a railroad subsidiary and a producing subsidiary, *ipso facto*, as a matter of law,—

1. Makes the railroad subsidiary the manufacturer, miner or producer of the commodities manufactured, mined or produced by the producing subsidiary; or

2. Makes the railroad subsidiary the owner, in whole or in part, of the commodities manufactured, mined or produced by the producing subsidiary; or

3. Gives the railroad subsidiary an interest, either direct or indirect, in the commodities manufactured, mined or produced by the producing subsidiary.

We believe that this issue was settled, as to each and all of the three points listed above, by *United States v. Elgin, Joliet & Eastern Ry. Co.*, 298 U. S. 492, 56 Sup. Ct. Rep. 841, 80 L. ed. 1300 (1936). We believe that case very properly distinguished *United States v. Reading Company*, 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64 L. ed. 760 (1920), because it was primarily a case under the Anti-Trust Laws, with the Commodities Clause only incidentally involved. It was only by virtue of the Anti-Trust Laws that the court found any authority for the decree there entered. The *Reading Case*, as we view it, did not hold that, *as a matter of law*, the ownership by a holding company of the stock of a railroad company and of the stock of a coal company was *ipso facto* a violation of the Commodities Clause.

Prior to the *Reading Case*, this Court had held that in order that there be a violation of the Commodities Clause the railroad must have an interest, legal or equitable, in the commodity transported, and that the mere ownership of the stock of a producing company does not give it such an interest, *United States v. Delaware and Hudson Company*, 213 U. S. 366, 29 Sup. Ct. Rep. 527, 53 L. ed. 836 (1909), and had further approved that principle in *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 31 Sup. Ct. Rep. 387, 55 L. ed. 488 (1911), and, again, in *United States v. Delaware, Lackawanna & Western R. Co.*, 238 U. S. 516, 35 Sup. Ct. Rep. 873, 59 L. ed. 1438 (1915). In these cases it was held that violations of the Commodities Clause were brought about only because the transportation companies and the producing companies were so inseparably operated as to be indistinguishable in fact.

Since, *as a matter of law*, the mere ownership by a holding company and a producing company does not result in a violation of the Commodities Clause where the railroad company transports the commodities of the producing company, there can be a violation of the Commodities Clause only where it is shown that there is such a domina-

tion by the holding company of the affairs of the railroad company and of the producing company that these companies are not separately and independently operated. That issue is left for discussion by the appellees. However, we would call attention to the proposition that form alone cannot bring a case within the prohibitions of a statute when in fact it is not within its terms. This was well illustrated by Mr. Justice Holmes, speaking for this Court in *Bullen v. Wisconsin*, 240 U. S. 625-630, 631, 36 Sup. Ct. 473, 60 L. ed. 830 (1916), when he said:

> "When the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits."

Having in mind that the primary evil aimed at by the Commodities Clause, as disclosed by its history, was the ownership of coal mines by railroads which transported the coal from these mines via their own roads with resulting discriminations against independently-owned mines, it will readily be seen that none of the evils aimed at by the Congress are shown, by the record in this case, to be in existence. Since the evils aimed at do not exist, there would seem to be no basis for the application of the Commodities Clause to the facts as developed by the record in this case. In the absence of such evils, no remedy is necessary.

Point 3.

Congress Has Repeatedly and Consistently Refused to Amend the Commodities Clause so as to prohibit, *ipso facto*, a Railroad Subsidiary of a Holding Company from Transporting Commodities Manufactured by a Producing Subsidiary of That Holding Company.

There have been many proposals for the amendment of the Commodities Clause since its enactment in 1906. These proposals are dealt with fully in the History of the Commodities Clause, at pages 92-126.

From that Legislative History it will readily be noted that Congress has consistently rejected proposals for the amendment of the Commodities Clause which would accomplish the purpose sought by the United States in the instant proceeding. In the *Elgin, Joliet & Eastern Case, supra*, this Court refused to legislate where the Congress had not. It is respectfully suggested that the forum for obtaining a change in the statute has been mistakenly chosen, and that this Court should remit the Appellant to its right to seek an amendment of the statute by the Congress.

IV

CONCLUSION

It is respectfully submitted that the judgment of the United States District Court for the Western District of New York should be affirmed.

Respectfully submitted,

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Appeal from the District Court of the United States for the Western District of New York

BRIEF AMICUS CURIAE FOR THE AMERICAN SHORT LINE RAILROAD ASSOCIATION

Part II—HISTORY OF COMMODITIES CLAUSE

(Part I is Argument)

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LEGISLATIVE and JUDICIAL

History

OF THE

Commodities Clause

[SECTION 1 (8) OF THE INTERSTATE COMMERCE ACT]

MARCH 15, 1946

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THE END

THE COMMODITIES CLAUSE

The "Commodities Clause"[1] of the Interstate Commerce Act was first enacted by section 1 of the Hepburn Act of 1906[2], and originally read as follows:

> "From and after May 1st, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

It was amended, as it now reads, by section 7 of the Mann-Elkins Act of 1910[3]. It now reads as follows:

> "(8) Transportation of commodity manufactured or produced by railroad forbidden.—From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The only changes in the language were the removal of the comma after the word "whole" and the insertion of

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[1] Section 1 (8) of the Interstate Commerce Act.
[2] Act of June 29, 1906, 34 Stat. L. 585.
[3] Act of June 18, 1910, 36 Stat. L. 547, effective August 17, 1910.

commas after the words "interest" and "direct". No change was made in the purpose and intent of the statute.

It was made paragraph (8) of section 1 of the Interstate Commerce Act by section 401 of the Transportation Act of 1920.[4]

[4] Act of February 28, 1920, 41 Stat. L. 475.

SHIPPERS' ALLOWANCES CLAUSE

At the time the Commodities Clause was enacted there was also enacted the Shippers' Allowances Clause[1]. As first enacted by section 4 of the Hepburn Act of 1906[2], that clause read as follows:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

It was amended, as it now reads, by section 12 of the Mann-Elkins Act of 1910[3]. It now reads as follows:

> "(13) **Allowance for service or facilities furnished by shipper.**—If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

---

[1] Section 15 (13) of the Interstate Commerce Act.
[2] Act of June 29, 1906, 34 Stat. L. 590.
[3] Act of June 18, 1910, 36 Stat. L. 553, effective August 17, 1910.

The only changes made in the language were the insertion of the words "or on its own initiative" after the word "complaint", and the substitution of the word "services" for the word "service".

It was made paragraph (13) of section 15 of the Interstate Commerce Act, by section 421 of the Transportation Act of 1920[4].

[4] Act of February 28, 1920, 41 Stat. L. 488.

PRESIDENT THEODORE ROOSEVELT'S MESSAGE TO CONGRESS

The first session of the 59th Congress convened on December 4, 1905. The following day President Theodore ROOSEVELT submitted his message to the Congress. His only statement with respect to the railroads was:

> "All private-car lines, industrial roads, refrigerator charges, and the like should be expressly put under the supervision of the Interstate Commerce Commission or some similar body so far as rates, and agreements practically affecting rates, are concerned. The private-car owners and the owners of industrial railroads are entitled to a fair and reasonable compensation on their investment, but neither private cars nor industrial railroads nor spur tracks should be utilized as devices for securing preferential rates. A rebate in icing charges, or in mileage, or in a division of the rate for refrigerating charges is just as pernicious as a rebate in any other way."[1]

[1] 40 Cong. Rec. 92 (1905).

BILLS INTRODUCED IN FIFTY-NINTH CONGRESS RELATING TO REGULATION OF RAILROADS

During the First Session of the Fifty-Ninth Congress many bills[1] relating to the regulation of railroads were introduced:

H. R. 184—By Mr. Russell
H. R. 278—By Mr. Candler
H. R. 296—By Mr. Richardson
H. R. 468—By Mr. Hearst
H. R. 469—By Mr. Hearst
H. R. 4425—By Mr. Townsend
H. R. 5966—By Mr. Adamson
H. R. 6019—By Mr. Sheppard
H. R. 8414—By Mr. Sulzer
H. R. 8437—By Mr. Smith
H. R. 8999—By Mr. Olcott
H. R. 9972—By Mr. Williams
H. R. 10097—By Mr. Hogg
H. R. 10098—By Mr. Hogg
H. R. 10099—By Mr. Hepburn
H. R. 11220—By Mr. McCall
H. R. 12312—By Mr. Davey
H. R. 11488—By Mr. Hepburn

All of these bills were referred to the House Committee on Interstate and Foreign Commerce.

[1] See Volume 40 of Congressional Record—History of Bills Introduced.

COMMITTEE CONSIDERATION OF PROPOSED LEGISLATION

All of the bills received consideration by the House Committee on Interstate and Foreign Commerce. H. R. 11488, introduced by Mr. HEPBURN, was considered at length by the Committee, and was amended in many particulars. The Chairman was requested to reintroduce H. R. 11488, as amended by the Committee.[2]

THE HEPBURN BILL INTRODUCED

On January 2nd, 1906, Chairman HEPBURN of the House Committe on Interstate Commerce, introduced H. R. 12987, 59th Cong., 1st Sess., which was H. R. 11488 as amended by his Committee.

So far as is pertinent to this study, that bill contained the following provisions:

> "The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all frieght depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and

[2] House Report No. 591, 59th Cong., 1st Sess. (1906).

it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * *

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnished any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."[3]

[3] This provision was the inception of section 15 (13) of the Interstate Commerce Act.

ANTECEDENTS OF COMMODITIES CLAUSE PROPOSAL

The third session of the 58th Congress convened on December 5, 1904[1] and adjourned on March 4, 1905[2]. On December 16, 1904, the Senate Committee on Interstate Commerce began hearings on bills to amend the Interstate Commerce Act. These hearings had not been concluded when the Congress adjourned. On March 2, 1905, the Senate adopted Senate Resolution 288, Fifty-eighth Congress, Third Session,[3] reading as follows:

> "*Resolved*, That the Committee on Interstate Com- or any subcommittee thereof, is instructed to sit during the recess of the Senate, at such times and places as may suit the convenience of said committee or subcommittee, to consider the question of additional legislation to regulate interstate commerce and to authorize the Interstate Commerce Commission to fix rates of freight and fares, and to acquire further information as to interstate commerce, including violations or evasions of the antirebate law and the devices and methods by which such evasions are accomplished, and including refrigerator and other private car systems, industrial railway tracks, switching charges, and the like, and also to consider what legislation should be enacted in relation to the liability of railroad companies engaged in interstate traffic, or operating lines in any territory of the United States, for injuries received by their employees when in the discharge of duty; said committee or subcommittee is authorized to employ experts, administer oaths, take testimony, send for persons and papers, employ a stenographer to report its hearings and to have them printed, which hearings shall be sent, as soon as printed to each member of the Senate. Said committee shall make a full report of its proceedings hereunder by bill or otherwise within ten days after the meeting of the next Congress.

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[1] 39 Cong. Rec. 1 (1904).
[2] 39 Cong. Rec. 4041 (1905).
[3] 39 Cong. Rec. 3857 (1905).

> All necessary expenses to carry out of the provisions of this resolution shall be paid from the contingent fund of the Senate."

Pursuant to this resolution, the Senate Committee on Interstate Commerce began further hearings on April 17, 1905 and continued to hold such hearings until May 23, 1905, taking 3795 printed pages of testimony and arguments.[4]

During the course of these hearings, members of the Interstate Commerce Commission testified at length.[5] Commissioner CLEMENTS said[6]:

> The Commission has never recommended or asked for anything more than the President recommends or suggests.

Commissioner CLEMENTS also said[7]:

> "The Commission has, since its existence, annually made reports to Congress, as the law premptorily requires it to do, respecting the work of the year, respecting defects in the law, and making such recommendations and suggestions as may be deemed necessary for the amendment of the law."

The Commission had made no recommendations to Congress for legislation forbiding carriers to engage in other

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[4] These Hearings are captioned "Regulation of Railway Rates".—Hearings before the Committee on Interstate Commerce of the United States Senate, in Special Session, Pursuant to Senate Resolution 288, 58th Cong., 3d Sess. (1904-1905). Six volumes with index. Volumes 1 to 4 (pp. 3559) contain the Report of the Hearings. Volume 5 (pp. 1154) contains the Appendices. Volume 6 (pp. 811) contains the Digest of the Hearings. Senate Library Volumes 97-101. These Hearings are herein referred to as "Hepburn Act Hearings".

[5] Commissioner Clements, May 19-20, 1905, pp. 2988-3057, 3220-3253; Commissioner Cockrell, May 22, 1905, pp. 3371-3382; Commissioner Fifer, May 22, 1905, pp. 3325-3368; Commissioner Knapp, May 20, 1905, pp. 3292-3308; Commissioner Prouty, May 18, 1905, pp. 2861-2913.

[6] Hepburn Act Hearings, p. 3004 (1905). For the President's recommendations see, *supra*, p. 5.

[7] Hepburn Act Hearings, p. 2988 (1905).

than their transportation activities and functions.[8] None of the Commissioners made such a suggestion in their respective appearances before the Committee. Senator DOLLIVER said to Commissioner PROUTY:

> "But do you think it is proper for railroads to be interested in manufacturing or mining as against their competitors on their lines?"

To this inquiry, Commissioner PROUTY[9] made this reply:

> "That is an economic proposition. No; I do not much think that it is; but there are a good many cases, not only in the case of the anthracite-coal roads in Pennsylvania, but it is the case with the bituminous roads out West and in a great many places."

This is the only comment on the subject by any Commissioner. Commissioner PROUTY referred only to coal-carrying railroads. The Commission had early recognized that such railroads possessed "the commingled attributes of carrier and producer".[10] Even after the Commission had made a comprehensive investigation of the coal-carrying railroads, pursuant to direction of Congress,[11] it went no further than to recommend[12]:

> "1. That every railroad publish its system of car distribution, as well as car allotments from time to time.
>
> 2. That a just estimate be made of capacity, where it is used as a basis, by an independent party in the presence of representatives of the mine in question.

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[8] 1-19 Annual Reports of Interstate Commerce Commission, 1887-1905. The only legislation on the subject that had been introduced in Congress up to that time was H.R. 12654, 49th Cong., 2d Sess., "to prevent the combination of carrying interstate commerce with other business." No action on this bill was taken.

[9] Hepburn Act Hearings, p. 2883 (1905).

[10] Haddock v. Delaware, L. & W. R. Co. 3 I.C.R. 302 (1890); Coxe Brothers & Co. v. Lehigh Valley R.R. Co. 3 I.C.R. 460 (1891).

[11] House Resolution 4, 59th Cong., 1st Sess. (1906); H.J. Res. 32, 59th Cong., 1st Sess., (1906).

[12] House Document 561, 59th Cong., 2d Sess. (1907) Preliminary reports had been submitted.

3. That individual cars be absolutely eliminated, and all others be distributed according to clearly defined rules.

4. That carriers or officers or employees be positively forbidden to have any interest whatsoever in any coal properties except such as are maintained solely for the purpose of supplying the railroad in question with fuel."

During the course of its hearings, the Senate Committee on Interstate Commerce requested the Commission to submit, in writing, its recommendations for changes in the law. The Commission complied, and on November 28, 1905, it sent the following letter to Chairman ELKINS of the Senate Committee[13]:

"As requested by your Committee, the Interstate Commerce Commission has the honor to submit herewith, in the form of a Bill, its recommendation for amendments and additions to the existing laws for the regulation of interstate carriers.

"The Act to regulate commerce was passed in February, 1887, and has been in force since that time. Its provisions have become familiar to the various interests affected by its administration and several of its sections have been judicially construed. For this and other reasons it is believed that needful changes in the law should take the form of specific amendments to that statute rather than the enactment of an independent measure. We are of the opinion that this course would simplify legislation and be more likely to avoid uncertainty of meaning. There appears to be no occasion to alter the general plan of the original Act, and it would seem advisable to increase the effectiveness by amending particular sections.

"With this preliminary observation we proceed to explain the changes proposed, taking up the various sections in numerical order.

"It will be seen that the amendments submitted to the first section are designed (a) to somewhat enlarge

[13] I.C.C. General Letter Book, Volume 55 p. 52 (1905).

the jurisdiction of the law as to the carriers subject to its provisions, and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation or respecting which there is dispute as to the authority of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase "under a common control, management, or arrangement," in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the Act. The second purpose is sought to be accomplished by enlarging the definition of the term "transportation" so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide the services here referred to is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the Act, which are commonly spoken of as containing its principles or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction.

* * * *

"The measure as drafted includes all the amendments to the Act to Regulate Commerce which the Commission deems necessary to now recommend. Some further legislation may be proposed in our next annual report to the Congress, relating to matters not distinctly within the scope or purpose of the regulating statute but such legislation would more properly amend other existing laws or take the form of independent enactments.

All of which is respectfully submitted."

A bill, containing the recommendations of the Commission, accompanied this letter.[14] So far as is pertinent to this subject, the bill contained the following provisions:

* * * *

[14] The bill is printed in full as an Appendix to the Commission's 19th Annual Report, at pp. 177-183 (1905).

"The term railroad, as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term transportation shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor.

"All charges made for any service rendered or to be rendered in the transportation of passenger or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the Commission may, after full hearing of a complaint, determine what is a reasonable charge to be paid by the carrier for the service so rendered or the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

Following the transmission of this letter, and the bill which accompanied it, the Commission submitted its Annual Report to the Congress, under date of December 14, 1905. In that report the Commission said[15]:

[15] 19 Annual Report of I.C.C. pp. 5-6, 10-11 (1905).

"The Interstate Commerce Commission has the honor to submit its nineteenth annual report for the consideration of the Congress.

"In previous reports the Commission has repeatedly called attention to the necessity for certain amendments and additions to the present act to regulate commerce.

* * * * *

"After the adjournment of the last Congress and during the spring and early summer of this year the Senate Committee on Interstate Commerce conducted an extended inquiry, which appears to have developed every important argument bearing upon the question. Toward the close of this inquiry opportunity was afforded to the members of the Commission to express their views, and they were heard at considerable length. The Commission was thereupon asked to submit its recommendations in writing to the committee, and has lately complied with that request. The recommendations so made were presented in the form of a bill, which, with the letter of explanation transmitting the same, is printed as an appendix to this report.

"The form of the proposed measure, as will appear upon inspection, is an amendment of certain sections of the present statute. This statute was passed in February, 1887, and has been in force since that time. Its provisions have become familiar to the various interests affected by its administration, and several of its sections have been judicially construed. For this and other reasons it is believed that needful changes in the law should be made by specific amendments rather than by the enactment of an independent measure. We are of the opinion that this course would simplify legislation and be more likely to avoid uncertainty of meaning. There appears to be little occasion to alter the general plan and framework of the original act, and it would seem advisable to increase its effectiveness by amending particular sections.

"Aside from the main question—the grant of power to the Commission, after hearing, to fix the future

rate—several other amendments are proposed with the view of improving the law as a remedial measure, and these amendments will now be referred to under appropriate headings.

Enlargement of Jurisdiction

"It will be seen that the changes proposed in the first section are designed (a) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation or respecting which there is dispute as to the power of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase "under a common control, management, or arrangement," in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the act. The second purpose is sought to be accomplished by enlarging the definition of the term "transportation," so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide the services here referred to is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the act, which are commonly spoken of as containing its principal or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction.

TERMINAL ROADS, ELEVATOR CHARGES, and PRIVATE CARS.

"There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper

is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper; the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another.

"It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown upon under the present system. Moreover, there are many instances in which the service can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public if provided by the shiper himself.

"We do think, however, that the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which should not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

This was the situation at the time the Hepburn Bill was introduced in the Congress, on January 24, 1906.

THE HEPBURN BILL REPORTED

H. R. 12987 (frequently referred to as the Hepburn Bill) was reported to the House by the Committee on Interstate and Foreign Commerce on January 27, 1906, without amendment, and with a recommendation for its passage. The action of the Committee had been unanimous, each of the 18 members being present when the action was taken, and all concurring therein[1].

From the Report of the Committee the following is excerpted:

> "The subject of enlarging the powers of the Interstate Commerce Commission is one that has received the attention of this committee for several years. During that period nearly all of the interests involved in such a change in legislation as is proposed has been heard through the representatives of those interests before the committee. The subject has also received the attention of the Committee on Interstate Commerce of the Senate, and five volumes of "Hearings" have been published that were accessible to your committee.
>
> "While House bill 12987 is reported without amendment, it is proper to explain that H. R. 11488 was considered at length by the committee, and was amended in many particulars, and after being so amended the chairman was requested to introduce H. R. 12987 for the purpose of convenience, and it is now presented as the action of the committee. In the preparation of this bill the committee has been aided by their study of all the bills and probably have borrowed something from each one. It will be noticed that many of the features of the Esch-Townsend bill, reported at the last session of the Fifty-eighth Congress with the recommendation of a large majority of the committee, are preserved in this bill.
>
> "For some time the shippers of merchandise throughout the country have very generally been demanding, through the press, through conventions, and through petition, an enlargement of the powers of the

[1] House Report No. 591, 59th Cong. 1st Sess. (1906).

Interstate Commerce Commission, so that certain abuses frequently perpetrated by common carriers by rail could be prevented. It has been believed by a large portion of the shippers that railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimination were indulged in by various methods by the carriers. This bill seeks to remedy those evils by amendments to existing laws. The interstate-commerce law has been in force nearly twenty years. During that time the Interstate Commerce Commission and the courts have given construction to many of its provisions. Therefore it was not deemed wise to attempt an entire new enactment, but, on the contrary, to preserve all of the law that could be preserved and only amend it in the direction of giving more power and making more plain some of its provisions.

* * * * *

"The first section of the bill is substantially section 1 of the act of 1887, with an enlargement of the definition of the word "railroad" and the word "transportation." By this enlargement it is believed that the "devices" resorted to by carriers, through the use of switches and cars owned by shippers, and by the use of frigerator cars, and so forth, can be obviated.

* * * * *

"* * * This section further provides that if the owner of property transported, directly or indirectly, renders any service in connection with or furnishes any instrumentality, the charges for these shall be no more than is just and reasonable, and also gives to the Commission power upon complaint to determine what is a reasonable charge, as the maximum, to be paid by the carrier or carriers for the service or the use of the instrumentality. It is believed that under this provision those excessive charges, constituting rebates that are in some instances paid to shippers who own their own cars, may be controlled. The Commission may also establish through routes and determine upon the division of rates, when such division can not be agreed upon by the carriers, but this power is limited to cases when no reasonable or satisfactory through route exists."

THE HEPBURN BILL CONSIDERED IN HOUSE OF REPRESENTATIVES

On January 30, 1906, MR. HEPBURN moved that the House resolve itself in Committee of the Whole House on the State of the Union to consider the bill H. R. 12987, asking unanimous consent that debate be confined to the subject matter, and that all gentlemen speaking on it, have five legislative days after the conclusion of the debate in which to extend their remarks on the bill in the Record.[1]

MR. TOWNSEND opened the debate on the bill, in the course of which he said:[2]

> "Mr. Chairman, for the second time the Interstate Commerce Committee of the House of Representatives presents a bill to the Congress and the country intended to amend the present interstate-commerce law, in response to a demand from the people for a larger and more satisfactory regulation of interstate carriers by the Government.
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> * * * * *
>
> "* * * It may not remedy every defect in existing laws to which every complainant has called the Commission's attention, but it is believed that it will be sufficient to cure every defect against which any considerable objection is made.
>
> * * * * *
>
> "The bill attempts to place under the supervision of the Commission every form of interstate and foreign commerce, all instrumentalities of commerce and transportation. The measure which passed the House last session was believed to cover all the facilities of transportation, but inasmuch as some gentlemen contended that it did not, we have endeavored in the present bill to use such language as will take the matter out of the realm of doubt. To that end we have

[1] 40 Cong. Rec. 1763 (1906). The debate on the bill will be found in 40 Cong. Rec. 1763, 1828, 1832, 1892, 1893, 1897, 1953, 1965, 1977, 1993, 2032, 2070, 2079, 2080, 2102, 2150, 2165, 2221 and 2270 (1906).

[2] 40 Cong. Rec. 1763-1765 (1906).

declared that cars, vehicles, and instrumentalities of shipment or carriage, irrespective of ownership or of any contract, express or implied, and all services in connection with traffic, such as elevation, ventilation, refrigeration, or icing shall be considered as being furnished by the carrier, and therefore under the supervision of the Interstate Commerce Commission. We have also stipulated that terminal, icing, and other similar charges shall be published as separate items, so that the shipper may understand just what he is paying for each particular service, and then we have said that all such charges shall be just and reasonable, that any other is unlawful.

* * * * * *

"The same argument applies to elevator and terminal charges. We believe it will no longer be possible for a great manufacturing corporation to build a spur or siding up to its factory and then use it as a basis for obtaining rebates prejudicial to its competitor."

MR. TOWNSEND thus indicated that one of the principal objectives of the bill was to prevent indirect rebates by means of excessive payments by railroads to private car lines, industrial railroads and the like for service often minor in character, as to which there had been much complaint during the hearings on the subject.

MR. HINSHAW, in the course of his statement, said:[3]

"However, I think it is incumbent upon me briefly to set forth what I regard as the salient features of this legislation, because, perhaps, in a peculiar way, it affects the great trans-Missouri country in which for eighteen years I have had the pleasure to live.

"This bill is voluminous and complete, and is an honest effort to reach and correct the various abuses and discriminations which exist in railroad traffic. It provides:

* * * * *

"7. If the owner of the freight renders any service or furnishes any instrumentality used in transpor-

[3] 40 Cong. Rec. 1778-1779 (1906).

tation, the charge therefor shall be just and reasonable, and the Commission may, on a hearing had, fix and enforce for such service a reasonable rate. This provision controls the charges for terminal facilities, icing of cars, and private cars furnished by the shipper.

* * * * *

"Another great difficulty which was sought to be remedied by the Elkins anti-rebate bill and which has been evaded in many instances by charges for terminal facilities, charges for small switches, or for 4 or 5 miles of track owned by the shipper, and by the payment to him of a relatively exorbitant higher rate for a terminal facility or other instrumentality, he gets in effect, a rebate upon his entire shipment. This bill, in my judgment, meets that difficulty, and says that these terminal facilities, these switches, as well as private cars and icing of private cars and refrigerator cars, shall be just and reasonable, and that the Commission is invested with power to see that a reasonable and just charge only is made for these different facilities, taking, no doubt, into consideration the general freight rates along the whole line over which the shipment is to be made."

Then followed a colloquy between MR. TOWNSEND and MR. RICHARDSON of Alabama[4]:

"MR. TOWNSEND. Does not the gentleman from Alabama believe that the provision against midnight tariffs, the provision against private cars, against terminal tracks, is a provision to stop the most iniquitous forms of rebate that are known.

"MR. RICHARDSON of Alabama. I think we have several provisions in this bill that will prove most efficient in suppressing rebates. I am coming to that in my remarks."

The provision in the bill, which became section 15 (13) of the Interstate Commerce Act, did not, in the opinion of some members of the House, go far enough to remedy

[4] 40 Cong. Rec. 1781 (1906).

the admitted evil of indirect rebating. MR. CAMPBELL offered an amendment to require trunk-line railroads to own all special types of cars used in transportation and to forbid them to lease or use cars owned by private interests, but the amendment was rejected.[5] However, in the interest of clarity the text of the proposed amendment is given:

> "*Provided,* That all ventilator cars, refrigerator cars, oil or tank cars, including express company and express cars, and any and all cars which have heretofore been termed 'private cars,' used in the transportation of any article or commodity of interstate of foreign commerce, are hereby declared to be and are common carriers and subject to all laws, rules, and regulations regulating or affecting common carriers in the transportation of articles or commodities of interstate and foreign commerce.
>
> "*Provided further,* That from and after the passage of this act it shall be unlawful for any railroad company engaged in the business of a common carrier to contract with any person, firm, or corporation, being the producers or shippers of any article or commodity entering into interstate or foreign commerce, for the shipment or transportation of such article or commodity when such article or commodity is offered for shipment or transportation in ventilator cars, refrigerator cars, tank cars, or private cars of any character whatsoever, owned or controlled, directly or indirectly, by such producers or shippers. To be a stockholder in, or director or officer of, any company owning or controlling such ventilator cars, refrigerator cars, tank cars, or private cars of whatever character shall be considered as having such an interest as is prohibited by this act."

MR. KNAPP, on February 1, 1906, supported MR. CAMPBELL'S amendment, criticising the payment of rebates, and saying[6]:

> "* * * Akin to this is the so-called 'private car system' a system by which private or corporate car com-

[5] 40 Cong. Rec. 1828 (1906).
[6] 40 Cong. Rec. 1893-1894 (1906).

panies owning their own cars obtain discriminating rates of transportation, and also the private terminal system, under which companies or corporation utilize branch or yard tracks for the purpose of organizing railway companies, and thereby obtain from the railroads a discrimination in rates for transporting the output of their industries.

"These illustrations suffice to show how and to what extent discriminations have been practiced, not all of which, however, it is just to say, have been invited by the railways. Laws have been enacted the intent and purpose of which were to eliminate these evils and to prevent the entire rebate system."

MR. FRENCH reviewed the evils which the bill sought to correct, and, in doing so, said[1]:

"Mr. Chairman, in my judgment the measure which we are now considering is the most important matter that has presented itself to this Congress.

* * * *

"The Elkins Act was passed three years ago and has afforded some relief. It is aimed mainly at the system of rebates and discriminations and is not sufficient there. The provisions of the law have been skillfully avoided, and clever devices have been resorted to to thwart the working of the law and the law which it amends. We could mention the 'midnight schedule,' where a favored shipper would be notified in advance of a certain rate on a certain day. The favored shipper would take advantage of the schedule, and before other shippers could do likewise the old rate would be established. We could mention icing and terminal charges, unreasonable charges for private cars, unreasonable division of the freight charges with a favored shipper who might own a mile or two of track, unreasonable elevator charges, and a host of other devices for increasing rates to one shipper while making the favored shipper in his line supreme.

* * * *

[1] 40 Cong. Rec. 1908-1911 (1906).

"First. The bill, by definition, gives broader meaning to the word "railroad" than does the present law, and declares that word to include all switches, spurs, tracks, and terminal facilities of every kind, also all freight depots, yards, and grounds used or necessary in the transportation or delivery of persons or property. It gives broader meaning to the term "transportation" and makes that term include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

* * * *

* * * It is also provided that should the owner of property transported under this act render any service connected with transportation or furnish any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable maximum charge to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished and fix the same by appropriate order.

* * * * *

"This, Mr. Chairman, covers the general scope of the pending bill, and, in my judgment, this measure strikes at the heart of existing evils. The sections of the bill giving broader meaning to the terms "railroad" and "transportation," so that they shall include, as I have pointed out, terminal facilities, and the necessary means of accommodation in transit will very largely do away with the possibility of secret rebates of all kinds."

On the following day, February 2, 1906, MR. THOMAS of North Carolina made this statement respecting the purpose of the bill[5]:

"Mr. Chairman, this bill is entitled "An act to

[5] 40 Cong. Rec. 1954 (1906).

amend 'an act to regulate commerce.'" approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission. The title indicates the purpose and intent of this measure.

* * * *

"Section 1 is subtantially section 1 of the act of 1887, with an enlargement of the definition of the word "railroad" and the word "transportation." By this enlargement it is believed that the "devices" resorted to by carriers, through the use of switches, terminal tracks, and private cars, and so forth, can be obviated."

MR. GOULDEN followed, supporting MR. CAMPBELL'S amendment, arguing that the bill did not go far enough. He referred to prior legislative attempts to prevent rebating, and the failure of the law to accomplish that purpose. With respect to the pending bill, he thought there should be greater control over the facilities relating to transportation. MR. GOULDEN said[9]:

"Mr. Chairman, I have listened with a great deal of pleasure and satisfaction to the debate upon this important measure.

"The bill (No. 12987) under consideration is in the main the more satisfactory railroad-rate bill than ever hitherto offered to Congress.

* * * *

"The bill that passed last Congress, and against which I had the honor of casting my vote, was exceedingly objectionable. The provision creating a special court with its heavy expenses, the failure to reach the private-car and terminal-charge evils, caused the Senate to refuse last year to consider the action of this body. The thousands of private cars of the meat, fruit, and other trusts dictated terms to the railroads and compelled compliance with their demands.

"The same is equally true of the terminals. With the indulgence of the Members of the House, allow

[9] 40 Cong. Rec. 1959-1961 (1906).

me to give a few of the many cases familiar to the country:

"The Union Railroad Company, of Pittsburg, Pa., less than 10 miles in length, and connecting the great plants of the steel trust at Homestead, Braddock, and Duquesne, secures an average of one-third of the freight charges on all freight entering or leaving from all points in the United States.

"The Monongahela and Southern Railroad Company, of Pennsylvania, 1 mile in length, connecting the works of Jones & Laughlin, of the South Side, Pittsburg, with the Baltimore and Ohio, the Pennsylvania lines, and the Lake Erie roads, secures one-fourth or more of the freight charges to all points in the country, exacted as tribute from the railroads mentioned.

"The gentleman from Missouri [MR. WOOD], in a forceful speech on the floor of the House recently, gave many startling facts of the outrageous and exorbitant charges of the St. Louis Terminal Railroad. He showed that the terminal charged five times as much for a 2-mile haul as the railroads did for a 50-mile run. The same conditions exist in every large city in this country. I doubt if the bill now under consideration will effectually remedy this glaring evil, to which the railroads are subject and for which the ordinary people must pay the freight. [Applause.]

"The meat in the Hepburn bill now under consideration is contained in the report of the committee and in the new section, to be known as section 24."

In the light of this discussion, the failure if the CAMPBELL amendment exhibits the will of the House to not forbid shippers the right to own facilities or provide services, but to leave them to regulation by the Interstate Commerce Commission, under what is now section 15 (13) of the Interstate Commerce Act.

MR. BURTON, while speaking on the Hepburn bill, threw light on what is now section 15 (13) of the Interstate

Commerce Act, the situation which called it forth, and to which it was intended to apply. MR. BURTON said[10]:

> "Human ingenuity has probably never been exercised with more acuteness than in avoiding the law in regard to rebates. Terminal charges, the use of elevators and of warehouses, switches, and branch lines owned by shippers have all been utilized in such a manner as to continue the most odious forms of discrimination. In addition to these there are the refrigerator cars and other kinds of private cars, all of which make it possible to give advantages to the favored shipper. It is a well-known fact that in past years persons engaged in trade have found that their business was conducted as a loss except for the rebates which they received, which were of so large an amount as not only to make up for the loss, but to afford a profit. Every device has been resorted to which was possible to conceal the unequal treatment of different shippers. Fictitious damage claims against the railway have been resorted to as a means for the payment of rebates. So far as legislation can correct these evils this bill corrects them. It strikes a blow at the abuses of the private car system, switches, branch lines, and terminal facilities. It provides that if the shipper renders any service in transportation the allowance for such service shall be no more than is just and reasonable, and gives the Commission power to prevent the partnership between railways and those who have received favors in this specious form."

MR. BURKE of South Dakota, speaking for the bill and of its purposes, said[11]:

> "Mr. Chairman, in 1887, responding to a demand from the people asking for remedial legislation against abuses on the part of the railroads of this country, Congress passed and enacted the present interstate commerce law, which was approved by the Executive on February 4, 1887. No one questions the fact that that was a step in the right direction and that it is a law that has given relief to the people of the country

[10] 40 Cong. Rec. 1963 (1906).
[11] 40 Cong. Rec. 1966-1968 (1906).

and at the same time been an advantage and a protection to the railroads.

• • • • •

"Before discussing some provisions of the bill now before the House I want to submit what it proposes to do:

• • • • •

"If the owner of property transported directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may determine what is a reasonable charge as the maximum to be charged by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished.

• • • • •

"This bill, Mr. Chairman, is substantially in form as suggested by the Interstate Commerce Commission. Instead of making a new law it proposes to amend the present interstate-Commerce act.

• • • • •

"• • • Mr. Chairman, the report of the Commission, all of the evidence upon this subject of rebates, shows that rebates are being indulged in quite generally throughout the country without any violation of the Elkins Act whatever by means of practices or instrumentalities, such as refrigerator cars, icing charges, elevator charges, terminal and side-track facilities, that rebates are given that are in fact rebates just as if the Elkins law had never been enacted. This bill makes it impossible for those practices to be continued if it should become a law."

MR. McCALL said[12]:

"Mr. Chairman, if the pending bill made an effective response to public opinion upon the railroad question, it would deal in the most comprehensive and the most particular terms with rebates or favored rates, wheth-

[12] 40 Cong. Rec. 1969 (1906).

er given directly or in any of the indirect forms in which they have been extended.

* * * *

"* * * The private car, refrigerator car, the industrial switch, receiving a part of the through rate as if it were an independent line, every instrument of favoritism and injustice, had justly received public condemnation."

MR. CLAYTON, the author of the Clayton Act, on February 3, 1906, supported the bill, saying[13]:

"Now, Mr. Chairman, I should like to dwell upon all the features of the pending bill, for I believe that every feature embraced in this bill is a good feature and should be enacted into law. I believe that every provision of this bill, every word and line of it, makes for the good of the great common people of our common country. [Applause.] They, and not the multimillionaires made such by their unlawful regulations and extortionate and sometimes criminal practices, are deserving of our best consideration. But time will not permit me to refer to all the features of the bill. I would support it did it embrace only putting the single provision of private cars, the icing cars, terminal and switch facilities under the jurisdiction of the railroad commission."

MR. ESCH, a prominent member of the Committee, later its Chairman, and for many years a member of the Interstate Commerce Commission, speaking for the bill, said[14]:

"Now, with reference to the bill here presented, I wish to call attention to the phenomenal fact that it has the almost unanimous indorsement of the Members of both sides of the Chamber and the unanimous indorsement of members of both parties on the committee. A unanimous report ought to insure the passage of any bill. Unanimity in committee was not secured by the sacrifice of principle by any member of it.

* * * *

[13] 40 Cong. Rec. 1996 (1906).
[14] 40 Cong. Rec. 2002-2005 (1906).

"The ills from which the shipping and general public have suffered, as a result of unjust charges and discriminations connected with industrial and terminal lines, switching, icing, elevation, and refrigeration were less heard of and less complained about prior to the enactment of the Elkins law than since. As these ills arose out of instrumentalities of shipment or carriage and were not due to the carriers themselves, immunity from prosecution under the Elkins Act was claimed. It is to prevent any further claim from such immunity that this bill makes the common carriers themselves solely responsible for all such instrumentalities and facilities of shipment or carriage, so that they, irrespective of any contracts or agreements they may have, may be held responsible.

* * * *

"The passage of this bill will place the charges for terminal tracks and switching and industrial lines within the jurisdiction of the Commission. When a great industrial corporation, doing a vast annual freight business, owns and controls a spur track a fraction of a mile in length connecting with trunk lines, it can, under the guise of a joint tariff, secure in return for routing its freight over a given line a certain amount per car as payment for use of its spur track. This charge is out of all proportion to what the spur track bears to the through route, but carriers pay the same in order to secure the business. This undue share of the through route is nothing but a species of rebate to the industrial company, and gives it by so much an advantage over all other companies engaged in the same locality in the same line of business."

No further discussion of the bill of pertinency here was had until February 5, 1906, when MR. STEVENS of Minnesota endorsed the bill, saying[15]:

"That is in previous existing legislation. The old interstate-commerce law and the Elkins law covered rebates thoroughly, and this gives additional power to prevent extortions.

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[15] 40 Cong. Rec. 2088 (1906).

"Of course, the language of the bill extending the scope of the Commission in the way of including private cars, refrigeration, switches, elevators, and terminals, which are only a convenient way of rebate, are covered in the bill, and in that way the question of rebates is well covered."

On the same day MR. DAVIDSON said[16]:

"Mr. Chairman, the country is to be congratulated upon the unanimity with which the bill now under consideration, touching the matter of railway rate legislation, has been reported to this House by the able committee having jurisdiction of the subject and the vote by which this House will approve of the work done by that committee. The subject is one of absorbing interest to the people of the country.

* * * * *

"In various parts of the country there now exist auxiliary companies known as 'private car lines,' 'terminal lines,' 'refrigerator lines,' and others, all created largely for the purpose of demanding a portion of the transportation charge in return for some slight service rendered, and which, in fact, is only another form of giving rebate to those specially favored.

"One of the important features of this proposed legislation is that which defines the word 'railroad' and the word 'transportation' in a manner to include all these auxiliary companies and all the instrumentalities of a common carrier."

On the following day, February 6, 1906, MR. BOWERS, speaking for the bill, said[17]:

"Mr. Chairman, the pending measure is beyond question the most important that will be considered by the Fifty-ninth Congress.

* * * * *

"Terminals and switch tracks are also convenient devices under which to conceal rebates, and they, too,

[16] 40 Cong. Rec. 2102-2103 (1906).

are, and should be, made the subject of legislation and regulation.

"I turn now to the present bill and will try to point out where it remedies the evils existing under the present law, as I see and conceive them.

"Section 1 amends the corresponding section of the existing interstate-commerce act so as to include within the term 'railroad,' as used in the act, and subject to the supervision of the Commission and to all the provisions of law, "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property," and "all freight depots, yards, and grounds used or necessary, etc.," and all "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

"To my mind this effectually includes the private car lines, switch tracks, and terminals, affords a fair guaranty for their supervision and proper regulation, and, in a great measure, if not entirely, provides for existing evils so far as they are concerned. It strikes a blow at rebating in that it puts their charges under the supervision of the Commission, provides for publicity, and gives that body an opportunity to correct any inequalities and improper practices.

* * * *

"The Commission is authorized to create through lines of carriage and through routes upon complaint and after hearing wherever, in their discretion, they

[11] 40 Cong. Rec. 2157-2160 (1906).

are necessary. This section specifically provides that if an owner of any property transported shall himself perform any service toward its transportation or carriage the charge therefor shall be no more than a fair compensation for the service or a fair proportion of the whole rate."

MR. WALDO followed, saying[18]:

"Mr. Chairman, in the first place, I believe, there is no one in this House and no one in the country who desires to do any injury to the railroads. We all know and believe that the prosperity of the whole country depends almost entirely upon our transportation system. There is no one who would take away any right from any road or in any way oppress any railroad corporation. In fact, I have never known of any attempt that was successful in this country to oppress any railroad corporation, and it is very doubtfull if there ever will be.

"Under the law, as it now exists, the Interstate Commerce Commission has every power, except one, granted by this bill, and that is to fix maximum rates. The only addition is to extend the control of the Commission to terminal facilities, private car lines, and private switch facilities, so that there shall be no special charges on these accounts that will make rates that are unjust or unreasonable or reductions that shall give undue preference to any particular person or favored shipper.

• • • •

"It is urged that there is no occasion for the grant of any such power, and I understood the gentleman from Ohio [MR. GROSVENOR] to state that there was no occasion and no demand from the country for the grant of any such power. In the first place, before the Interstate Commerce Commission during the last year there were filed 568 complaints. These include 65 formal cases and investigations, and these involve directly the rates and practices of 321 railroads and common carriers in all parts of the country. After hear-

[18] 40 Cong. Rec. 2178-2179 (1906).

ing these cases, the Commission were authorized only to find that the rates or practices were unjust, and that was their finding in most of these cases, but they had no power to state what was just or reasonable. And there was no one that had any power to state it except the corporation that made the unjust charge.

"Many cases of unjust rates charged by railroads, known to the people of all sections of the country and still persisted in, have never been before the Commission. There is one practice of the Pennsylvania Railroad that obtains every year which is clearly an outrage upon the rights of the people. The coal railroads start every April with a fixed price for coal delivered at tidewater, and with the announcement that the rate will be increased 10 cents per month for five months, until the time when the poor must have coal, and then they have to buy coal at the highest rate during all the rest of the year until the next April. There is no justification for any such practice as that. The coal railroads of Pennsylvania have fixed the freight for carriage of coal to the seaboard at such a rate that the coal has been advanced from a dollar to one dollar and a half in price ever since they made their combination and forced the independent operators to come in with them, and it has remained at that ever since. Before they made their combination and forced the independent operators to sell all their output to the combination, the price of coal delivered to the Atlantic seaboard was only $4 a ton.. Today it runs from $5 to $5.50 a ton, and has been so continuously ever since that combination of the roads in Pennsylvania.

"These railroads own today 90 per cent of all the coal mines in Pennsylvania, and have control substantially of all the coal that is used in the great cities of the East, New York, Philadelphia, Baltimore, and, to a considerable extent, of this city. In this city coal is today a dollar a ton higher than it ought to be, on account of the unlawful combination and unreasonable freight charges of these roads."

MR. CANDLER said[19]:

[19] 40 Cong. Rec. 2180-2181 (1906).

"Mr. Chairman, I would not undertake at this stage of the consideration of this measure to go into any extended discussion of the legal question involved, or to the expediency of the policy which is presented by the bill now pending before the House.

• • • • •

"Now, with the definition clear and distinct as to what carriers are included in the provisions of this act and what shall be meant by the term 'railroad' and by the term 'transportation,' and that all the rates shall be reasonable, in my judgment, the provisions of this act can not be construed away, and that is important, because the courts have held that the Interstate Commerce Commission can only exercise the powers specifically conferred in the act and that nothing shall be done by implication. Hence, the importance of these provisions."

MR. MANN, a prominent member of the Committee on Interstate and Foreign Commerce, on February 7, 1906, enumerated the main propositions of the bill[20]:

"Now, you wish to know what we have attempted to do through the Hepburn bill. Let me briefly enumerate the main propositions of this measure. What does the bill do?

(*a*) Enlarges definition of the common carriers covered by putting under the provisions of the act all railroads transporting passengers or property from one State to another, without regard to whether they are used for such transportation under a common control or arrangement or for continuous shipment, thus permitting the establishment by the Interstate Commerce Commission of compulsory through routes for shipment where the companies have failed to establish such through routes, and the authority to do this is expressly conferred upon the Commission.

"(*b*) Enlarges the definitions of the terms 'railroad' and 'transportation' by expressly including un-

[20] 40 Cong. Rec. 2243-2244 (1906).

der the one all terminal facilities and under the other services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported when such services are not exempt from the provisions of the act as stated therein.

* * * * *

"(*h*) Provides that the allowance made by the carrier to the owner of the property transported for service, private cars, etc., furnished by him, shall be no more than is just and reasonable, and the Commission may determine the maximum charge to be allowed."

MR. HEPBURN finally summarized the purposes of the bill, saying[21]:

"Mr. Chairman, with reference to the differences of opinion that have prevailed in regard to some features of the bill, I do not now care to say anything, but we were agreed in regard to two fundamental propositions: One was the investment of the Interstate Commerce Commission with the measure of power, the full measure of power, that the President in his message said he thought they ought to have. That we have done. Then to include by changes enlargement of the definition of the word 'railroad' and 'transportation,' to bring in all of those auxiliaries, or aids, or instrumentalities through which so many frauds and wrongs in the nature of rebates and discriminations have occurred. We believe that we have done that. These we regard as the two essential things. The other changes or provisions that there are in this bill are simply changes of existing law, so as to make more easy, more certain, the administration of the power that the Commission now has."

The bill was passed by the House on February 8, 1906, by a vote of 346 to 7, with 10 members "present", and 29 not voting.[22]

The bill as passed by the House contained no commodities clause. The only proposal of such was an amendment

[21] 40 Cong. Rec. 2255-2256 (1906).
[22] 40 Cong. Rec. 2303 (1906).

to the Hepburn bill providing that no railway official or employee should be interested directly or indirectly in the furnishing of material or supplies to a mining company.[23] The amendment was objected to by MR. HEPBURN, and was withdrawn.[24]

[23] 40 Cong. Rec. 2090 (1906).
[24] 40 Cong. Rec. 2256-2257 (1906).

THE COAL-CARRYING RAILROADS

Although, as previously indicated,[1] the Interstate Commerce Commission, after several investigations of coal-carrying railroads,[2] had made rather limited remedial recommendations, the situation was deemed so serious that a resolution was introduced in the House of Representatives by MR. GILLESPIE requesting the Attorney General to furnish information concerning certain coal-carrying railroads.[3] This resolution, which was referred to the Committee on Interstate and Foreign Commerce, was not reported. When MR. GILLESPIE attempted to present a privileged resolution to the same effect, it was ruled out of order as calling upon the Attorney General to express an opinion.[4] Later, the resolution was modified so as to request the President to report with respect to an alleged merger of the Pennsylvania and other bituminous coal-carrying railroads, and, as thus amended, was passed without a roll call.[5]

MR. GILLESPIE, the following day, introduced another resolution, more specific in nature, authorizing the President to direct the Interstate Commerce Commission to discover whether common carriers doing an interstate business, or officers or employees of such carriers, own or have any interest in the bituminous coal mines producing the coal carried over their lines.[6] This resolution was referred to the Committee on Interstate and Foreign Commerce but was not reported.[7] Other resolutions and

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[1] *Supra*, pp. 10-13.

[2] *Haddock v. Delaware, L. & W. R. Co.*, 3 I.C.R. 302 (1890); *Coxe Brothers & Co. v. Lehigh Valley R.R. Co.*, 3 I.C.R. 460 (1890); *Red Rock Fuel Co. v. Baltimore and Ohio R. Co.*, 11 I.C.R. 438 (1905).

[3] H.Res. 125, 59th Cong., 1st Sess.; 40 Cong. Rec. 779 (1905).

[4] 40 Cong. Rec. 1240 (1906).

[5] 40 Cong. Rec. 1701 (1906).

[6] H.Res. 260, 59th Cong., 1st Sess.

[7] 40 Cong. Rec. 2198 (1906).

joint resolutions, to the same effect, were introduced, referred to the Committee on Interstate and Foreign Commerce, and not reported.[8]

While the Hepburn bill was under consideration by the House of Representatives, Senator TILLMAN presented the Senate a letter from the President of the Red Rock Fuel Company,[9] of Upshur County, West Virginia, alleging that the company was unable to develop some 4,000 acres of its coal lands because of the refusal of the Baltimore and Ohio Railroad Company to make proper connections between the tracks of its railroad and the private switches of the mining company, even though the latter had agreed to pay the entire cost of making such connections; and that the Baltimore and Ohio owned a controlling interest in various coal companies along its line of railroad, and was engaged in marketing its own product.[10] The Interstate Commerce Commission had made an order requiring the railroad to discontinue this discrimination, allowing one month for the furnishing of the requested connection.[11]

The *Red Rock Fuel Company* case led the Governor of West Virginia, in a letter to Senator TILLMAN, to declare that

> "An investigation would show that the Baltimore and Ohio Railroad Company is interested in the production of coal. * * * It may be that the Pennsylvania does not legally own a controlling part of the stock of the Baltimore and Ohio Railroad Company, or the C. & O. Ry. Co., or the N. & W. Ry. Co., but I have no doubt that an investigation will show that the Penn-

[8] H.J.Res. 101, 59th Cong., 1st Sess., by Mr. Campbell.; H.Res, 276 59th Cong., 1st Sess., by Mr. McNary of Massachusetts. Chairman Hepburn had earlier defended the failure to report such resolutions on the ground that his Committee had been engaged upon public matters of superior importance. 40 Con. Rec. 1702 (1906).

[9] See footnote 2, *supra*.

[10] 40 Cong. Rec. 1671-1672 (1906).

[11] *Red Rock Fuel Co. v. Baltimore and Ohio R. Co.*, 11 I.C.R. 438 (1905).

> sylvania Railroad Company practically controls these three great trunk lines which traverse West Virginia. * * *. Hence it is a fact that West Virginia is today in the grasp of a railroad trust which practically says what part of the state shall be developed, and what shall not be developed, how much coal shall be shipped out of the state, to what points * * * it shall be shipped, and when * * *." [12]

When MR. GILLESPIE failed in his efforts to have the House pass a comprehensive measure for an investigation, Senator TILLMAN introduced S.J.Res 32, 59th Cong., 1st Sess.,[13] to authorize the Interstate Commerce Commission to conduct an elaborate and detailed investigation into all forms of alleged relationships sustained by railways and railway officials toward mining interests, all agreements or conspiracies among any roads looking to the monopolization or the control of coal mines or coal or any other traffic, and all customs and practices of granting transportation facilities that appeared to be unfair or discriminatory in their nature. This resolution was somewhat similar to the GILLESPIE resolution in the House, but was more specific and much broader in scope. The TILLMAN resolution was passed by the Senate on the same day introduced, February 12, 1906.[14]

On February 19, 1906, the Supreme Court of the United States handed down its decision in *New York, New Haven & Hartford R. Co. v. Interstate Commerce Commission*,[15] enjoining the Chesapeake & Ohio Railway from violating prohibitions of the Act to Regulate Commerce against undue preference and discrimination. It enjoined the taking of less than the published tariff rates by means of dealing in the sale and purchase of coal. It enjoined a practice of stipulating to sell coal and transport it at

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[12] 40 Cong. Rec. 2276 (1906).
[13] 40 Cong. Rec. 2424 (1906).
[14] 40 Cong. Rec. 2431 (1906).
[15] 200 U.S. 361, 26 Sup. Ct. 272, 50 L.ed. 515 (1906).

an agreed price insufficient to yield the published freight rates after deducting the cost of purchase and delivery.[16] While the Court based its decision entirely upon the departure from the published rates, it recognized that this construction might make it impossible for a carrier to deal in commodities.

Within a few days after this decision was rendered, the House Committee on Interstate and Foreign Commerce reported the TILLMAN resolution, broadening it to include oil and oil properties.[17] It was passed by the House as amended, and the Senate concurred in the amendment.[18]

President Theodore ROOSEVELT approved the resolution, but expressed doubts as to its efficacy, for reasons which he very clearly expressed, but which need not here be detailed.[19] In an endeavor to eliminate the doubts raised by the President, a new joint resolution was introduced.[20] As finally passed, the Interstate Commerce Commission had ample authority to make the investigation contemplated by the TILLMAN resolution.[21]

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[16] For opinion of the Court, see *infra*, pp. 127-155.
[17] 40 Cong. Rec. 2885 (1906).
[18] 40 Cong. Rec. 2886-2888 (1906).
[19] Senate Document 256, 59th Cong., 1st Sess. (1906).
[20] H.J.Res. 115, 59th Cong., 1st Sess.
[21] 40 Cong. Rec. 3852, 3875-3876 (1906).

HEPBURN BILL REPORTED BY SENATE COMMITTEE ON INTERSTATE COMMERCE

The HEPBURN bill, upon passage by the House,[1] had been referred to the Senate Committee on Interstate Commerce.[2] On February 26, 1906, the bill was reported out of that Committee without amendment,[3] but with the understanding that members of the Committee reserved the right to offer amendments to the bill and to vote for them while it was under consideration by the Senate. The report throws no light on the subject here under consideration.

[1] 40 Cong. Rec. 2303 (1906).
[2] 40 Cong. Rec. 2968 (1906).
[3] 40 Cong. Rec. 2968 (1906); Senate Report No. 1242, 59th Cong., 1st Sess., Part 1.

VIEWS OF SENATORS TILLMAN AND ELKINS—MINORITY REPORT ON HEPBURN BILL

When the HEPBURN bill was reported to the Senate, Senators ELKINS and TILLMAN gave expression to their views with respect to needed legislation.

In the formal report to the Senate,[1] Senator TILLMAN said that—

> "There should be a provision * * * to divorce absolutely the business of transporting freight as a public carrier and the business of producing freight to be transported. * * * No public carrier engaged in interstate commerce should be allowed to produce and transport any article for sale beyond such as are necessary for its own consumption."

The views of Senator TILLMAN were printed in the Congressional Record of March 15, 1906.[2] The Record reads as follows:

> "Mr. TILLMAN, having reported from the Committee on Interstate Commerce House bill 12987 without amendment, submits his views thereon as follows:
>
> The peculiar circumstances under which this bill was reported to the Senate from the Committee on Interstate Commerce make it a difficult and somewhat embarrassing task to write a report upon it.
>
> Instead of being amended in committee, as is usual, so as to command the indorsement and support of a majority of its members, the bill was brought into the Senate in a form not entirely satisfactory to more than two members. Party lines in the committee were broken down and the bill is in the Senate by reason of the union of five members of the minority party and three members of the majority party in Congress who concurred in reporting it favorably; and while

[1] Senate Report No. 1242, 59th Cong., 1st Sess., Part 1, p. 11 (1906).
[2] 40 Cong. Rec. 3834-3837 (1906).

these eight Senators are agreed as to the general purpose and scope of the bill, there are radical differences among them as to the amendments that ought to be incorporated in it to make it fully adequate to meet the demands of the business interests of the country at this time.

This lack of harmony among the supporters of the bill—it would be speaking with more accuracy to say the supporters of the policy involved in the bill brings about the anomalous situation in which a member of the minority party in Congress is put in charge in the Senate of proposed legislation which is generally regarded throughout the country as the cherished scheme of the President, with whose general policy and principles that member is not in accord. At the same time the bill is designed to carry into effect his own long-cherished convictions and the thrice-reiterated demands of the party to which he belongs."

* * * * *

(a) THE WEST VIRGINIA SITUATION.

"The necessity for granting, at some time, relief to producers and shippers in several important particulars not provided for in this bill may be wisely considered in connection with the pending discussion. There is no provision, except a most vague and indefinite one, for the anomalous and outrageous condition of affairs disclosed as existing in West Virginia. The letter of Governor Dawson of that State published in the CONGRESSIONAL RECORD of February 8 and the memorial of the Red Rock Fuel Company published in the RECORD of January 29, taken together, disclose a situation that is almost beyond belief. The railroads have seized on the vast mineral wealth of the State in its extensive coal fields and have created a monopoly in that prime necessity of life, fuel.

Landowners who wish to mine and ship their coal are denied access to market, while the roads themselves are engaged extensively in mining and shipping coal; and when private individuals or companies seek to develop their coal lands and send their product to

market the railroads deny or refuse to grant them the privilege of engaging in interstate commerce. In the case of the Red Rock Fuel Company physical connection was refused. They would not permit this coal-mining company to join its track with a switch to the track of the Baltimore and Ohio Railroad and thus obtain an outlet. In other cases mines have had to shut down because of the denial of cars by the railroads. The coal output, in effect, is controlled absolutely by the railroads in their own interest, and in the case of this particular State the infamy of the situation is aggravated by the fact, which is practically proven, that the three railroad systems entering West Virginia are controlled by an outside road, the Pennsylvania.

There are many other instances in which the proof has been furnished of even more outrageous abuse of power than in the instance cited of the Red Rock Fuel Company case. Where connections between the mines of private companies were already in existence under arrangements made some years ago, the tracks have been torn up, and virtual confiscation of the property is threatened. Vested with the rights of eminent domain to construct their lines and granted liberal franchises and charters, the railroads designed to be public carriers for the benefit of the whole people, in the last few years have become rapidly transformed into the veriest band of robbers—highwaymen who do not thrust their pistols in the faces of their victims and demand money or their lives, but who levy tribute in freight rates which are as high as the traffic will bear, deny access to market, monopolize with brazen effrontery one of the prime necessities of life—coal—and in every way show their absolute contempt for the people and the people's rights.

The condition of affairs in West Virginia is even worse in Pennsylvania, and from every part of the country come reports that the railroads have practically already obtained control of almost all the coal lands, and where they have not bought the land itself they have obtained mineral leases and are rapidly carrying out the scheme of monopolizing the fuel sup-

ply of 85,000,000 people. In Pennsylvania it is charged that they have for years controlled absolutely the State government, and they snap their fingers in contempt at any and every effort to enforce the law and the constitution which prohibits the ownership of coal mines by public carriers. It will be a task of immense difficulty to undo the incalculable mischief and wrong that has already been done.

The plea of vested rights and the complications from the secret transfers, the purchase by holding companies and trust companies, the ramifications of partnerships and of trusteeships, and of other subtle agencies contrived by hundreds of the best legal minds in the country, whose services are at the command of these gigantic corporations, will require firmness, perseverance, and patience by Congress to grant relief from existing conditions and safeguard the public interests in the future. It is our bounden duty to amend this bill so as to compel every public carrier to give the freest possible access to market to every producer who wishes to engage in interstate commerce.

We should incorporate an amendment in the bill which will compel all railroads to make connections with any and every other railroad, public or private, and grant just and fair traffic arrangements, so as to put every producer upon an equal footing with every other producer. There should also be a provision incorporated in this bill to divorce absolutely the business of transporting freight as a public carrier and the business of producing freight to be transported. The temptation to discriminate against competitors on the part of a public carrier is too great, and it stands to reason that a producer who controls the means of transportation to market at the same time will discriminate against and will in the end destroy every competitor who is in the same business with him."

(b) DIVORCE PRODUCTION AND TRANSPORTATION.

"Inasmuch as the railroads are creatures of the State, brought into being for a specific purpose, the public welfare demands that they shall be compelled

to confine their operations and content themselves with pursuing the legitimate business for which they were created and not monopolize and destroy the interests which they were made to serve. It therefore appears to me as a matter of transcendent importance and necessity that no public carrier engaged in interstate commerce shall be allowed to produce and transport any article for sale. Where a railroad owns coal lands it may and should be permitted to mine the coal which it itself consumes, but that is as far as it should be allowed to go.

In concluding this imperfect presentation of my views on this all-important subject I wish to speak a word of caution to the friends of the proposed legislation. Our full expectations may not be realized at the present session of Congress. The opponents of effective legislation are alert, have had large experience, and are thoroughly organized."

Senator ELKINS, of West Virginia, was Chairman of the Committee on Interstate Commerce. In submitting the views of the majority of the Committee, he declared that—

"The bill should compel the separation of the business of railway transportation from the business of manufacturing or otherwise producing the article transported."[3]

The minority report recommended amendments to—

"Divorce transportation and production by restricting public railway carriers to the performance of their functions as such and restraining them from entering the fields of mining and manufacturing, or in any other way becoming competitors with those to whom their services are offered and sold."[4]

On April 6, 1906, Chairman ELKINS discussed the Hepburn bill and its deficiencies, saying:[5]

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[3] Senate Report No. 1242, 59th Cong., 1st Sess., Part 2, pp. 3-10. While this report is dated February 27, 1906, it was not actually presented to the Senate until June 28, 1906. See 40 Cong. Rec. 9505 (1906).

[4] See note 3, *supra*.

[5] 40 Cong. Rec. 4832-4835 (1906).

"Mr. President, I desire to approach the consideration and discussion of this most important subject in a spirit of fairness and impartiality, with a sincere purpose to do justice to all interests concerned, and above all to secure to the people a prompt and adequate remedy for the evils, injustices, abuses, and wrongs of every kind practiced by railroads, or in any way growing out of their operation.

I desire now to bring to the attention of the Senate what I consider omissions of necessary provisions in the Hepburn bill, and discuss the same from a practical and legal standpoint.

The main purpose of the Hepburn bill, among other things, is to provide a more efficient remedy against excessive rates in which all agree. I regret to say, however, that there are evils, injustices, and abuses by railroads for which the bill does not even attempt to provide a remedy. It makes no provision:

First. To prevent interstate carriers producing, mining, and selling coal, iron ore, and other products which they transport in competition with shippers, thereby oppressing and driving out of business the independent operator and absorbing his business.

Second. To oblige interstate carriers, on application of shippers of interstate commerce, to put in when needed, upon reasonable terms, switches to enable such shippers to get their products to market. There are instances where shippers have spent hundreds of thousands of dollars in equipping mines and mills to do business, and railroads have denied them switches and connections.

Third. To compel interstate roads to make prompt and suitable connections with connecting branch and lateral lines, as well as just, fair, and reasonable prorating arrangements with the same and allowances for originating freight.

Fourth. To require interstate carriers to make a fair and just distribution of cars among shippers on their lines.

These four omissions and, I may say, abuses on the part of the railroad have aroused public sentiment almost to an alarming degree in West Virginia, and the chief objection of her people to the bill is that no remedy whatever is prescribed in the bill to correct all or any one of these abuses.

* * * * * *

I have introduced amendments covering these omissions in the bill and sincerely hope they will be adopted by the Senate. Nothing short of their adoption and becoming law will satisfy the shippers, independent operators, and the people generally of my State.

* * * * *

I have just named four omissions in the bill: First, the interstate railroads do not put in switches and sidings upon a reasonable request from the shippers to enable them to do their business; secondly, they do not make connections with branch or lateral lines and prorating arrangements, so that the branch line can live and shippers on those lines ship their products to market. They do not provide fair distribution of cars. There is no provision in the bill to correct these abuses. Another thing is that there is nothing in this bill to prohibit a railroad from owning, mining, and selling coal in opposition to shippers.

* * * * *

* * * One of my amendments goes right to that point, that the carrier shall be confined to doing the business for which it is incorporated, namely to transport freight and passengers and do no other business, and, as the Senator has said, that would be very helpful in the line of securing a fair distribution of cars.

* * * * *

The most important amendment is the one providing that interstate lines shall make prompt connections with connecting branch or lateral lines, and fair, just and reasonable prorating arrangements with them. It can hardly be hoped that another trunk line will be built to New York, Boston, Philadelphia, or Baltimore. Entrance into these cities by another trunk line is almost impossible. The cost and obstacles to be over-

come make it prohibitory. In a less degree the same might be said of the great cities of the Union, especially Chicago, St. Louis, San Francisco, and Cincinnati. The people must, therefore, in the future depend largely for the further development of the country and continued increase in business upon short lines of railroad reaching rich sections. This is especially the case in the great State of West Virginia, one of the richest in the Union.

Unless the interstate railroads, reaching all the large cities and markets, make fair connecting and prorating arrangements with branch and lateral lines, the business and development of the country must be retarded. These great railroads already have immediately along their lines all the business they can do at present, and they hold that no one else should build necessary branch and lateral lines in what they term their territory. That is the assumption of these great lines, that it is "their territory," and if anyone attempts to build a branch or lateral line it is an invasion of this terrifory. There are many men who can build 10, 20, 50, or 100 miles of railroad to connect with interstate lines who could not possibly build a trunk line.

In the State of West Virginia and other States there are many men who have made large investments in agricultural, coal, timber, iron-ore, and other lands who are able and desirous of building short lines from 10 to 100 miles long to reach these lands and find a market for their products, but they will not build them under present conditions because of the difficulties in the way of getting switches and connections with the interstate lines, and when they do get them, securing fair treatment. Men can not afford to take this risk without the law guarantees them protection, and the people look to Congress to provide this protection in the bill under consideration.

CONSIDERATION OF THE HEPBURN BILL BY THE SENATE

The HEPBURN bill was debated in the Senate over a period of several weeks.[1] During the course of the consideration of the bill, certain statements were made which appear to throw light on the purpose and intent of the "Commodities Clause," and these statements are herein reproduced.

On April 6, 1906, Senator GAMBLE, after disclaiming any purpose to detain the Senate with an extended discussion of the questions raised by the bill, said:[1]

> "Although much has been accomplished by the ELKINS Act on the subject of rebates, it can not be claimed that this evil has been eradicated. With the fuller powers given to the Commission in this bill, and with the enlarged jurisdiction extended over all related instrumentalities connected with transportation, I believe it will have a most wholesome effect and will strengthen the present law looking to the correction of this evil."

Senator LATIMER, on April 12, 1906, made this statement:[2]

> "The pending bill, known as the HEPBURN bill, seems to me to embrace in the main all of the essential features needed in a bill of this character. It provides for the public inspection of rates, fares, and charges made by the railroads for the transportation of property and passengers; that all service rendered shall be reasonable and just, declaring unlawful any unjust and unreasonable charge for any service. It also provides that the railroads shall make an annual report and shall furnish to the Commissioners any information which they desire; that the Commission shall have jurisdiction over private cars, elevators,

[1] 40 Cong. Rec. 4846-4849 (1906).
[2] 40 Cong. Rec. 5123-5124 (1906).

refrigerators, terminals, private switches, and all other means and devices used by the railroads."

On the same day, Senator FORAKER recalled that the Senate Committee on Interstate Commerce, of which he was a member, had been studying the subject of railroad legislation, and that throughout the hearings held by the Committee the complaints were not about excessive rates but were about rebates and discriminations. Senator FORAKER said:[3]

> "We were studying it most conscientiously. We were hearing all who came, whether the representatives of shipping interests or the representatives of railroad interests, getting all the light, getting all the information as to what we should do with respect to it; and in all that hearing, from the beginning to the end, not one single witness ever told us about excessive rates. Go search the record and ascertain. It was all about rebates; it was all about discriminations.
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> . . . . .
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> So the House took up this subject with a view of dealing with all these complaints, and they considered rebates in all the various forms in which they have been allowed, not only rebates granted and paid in money, secretly or openly, but rebates allowed by discriminations—by allowance for terminal roads, for elevator charges, for icing charges—rebates of every character and description that could be thought of. Every kind of a rebate that human ingenuity could devise was talked about, and discriminations of every character were testified about, and they considered them in the House; discriminations as to localities, discrimination by means of relative rates that were unjust."

On May 4, 1906, Senator DOLLIVER, another member of the Committee on Interstate Commerce, said:[4]

> "Mr. President, the complaints are pretty numerous

[3] 40 Cong. Rec. 5129 (1906).
[4] 40 Cong. Rec. 6375-6376 (1906).

that the House bill is crude and awkward in its construction, and therefore unpalatable to the Senate.

* * * * *

There is some force in what my friend from North Dakota says about the regulation of a man's business who owns the car and the merchandise which the car carries. I think it will not be disappointing, however, to the Senator from North Dakota if I call his attention to the fact that this bill seems to have been drawn after some possible crude meditation on that subject. If he will examine section 15, which is the great remedial section of this proposed statute, he will find, on page 12 of the printed bill, this provision:

> If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

I am not prepared to say that that provision is a perfect protection in the matter to which the honorable Senator refers, but, if it is to be made more perfect, I think it is not out of the way for me to suggest to him that an amendment offered to section 15 covering that point would be appropriate."

Genesis of Commodities Clause

It was not until May 7, 1906, that the genesis of the "Commodities Clause" was proposed. On that day Chairman ELKINS proposed that the following be added at the end of section 1—[5]

"It shall be unlawful for any common carrier subject to the provisions of this act, unless authorized by

[5] 40 Cong. Rec. 6455 (1906).

its charter to do so, to engage, directly or indirectly, in the production, manufacture, buying, furnishing, or selling of coal or coke or any other commodity or commodities of commerce in competition with any shipper or producer on its line or lines: Provided, That nothing in this act shall be construed to prevent a carrier from mining coal exclusively for its own use."

Senator DOLLIVER inquired whether it was the purpose of this amendment to prevent a common carrier from engaging in the mining of coal or any other business, if the operations are not conducted upon its own line. To this inquiry Senator ELKINS made this reply:[6]

"Mr. President, I want to confine the railroads to the legitimate business for which they are incorporated—the transportation of freight and passengers—and to forbid them engaging in any other business, especially the business of mining, producing and selling coal or any other commodity on their lines in competition with a shipper.

* * * *

I do not agree with the Senator from Texas [Mr. BAILEY]. It seems to be the language of the amendment is plain and unmistakable and that it meets the objection raised by the Senator from New Hampshire [Mr. GALLINGER]. What I am aiming to do is to prohibit interstate roads, carriers of interstate commerce, from engaging in or doing any other business than the transportation of freight and passengers.

* * * *

Mr. President, I want to get this amendment in such shape that it will stop an evil or an abuse that obtains in West Virginia, Pennsylvania, and other coal-mining States. The Supreme Court of the United States, in a recent opinion in a case coming up from West Virginia, decided that under the existing law railroads can not engage in the mining, manufacturing, and selling of coal.

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[6] 40 Cong. Rec. 6456-6457 (1906).

I understand what the Senator means. I do not mean to say that they have decided it definitely, but they intimated in a way that is notice to the country and to Congress and to everybody concerned that the railroads were not empowered to produce and sell coal. I thought, following that intimation, it would be better to put into the statutes of the United States a positive prohibition that railroads should not engage in the mining and manufacture and production and selling of coal and coke, and that they should be confined to the legitimate business for which they were chartered, to wit, the transportation of freight and passengers."

Senator ELKINS then modified his original amendment to read as follows:[7]

"It shall be unlawful for any common carrier engaged in the production, manufacture, buying, furnishing, or selling, directly or indirectly, of coal, coke, or any other commodity of commerce to engage in interstate commerce: Provided, That nothing in this act shall be construed to prevent a carrier from mining coal or furnishing or producing other commodities exclusively for its own use."

Senator SPOONER, following the introduction by Senator ELKINS of his modified amendment, gave this explanation of its purpose:[8]

"Mr. President, the evil sought to be remedied by this amendment is one as to the existence of which there can be no question. I think it has relation principally to the mining of coal. Companies engaged in interstate transportation, even though engaged lawfully in the States in mining and producing coal, have been able to freeze out independent operators. They have been able thereby to diminish the output of a necessary of life, and to put upon consumers throughout the country a price to suit their own will. That ought to be remedied. But the Senator who believes that it is a subject free from difficulty and intricacy I

[7] 40 Cong. Rec. 6457 (1906).
[8] 40 Cong. Rec. 6459 (1906).

think makes a very grave mistake. It requires much thought, more thought, I think, than has been bestowed upon it in the preparation of this amendment."

Senator TILLMAN warned against hasty and ill-advised action on so complex a problem, saying:[9]

"Mr. President, I think when Senators consider this question a little more they will find that there are other sides to it which will add to its perplexities. Granting that all of us are earnestly desirous of accomplishing the result of divorcing production and transportation—and I have heard no objection to it, stated in a general way like that, from any source—the more you consider it the more troublesome it grows. At least that has been my experience, and I have been thinking a great deal about it, and I have had suggestions from various sources. I have asked half a dozen great lawyers to suggest amendments; each and every one of them differ; and as yet I have not been able to get any satisfactory solution so far as my own mind goes.

Now, I will state some of my perplexities. This amendment deals with the three great problems: First, of monopoly—the railroad controlling coal lands and freezing out competitors who are engaged in the business as private owners. Second, it deals with the question of discrimination—preventing a fair deal between the private owner and the railroad by distribution of cars and access to market. It also deals with the more perplexing question or idea of the destruction of private interests.

For instance, suppose we should limit the engaging in interstate commerce of a public carrier to the production by others, forbidding transport beyond the State line of any article which he himself was producing, what would become of that class of cases or those conditions in some region where the country is sparsely settled and where there is a great lumbering industry—that is, a great deal of lumber standing in

[9] 40 Cong. Rec. 6460 (1906).

trees? I have known half a dozen railroads in the South, in my own limited scope of view, that have been built entirely and solely for the purpose of hauling out the lumber from the swamps and backwoods to get it to market; and but for the fact that the lumbermen built their own road they absolutely would have had no market for their product.

Take Coal. Go into West Virginia and you find in some of these coves and backwoods large and rich deposits of coal which will lie there—I will not pretend to guess how long, but fifty or a hundred years—undeveloped and unproductive, lacking in value to the present owners, if you say to a company, "You shall not buy this coal and construct a road to market your coal and get it out so as to put it on the market." So you will put a ban on those lands and they will lie there useless.

I take West Virginia as an illustration, because I have had a great many communications from down there complaining about the discrimination and injustice of the Baltimore and Ohio and the Chesapeake and Ohio in their dealings with private operators. Lots of those people have been bottled up, but those little roads have been built primarily for the purpose of getting to the through roads or interstate-commerce roads. While they will transport small quantities of other products, they will build primarily and solely for the purpose of marketing the coal which they have bought, and without the coal there would have been no road, and without the road the coal is valueless. So if you say a man who undertakes to build his own road solely for the purpose of marketing his own coal shall not continue to run the railroad, you put up a barrier to his utilization of his own property.

As I said, you can not have any sweeping and general provision here without doing serious injury somewhere. The more I think about it the more I consider the condition in the anthracite field where this coal monopoly already exists, where the five railroads penetrating the anthracite field have absolute domination over every ton of coal and have parceled out the product and fixed the price. You see the perplexity and

the difficulty of legislating along this line without seriously jeopardizing somebody's interests.

Now, I want to stop it. I want Senators to consider seriously the various aspects and difficulties involved. While the amendment offered by the Senator from Mississippi [MR. McLAURIN] will go a long way toward helping, it will itself bottle up and destroy private interests in ownership in coal lands which can never be utilized or reach the market unless the man who owns the land shall also be allowed to build a railroad to get to market.

So, Senators, you will not quickly dispose of it in any wise and judicious way. By careful consideration we may be able to discover a method by which we can accomplish what we seek to do, but unless we are very cautious we will make a mistake, and we had better go not quite far enough than to go too far."

Senator McCUMBER agreed that railways as common carriers should be divorced from engaging in any character of business in competition with any person, firm, or corporation, but believed the modified Elkins amendment, as proposed, to be unconstitutional.[10]

Following an inquiry by Senator DRYDEN, Senator DICK, said:[11]

"Mr. President, the inquiry of the Senator from New Jersey [MR. DRYDEN] is both pertinent and important. Either the time should be extended very considerably or this matter should be dealt with in an entirely separate bill. In the first place, we recall that some years ago the iron masters of Pittsburgh constructed a railroad, extending through a part of the State of Pennsylvania and a part of the State of Ohio, to reach the ports of Lake Erie for the purpose of carrying iron ore from the Lake ports to Pittsburgh because of extortionate rates charged them by the railroads. If this amendment is adopted and that

[10] 40 Cong. Rec. 6494 (1906).
[11] 40 Cong. Rec. 6496 (1906).

road is still in the possession of the men who constructed it, they must either go out of the business of manufacturing steel or the business of common carriers.

Again, we adopted in the early part of the voting an amendment putting pipe lines into the list of common carriers; and the men who own pipe lines, whether the companies are large or small, will be compelled, if this amendment is adopted, either to go out of the business of pumping and refining oil or out of the business of conveying it.

Within a few days the Committee on Territories favorably reported a bill chartering a railroad in the district of Alaska, its purpose being largely to mine coal and other minerals, and the bill grants certain coal-mining privileges in that district. The company means to mine that coal, to convey it to a seaport, and thence to the Pacific coast. It will have to change these arrangements, and perhaps abandon the enterprise altogether, if it is confined entirely to the business of a common carrier and prohibited from engaging in the business of mining.

Ample illustrations might be given, in addition to the illustration made by the Senator from New Jersey or the one made previously by the Senator from South Carolina [MR. TILLMAN], when he referred to the lumber industries of the South. It extends still further. Great companies are mining iron ore in Michigan and in Wisconsin. They own vessels for the transportation of that ore from where it is mined to points where it is consumed in the manufacture of steel. They will have to go out of the business of mining or out of the business of common carriers.

So that, in all its ramifications, this question is so great, it affects so many interests, not only the interests of capital, but the interests of labor as well, that it seems to me the question itself is quite as important, and perhaps of even greater importance, than this matter of railroad-rate regulation, in that railroad-rate legislation has been a question that has been dealt with by Congress for more than twenty years.

This very bill is but a conformation of old legislation to newer conditions, but this particular question is a new and a very important question. It is to be hoped the Congress will see that it is a wise thing to do to defer action upon so important a matter until the pending rate legislation is out of the way and it can be dealt with as a separate and distinct proposition in important legislation."

Then, Senator ELKINS made this statement with respect to the purpose of his modified amendment:[12]

"Mr. President, the purpose of introducing this amendment was to correct an abuse and evil growing up in the State of West Virginia and in other mining States, owing to the fact that railroads engage in competition with producers on their lines."

Thereupon consideration of the subject was ended for that day. On the following day, May 8, 1906, Senator McLAURIN, a member of the Committee on Interstate Commerce, proposed the following as a substitute for the pending ELKINS amendment:[13]

"It shall be unlawful for any corporation that mines or manufactures or produces any article or commodity of commerce for sale to engage in the business of interstate commerce as a carrier of any of its own product, mining, or manufacture; and it shall be unlawful for such corporation to charge, demand, collect, or receive any money or other thing for the carriage, as a carrier of interstate commerce, of any of the like kind of articles or commodities produced, mined, or manufactured by any other person, company, or corporation; and for a violation of this provision the person paying such charge or demand may recover in any State or Federal court having jurisdiction of the subject-matter an amount triple the amount so collected or paid, together with all costs of collection, including attorney's fees and costs of travel to and from and attendance upon court. If any such cor-

[12] 40 Cong. Rec. 6496 (1906).
[13] 40 Cong. Rec. 6497 (1906).

poration shall engage in the business of a carrier of such articles or commodities as intrastate carrier it shall be unlawful for such corporation to engage in interstate commerce as a carrier of any kind of commerce."

Thereupon, Senator ELKINS said:[14]

"What I am contending for in this amendment is that the independent operator, the individual mine owner, shall be protected in his business against the rapacity and injustice of railroads owning coal lands. No independent operator, no small mine owner, can afford to engage in competition with a railroad company that owns twenty or thirty or forty thousand acres of coal doing business in the same locality. I say it is perfectly competent for Congress to pass such legislation. The law of West Virginia on this subject has been sustained. Congress by proper laws should forbid railroad companies from engaging in any business in competition with shippers on their lines.

* * * * *

Railroads in recent years have been chartered and organized primarily for one purpose—namely, to transport freight and passengers. Nothing else. Fifty years ago I admit that the Reading, the Lehigh Valley, the Pennsylvania, and other roads, under special acts of the legislature, had the power conferred upon them of owning coal lands and mining and selling coal, which they have exercised for all these years. I do not want to interfere with these powers, but for the future I want it to be clearly understood that all interstate roads shall refrain from engaging in such business.

I do not know of any intrastate roads. There may exist in a State a road 50 or 100 or 200 miles long, but all these roads do interstate business, and doing that, it has been decided they become interstate carriers and interstate roads. I believe in confining strictly and positively railroads to doing two things—the transportation of freight and the transportation of

[14] 40 Cong. Rec. 6498-6499 (1906).

passengers and engaging in no other business of any kind whatsoever, directly or indirectly.

* * * * *

Mr. President, I know it is sought to sidetrack this amendment that corrects a great abuse and injustice. I know we are dealing with rates and trying to prohibit excessive rates, but there are abuses and evils produced by railroads far greater than excessive rates. The great evils and abuse are the kind I have mentioned. Rebates and discriminations are prohibited now by stringent laws. Now, another abuse by railroads is they refuse at times to give switches to shippers of interstate commerce. They will not give physical connection. If we are going to regulate railroads, if we are going to correct abuses let us correct the real abuses that oppress the people and drive them out of business. What I complain of in this bill is that while it is a good bill as far as it goes, it does not go far enough. It does not correct the very abuse I am trying to bring to the attention of the Senate. It does not provide that where an interstate shipper is prepared to operate he shall have the right of switch connection. It does not provide that connecting lines shall have connections and fair, just, and reasonable prorating arrangements. Those are abuses of which the people of West Virginia complain, and they are evils which I should like to see corrected in this bill.

Mr. President, I think it is plain, in the words of the substitute offered by the Senator from North Dakota, that if common carriers are engaged in mining and selling coal or coke or other commodities along their lines in competition with shippers, it should be prohibited. That is a plain, simple proposition. It is an evil and an abuse, and if it is not checked it will enable the railroads of the country to absorb the mining business along their lines to any extent."

Senator BACON said: [15]

"Mr. President, I am very much inclined to the opinion, as has been expressed by several Senators,

[15] 40 Cong. Rec. 6499 (1906).

that this is a matter we should not attempt to deal with in the pending bill. It is a bill to regulate railroads in the matter of transportation rates and fares for passenger transportation. It is an impossibility to make it a cure-all for all the evils which may exist in the operation of railroads. This is an extremely difficult question and one in which almost certainly there is an evil which should be remedied by legislation, but it is one which affects so many interests that it is extremely important that whatever is done should be done with the utmost care.

I have in my hand the opinion of the court in the Chesapeake and Ohio case. I have not had the opportunity to give it the very careful examination which one ought to give to attempt to discuss it or to predicate an argument upon its rulings. I had only seen heretofore the newspaper accounts, and I have had an opportunity to look at this decision only this morning, since the Senate has been in session. As I understand, though, in the hasty examination which I have been able to give it, the particular point ruled by the court was this: It was charged that the Chesapeake and Ohio Railroad Company sold and agreed to transport and deliver to the New York and New Haven Railroad Company coal at a rate which represented in the aggregate less than the cost of the coal and the rate of transportation as published by them as their regular rate, and that therefore it amounted to a system of rebates.

* * * * *

That is an extremely difficult question, and it is one which not only will affect illegitimate enterprises, if I may so denominate them, but it is one which will affect legimate enterprises, and therefore it should be regulated with great care, so as not in any manner to do unwanted injury to those legitimate enterprises.

I will give an illustration. Of course, in these matters the fact that it will affect industries in our particular localities naturally occurs to Senators. The Senator from Pennsylvania instanced the case of the lumber trade in North Carolina, and that is true also in the State of Georgia. The southern half of the

State of Georgia is a timber-producing section. Very many railroads have been built in that section for no purpose except to develop the timber industry. Men owning large tracts of timber land remote from railroads have built railroads into those tracts of land for the purpose of being able to market the timber. After they have built the railroads, while they are engaged primarily and principally in the transportation of timber which they themselves cut, they also take some business from the public in the way of carrying of passengers and freight and however minor it may be compared with the main business of carrying the timber, it constitutes them as common carriers."

There followed a colloquy as set forth below:[16]

MR. FORAKER. "I call the Senator's attention to the fact that when the Chesapeake and Ohio Railroad was incorporated, as stated by the Supreme Court decision to which the Senator has referred, there was no law of the State of Virginia prohibiting it from engaging in contracts of this kind. After that the State passed a law in 1895 prohibiting it, before this contract was entered into, and that cut a very important figure in the decision of the court."

MR. LACON. "But, if the Senator from Ohio will pardon me, if I have not incorrectly understood the decision, the main point in the case, as I gather it, is that the Chesapeake and Ohio Railroad Company bought coal and agreed to deliver it to the New York and New Haven Railroad Company at a price which did not represent the cost of the coal and the transportation of the coal at the published rates of transportation, and that therefore the conclusion was irresistible, as stated by the court, that they had undertaken this transaction with a view to the transportation of the coal at less rates than they were charging to the general public, and at less rates than the published rates for transportation, and therefore it was a violation of the interstate-commerce law. It would have been a violation of interstate-commerce law, even conceding that the company did have the

[16] 40 Cong. Rec. 6500 (1906).

authority under its charter to engage in the business of buying and selling coal. That is a great question with which we have to deal."

* * * * *

MR. DOLLIVER. "Mr. President, the Senator from West Virginia has introduced a very important practical question, probably a more far-reaching and difficult question than any with which the pending bill undertakes to deal.

* * * * *

No more difficult railway proposition exists than this connection of the carriers with the productive enterprises of the country. That relation is in all forms. Some railroads own coal mines and undertake to engage in the distribution of coal, and curiously enough some coal mines own railroads, because it has become a favorite method in these days in organizing a coal corporation to anticipate in a way the probable attitude of Congress, and the public dreads a mixture of the two functions. So it is not uncommon to find great coal corporations having as a part of their charter rights the right to build and operate railroads."

Senator LODGE concluded consideration of the subject for that day with the observation:[17]

"Mr. President, I think it is fairly demonstrated that there is a good deal of confusion in regard to these amendments.

* * * * *

The ownership by the railroad companies of these great properties which comprise the necessities of life is an admitted evil. The attitude of the Supreme Court in the Chesapeake and Ohio case recognizes such ownership as contrary to sound public policy. It is idle to say that we are unable to deal with it or to stop it. If we are to be paralyzed in dealing with such an evil as this, then the interstate-commerce clause in the Constitution is utterly vain."

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[17] 40 Cong. Rec. 6509 (1906).

When consideration of the subject was resumed on the following day, May 9, 1906, Senator McLAURIN asked that his amendment [18] be withdrawn, and then, in lieu of the amendment proposed by Senator ELKINS, he offered the following amendment: [19]

> "From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or District of the United States to any other State, Territory, or District of the United States or to any foreign country any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier."

Thereupon, Senator McLAURIN, to save a point of order, withdrew his amendment to allow a vote to be taken on the amendment offered by Senator Elkins.[20] Then Senator ELKINS modified his previously-proposed amendment to read: [21]

> "From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier."

Senator CULBERSON stated the evil to be eradicated, and the problem of doing it, in these words: [22]

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[18] See pages 61-62, *supra*.
[19] 40 Cong. Rec. 6559 (1906).
[20] 40 Cong. Rec. 6559 (1906).
[21] 40 Cong. Rec. 6561 (1906).
[22] 40 Cong. Rec. 6562 (1906).

"Mr. President, the chief evil which we desire to eradicate in this matter is the ownership of coal mines by railroad companies engaged in interstate commerce. A great many Senators believe that an absolute prohibition against the ownership, production and manufacture of coal by such corporations can not be legitimately made by the Congress of the United States. Without going into that question—and as to its general effect I agree—the question before the Senate is, How, if at all, we may reach that evil without undertaking to prohibit such ownership and production absolutely? That is the point—not to prohibit these companies from carrying coal from one State to another necessarily, because that will not reach the evil. The evil is the ownership and the production by the corporations themselves aside from their legitimate business of transportation."

Senator CARTER, of Montana, had, on a previous occasion, expressed grave doubt as to the propriety of engaging in departures from the main purpose of the pending Hepburn bill. But, at this point in the debate, he took occasion to explain the necessity for industries building, owning and operating industrial railroads. Senator CARTER said:[28]

"We have one enterprise in the State of Montana in which there are to-day over 20,000 men engaged at good wages in the production of copper. It constitutes the great industrial enterprise of our State. This copper is produced 20 miles from the mines. The mines are chiefly in and about the city of Butte. The largest copper smelter in the world is located at Anaconda, some twenty-odd miles distant. For many years the great mining companies undertook to have their ores transported from Butte to Anaconda through the agency of an independent railroad company.

They found the rolling stock inadequate; the cars were not suited to the purpose; the service was fitful

[28] 40 Cong. Rec. 6564 (1906).

and uncertain, and rates were often prohibitive.

In order that this work might proceed, the copper companies on their own account built a railroad from the copper mines to the copper smelter, a distance of 20 miles. In actual operation this intervening piece of track between the mine and the smelter is as essential to the operation of the general business as the tracks within the levels themselves, upon which run the small cars filled with ore.

This railroad, running from Butte to Anaconda, was constructed principally to carry the copper ore from the mine to the smelter. Incidentally passengers are carried over it also. The Great Northern uses that track for 20 miles, because Anaconda is the terminal of the Great Northern passenger trains which reach there from St. Paul and Puget Sound. It is therefore partly engaged in interstate commerce. The supplies shipped in to the citizens of Anaconda are billed from Philadelphia, New York, and Chicago over this road to Anaconda, and whatsoever the body of the people have to ship out from the town of Anaconda must be shipped over this road, and billed to distant points in the country. The coal needed to run the smelter at Anaconda is shipped from Wyoming very largely, and to a considerable extent the coke is shipped from British Columbia, and to a considerable degree from Connellsville, in the State of Pennsylvania.

Therefore this line of road, only 20 miles in length, primarily constructed to haul ore, splendidly equipped, with a magnificent roadbed, 90-pound steel rails, ponderous locomotives, equipment unexcelled in any part of the country for a road of like length, is engaged in interstate commerce.

Now, what would be the effect of the amendment of the Senator from West Virginia? This company would be compelled to dismember itself. The effect would be to disrupt and disorganize and devitalize the best and largest industry and enterprise in that State. The enterprise can not be successfully conducted without the railroad, and the railroad can not be operated successfully by an outside company.

"* * * The chief purpose of the amendment is to cure an evil which has become well known to the country at large—the control of coal by the railroads in the anthracite region in Pennsylvania. That is the main purpose of the amendment. Of course the evil extends to West Virginia and contiguous territory. But therein rests the point to which most of the discussion is directed, and that is the evil sought to be corrected. It will require the best thought of the Interstate Commerce Committee to apply a general law to that existing evil and at the same time avoid touching a vital point in the industrial life of the country in many other sections."

Senator CLARK, of Montana, then complemented and supplemented what Senator CARTER had said. Senator CLARK said:[24]

"There is another feature of this question which I want to present to the Senate. All over that western part of this continent, as has been shown by the development of a half century, discoveries of great mines have been made and are still being made everywhere. In many instances mines are found containing base metals, lead and copper, at points many miles away from any railroad. Persons who own those mines of base metals can not work them unless they have railroad facilities. Butte was kept back for fifteen years for want of railroad facilities, and I know of a number of instances where mines have been discovered and developed and found to be big mines, but being owned by individuals or perhaps by a single company there was no railroad company that would undertake to build a line to them for the reason that it would be hazardous, as they might shut down the mines at any time. What was the result? The owners of the mines—the individuals or the company, as the case might be—have been obliged to build a branch road themselves to the nearest road, in order to secure access to the markets of the world for the products of their mines.

[24] 40 Cong. Rec. 6565 (1906).

There is an instance of this kind in southern Arizona. The Copper Queen Mining Company is owned by Phelps, Dodge & Co., and they have a number of the greatest mines in that wonderful Territory. They were obliged for their own protection to build a road about 200 miles in length, and to-day it is in operation. * * * Now, what are you going to do under this amendment with such a proposition as that? I myself was obliged to build a road shorter than that—but 28 miles in length—before I could get the products of a copper mine to the market. When I completed that road, some fifteen years ago, it became an interstate-commerce road, because all the products went out and supplies came in through other States and Territories."

Senator TELLER said:[35]

"The case decided by the Supreme Court in February last was decided under the existing law, and it would appear from an examination of that case that there is ample law to deal with this subject. What I want to call the attention of the Senate to is simply that the complaint there was with reference to the transportation of coal. The Senator from West Virginia [MR. ELKINS] who has introduced this subject is making his complaint simply because of the unfair treatment of the coal dealers of that State. The Senator from Montana who first spoke [MR. CARTER] has told us something of the difficulty of dealing with this question, and so has the Senator from Montana [MR. CLARK] who spoke last. With some knowledge of the condition not only in Montana, but in Arizona, what both Senators have presented here satisfies me that there is danger of this legislation going very much beyond the point we ought to go. We are very liable to do more harm than good. If we could confine it entirely to the coal business for the time being, I think perhaps it would be better than to include all commodities and all kinds of service."

Senator FULTON said:[36]

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[35] 40 Cong. Rec. 6565-6566 (1906).
[36] 40 Cong. Rec. 6566-6567 (1906).

"All over the West, as the Senator from Colorado [MR. TELLER] has said, there are little railroads which have been built to connect with coal mines and sawmills, that have been built simply to get the product from the mills and the mines. In such cases mining and milling are the principal enterprises. The railroading is merely incidental thereto, and yet those railroads connect with interstate lines, or with other railroads connecting with transcontinental or interstate lines. Hence these small roads doubtless would be held to be engaged in interstate commerce. It seems to me, Mr. President, that a distinction should be made and that proper exceptions should be provided in any legislation that shall be enacted on this subject in order to protect such enterprises. Just what those exceptions should be and just how they should be framed I am not prepared at this moment to say, and it does not seem to me that any other Senator is prepared to say."

Then, Senator TILLMAN said:[27]

"• • • We all know there are grave abuses and outrageous conditions not only in West Virginia, but in Pennsylvania, in East Tennessee, in the Indian Territory, and I do not know where else. I will read, for the information of the Senate, what very few Senators have ever read since I introduced my report here, some observations I made on this very topic in the brief report which I presented."[28]

Senator BAILEY said:[29]

"If the Senator will allow us to vote on the original proposition, as corrected in accordance with my suggestion, and that is voted down, then the Senator from Mississippi has a proposition, and we will vote on it, and I believe we can do it all without debate."

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[27] 40 Cong. Rec. 6567-6568 (1906).

[28] Senator Tillman here read from his report as printed herein, *supra*, pp. 45-48. It is not here repeated.

[29] 40 Cong. Rec. 6568 (1906).

Senator ELKINS then proposed the following substitute for his earlier amendment:[30]

> "From and after May 1, 1908, it shall be unlawful any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier."

Senator BACON immediately called attention to the fact that the amendment as just presented would not prevent railroads from owning coal mines or continuing to transport the coal from company-owned mines so long as that transportation is limited to the particular State in which the coal mines are located and the railroad is situated. Senator BACON said:[31]

> Mr. President, I wish to say a word. I do not think the amendment will be effective. The evil sought to be remedied, as I understand, is that railroad companies own coal mines and monopolize the production and the carriage of this property. **The substitute does not in any manner prevent their continuing to own the coal mines or continuing to transport the coal, so long as that transportation is limited to the particular State in which the coal mines are located and the railroad is situated.** [Heavy type supplied.]

The amendment as thus proposed by Senator Elkins was agreed to.[32]

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[30] 40 Cong. Rec. 6568 (1906).
[31] 40 Cong. Rec. 6568, (1906).
[32] 40 Cong. Rec. 6570 (1906).

On May 11, 1906, Senator LAFOLLETTE offered the following amendment:[33]

> "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.
>
> The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this act."

The Senator said:[34]

> "I did neglect to state that this section clothes the Commission with power to make an order upon an investigation which has originated with the Commission. Section 13 of the bill as reported by the committee leaves with the Commission authority to make an investigation upon its own motion, but section 15 does not empower the Commission to make the order to correct a wrong which it may discover upon an investigation under section 13.
>
> Now, section 15, which I propose as a substitute corrects that obvious defect in the pending bill. That is the only difference with reference to this particular point. It is manifestly absurd to allow the Commission to make an investigation on its own motion under section 13 and then withhold from it all authority to issue an order to remedy the defect or evil which the investigation has disclosed."

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[33] 40 Cong. Rec. 6697 (1906).
[34] 40 Cong. Rec. 6697 (1906).

The Amendment offered by Senator LaFollette in the nature of a substitute for the Elkins amendment was rejected.[35]

On May 17, 1906, the following paragraph was inserted in the bill, at page 5, beginning with line 25, as in Committee of the Whole:[36]

> "From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, or district of the United States or to any foreign country any article or commodity manufacured, mined, or produced by it or under its authority or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier."

When the foregoing paragraph had been inserted in the bill as in Committee of the Whole, Senator TILLMAN said:[37]

> Mr. President, I regard this as one of the most far-reaching and important amendments that it is proposed to incorporate in the bill now under consideration. The words in the bill that have just been read are a substitute for the original amendment proposed by the Senator from West Virginia [Mr. ELKINS.]
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> • • • •
>
> I further stated that there were two important amendments which I wished to see incorporated in the bill. One of these was the idea embraced in this amendment to wit, the divorce of the business of transportation from the business of production—to make a public carrier a public carrier and nothing else.
>
> The other was a provision to compel interstate-commerce roads to give connections by means of switches or other appliances, so these little branch lines could

[35] 40 Cong. Rec. 6700 (1906).
[36] 40 Cong. Rec. 7011 (1906).
[37] 40 Cong. Rec. 7011-7012 (1906).

gain access to the markets. That idea had been discussed and pressed with great earnestness by the Senator from West Virginia in committee, and I am perfectly willing that he should claim the paternity of it. But, so far as this other proposition is concerned, I think it never would have received the attention it has in the eyes of the people of the country and that the Senator from West Virginia himself never gave it the serious consideration which he afterwards did until I presented to this body the memorial of the Red Rock Fuel Company, pointing out the iniquities and outrages perpetrated on that corporation by the Baltimore and Ohio, and also followed, as it was, by the letter from the governor of West Virginia, Mr. Dawson, proclaiming the fact that the State of West Virginia was absolutely at the mercy of the three railroad systems entering it, so far as getting to market was concerned.

Then Senators will recall that day after day for a week or more every morning I presented in this Chamber and had read letter after letter from various coal producers, pointing out the absolute helplessness of the independent operators because of the fact that the Pennsylvania road and the Baltimore and Ohio road and the Chesapeake and Ohio road and the Norfolk and Western road absolutely dominated the bituminous and the anthracite coal fields of the two States of Pennsylvania and West Virginia, and that their property was being confiscated. So much for the genesis of this proposition.

But my attention has been called to the fact that the amendment that is incorporated in the bill as it stands, which it is proposed to concur in, does not cure the evil.

I have here a communication from a gentleman engaged in coal production, and he points out that this amendment would not prevent the ownership of coal properties by the ownership of stock in coal companies; that it would not prevent the control of coal companies by officials of railway companies; that is would not touch the ownership of railroads by coal companies or the common ownership of railroad companies and coal companies. Here is a letter prepared by an Inde-

pendent coal operator, in which the scheme by which this amendment can be evaded is elaborated and pointed out in detail. I have not time to read it, but I ask to have incorporated in my remarks.

* * * * *

Mr. President, there are differences of opinion among able lawyers whom I have consulted, and I have before remarked in the Senate that this question is so perplexing and has so many ramifications and there are so many complex conditions, so many methods of evasion, that it is difficult, without a long and well-guarded enactment, to accomplish what we are trying to do without overdoing it and perpetrating great injury and wrong in certain instances. I have prepared what appears to me to be a much stronger and more efficacious provision, which I send to the desk and ask to have read as a substitute for the pending amendment.

The amendment which Senator TILLMAN proposed in lieu of the amendment agreed to as in Committee of the Whole was as follows:[38]

After May 1, 1908, it shall be unlawful for any common carrier to engage in the transportation of interstate commerce, if such common carrier shall at the time be interested, directly or indirectly, by stock ownership or otherwise, in the article or property which is the subject-matter of such commerce, or if it be interested in the time, directly or indirectly, by stock ownership or otherwise, in the mines or factories producing such commerce; or if at the time any officer, director, agent, or employee of such common carrier be interested, directly, or indirectly, by stock ownership or otherwise, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same; or if at the time stockholders owning more than 10 per cent of the capital stock of such com-

[38] 40 Cong. Rec. 7012 (1906).

mon carrier be interested, directly or indirectly, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same.

This section shall not prevent a common carrier from mining coal or carrying articles or property for its own use or for the use of its officers, directors, agents, employees, or stockholders.

The amendment offered by Senator TILLMAN was rejected.[39]

Following the rejection of the substitute amendment proposed by Senator TILLMAN, Senator PILES said:[40]

Mr. President, I know, for instance, in my own home city, in the early history of that country the people turned out en masse for the purpose of constructing, or aiding in the construction, of a little line of railroad —which is now some 38 miles in length—to the coal mines, in order that they might have some product to send to market and get ready money into that new country. That road exists to-day, and to my personal knowledge its stock is, or was, owned by another transportation company. It is run in connection with a steamship line, and it carries freight and passengers for hire for the people living along the line of the road. But the transportation of outside freight is a mere incident to its business. The principal business of that road is to carry the coal mined by its stockholders up the mountains down to the city of Seattle, and there it is transported by steamers to California and other domestic ports, where it is sold. That steamship line is indirectly, at least, interested in that railroad. Is it the intention of Congress to put that railroad out of business? Is it the intention of Congress to put that steamship line out of business? I think not.

Mr. President, that is but one incident. Many more might be cited. That road is doing nobody any injury.

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[39] 40 Cong. Rec. 7012 (1906).

[40] 40 Cong. Rec. 7012-7013 (1906).

It and the mines which it reaches employ hundreds of men in a great and beneficial industry. The steamship line operated in connection with it is engaged in building a great commerce. Shall this railway company, this steamship company, and other companies conducting great industries on similar lines be put out of business? That is exactly what will be done if the amendment of the Senator from South Carolina is adopted, because it provides, in effect, that the steamship line shall not own any stock in the railroad company, and the railroad company shall own no stock in the steamship line, and if such ownership shall exist it will be unlawful for the steamship company to transport from the State of Washington to the State of California, for instance, the coal carried by the railroad company to the city of Seattle for transshipment.

But let me go one step further, Mr. President. In the development of the great Pacific Northwestern country we have opened up the most magnificent forests in the world. We have done it by building great logging railroads into the forests. We are not logging in that country with horses and wagons or oxen. We are logging by means of railroads. Those railroads, running from 5 to 40 or 50 miles back into the forests, necessarily penetrate the valleys. People to a certain extent have settled in those valleys and have builded for themselves homes. Their little freight, as a matter of accommodation more than anything else, and some passengers, are carried by the logging railroads. Those logging roads own sawmills on tide water, or the mill companies own the logging roads. The roads take the timber to the sawmills, where it is sawed into lumber. The mill companies own their own schooners, both steam and sail. When the timber is sawed into lumber it is transported on these schooners to all parts of the maritime world.

If, then, these little logging roads can not own stock in the sawmills, or the mill companies can not own stock in the logging roads or own such roads outright, the great lumber industry, which employs in the woods 30,000 men alone, and which employes in the woods and in the mills and in the various industries connected

with the manufacture of lumber in the State of Washington alone upward of a hundred thousand men, and has an annual pay roll of something like $60,000,000, will be seriously retarded if not wholly destroyed.

Mr. President, I think it is time for Congress to call a halt. We came here to enact legislation upon this great question which would be beneficial to the people. The people of this country have had one object in view, if I understand them aright, and that is to create some tribunal before which they can appear and submit their grievances. Every man in this country has a right to go into court and complain of any man who does him an injury, or with respect to whom he assumes that he has a grievance. The shippers of this country came to the conclusion that they were entitled to have some forum before which they could present their grievances with reference to the railway in this country. And finding they had none, except that afforded by the common law, which was worse than nothing, they wanted Congress to enact a rate law, and that was all they wanted in this bill, in my judgment. They did not want Congress to indict the great industries of this country. They did not want Congress to stifle the energies and the industry of man; and I protest in the name of the great Pacific Northwest against the injustice that is about to be inflicted upon those people, and I hope the Senate will not permit the amendment to prevail.

Thereupon the following colloquy occurred:[41]

Mr. McLaurin. Before the Senator from Washington takes his seat, I should like to ask him a question.

Mr. Piles. Certainly.

Mr. McLaurin. If the words I shall read were inserted after the word "carrier," in line 1, page 6, would they not meet the objection of the Senator from Washington?

whose principal business is common carrying.

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[41] 40 Cong. Rec. 7018 (1906).

It seems to be the desire of the Senate to prohibit common carriers, whose principal business is common carrying, from engaging in the business of mining, but not to prohibit producers from providing their own means of transportation for their freight when they make the transportation business incidental to their main business. It seems to me if the words "whose principal business is common carrying" were inserted just after the word "carrier," in line 1, page 6, it would meet the objection of the Senator from Washington.

Mr. PILES. "Whose principal business is that of an interstate-commerce carrier." Is that what I understand the Senator to say?

Mr. MCLAURIN. The words I would suggest are "whose principal business is common carrying."

Mr. PILES: I think that would greatly benefit the amendment as it now stands; it would make it a great deal better; but I want to insert the word "interstate" —"whose principal business is that of an interstate carrier." But I think that this amendment should be defeated altogether. It is too large a question to be dealt with in this way. In my judgment too much mischief may be done by the enactment of this proposed law at the present time.

Mr. ELKINS. Mr. President, the purpose of this amendment, which was adopted by such a large majority when the bill was under discussion in Committee of the Whole, is to make a start toward divorcing production and transportation. I think the amendment is drawn as mildly as it can be and accomplish anything.

The Senator from Washington [Mr. PILES] makes an appeal here that logging roads in this State shall be excepted, or that, on account of their being handicapped so much by this amendment, it should not go into the law. If I understand the Senator's position, and if these logging roads are owned by lumber companies and incidental to their business, the law would not apply to them; or, if I understand, if these are intrastate logging roads or private roads they do not

come under the operatoon of the law, nor are they interstate carriers.

Mr. PILES. Will the Senator pardon me for a moment?

Mr. ELKINS. Certainly.

Mr. PILES. It is provided that this bill shall be applicable to carriers partly by rail and partly by water. I have endeavored to demonstrate that these logging roads are carrying partly by rail and partly by water, and it is not only interstate, but it is foreign commerce.

Mr. ELKINS. Which company owns—the steamship company, the lumber, or the railroad company?

Mr. PILES. One company owns the logging road and the sawmill and the steam schooners.

Mr. ELKINS. Which owns?

Mr. PILES. One company.

Mr. ELKINS. Which is the owning company?

Mr. PILES. I do not recall. In some cases it may be the lumber company, and in others it may be the railway company.

Mr. ELKINS. That is the very thing which produces the confusion here. If the lumber company owns this little line of railroad, 20 or 30 miles long, as an incident to its business, then this proposed law does not apply.

The record then shows the following:[42]

The PRESIDENT pro tempore. The yeas and nays have been demanded on the amendment proposed by the Senator from South Carolina [Mr. TILLMAN], and the secretary will call the roll.

The yeas and nays were ordered.

Mr. FLINT. I understand that the amendment offered by the Senator from Washington is accepted by the Senator from South Carolina?

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[42] 40 Cong. Rec. 7014-7016 (1906).

Mr. TILLMAN. I have no right to accept.

The PRESIDENT pro tempore. It is to an entirely different part of the section from that to which the amendment of the Senator from South Carolina is offered.

Mr. TILLMAN. I ask that my amendment may be read.

The PRESIDENT pro tempore. The amendment will be read.

The SECRETARY. On page 6 of the bill, line 7, after the word "indirect" insert "by partnership, stock ownership, or by any arrangement whatsoever."

* * * * *

So Mr. TILLMAN's amendment was rejected.

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The PRESIDENT pro tempore. The next amendment made as in Committee of the Whole is at the bottom of page 5, which the Secretary will read.

The Secretary read as follows:

From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any State, Territory, or district of the United States to any other State, Territory, district of the United States or to any foreign country any article or commodity manufactured, mined, or produced by it or under its authority or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier.

Mr. PILES. Mr. President, I move that the amendment be amended by inserting after the word "commodity," in line 4, on page 6, the words "other than timber and the manufactured products thereof."

The PRESIDENT pro tempore. The amendment proposed by the Senator from Washington will be stated.

The SECRETARY. On page 6, in line 4, after the word "commodity," it is proposed to insert "other than timber and the manufactured products thereof."

The PRESIDENT pro tempore. The question is on the amendment proposed by the Senator from Washington to the amendment made as in Committee of the Whole. [putting the question.] The ayes have it; and the amendment to the amendment is agreed to.

* * * * *

Mr. CLAY. I am sure the Senator from West Virginia will accept the amendment which I now offer, as the words I propose were in the amendment as it was originally drawn. In line 8, on page 6, after the word "necessary," I move to strike out the words "or used in" and insert "and intended for its own use."

Mr. ELKINS. I accept the amendment.

The PRESIDENT pro tempore. The Senator from West Virginia can not accept the amendment. The amendment must be acted on by the Senate. The amendment to the amendment will be stated.

The SECRETARY. On page 6, line 8, it is proposed to strike out the words "or used in" and to insert "and intended for its own use."

The PRESIDENT pro tempore. The question is on the amendment to the amendment.

The amendment to the amendment was agreed to.

On the following day, May 18, 1906, the bill was passed.[43] It was sent to conference on May 25, 1906, pursuant to House Resolution 534, and by the action of the House in

[43] 40 Cong. Rec. 7088 (1906).
[44] 40 Cong. Rec. 7428 (1906).
[45] 40 Cong. Rec. 7434 (1906).

adopting this resolution.[44]. The Speaker of the House appointed the following conferees: Mr. Hepburn, Mr. Sherman, and Mr. Richardson, of Alabama.[45] On May 28, 1906, the Senate consented to the conference requested by the House, and the Vice President appointed Senators Tillman, Elkins and Cullom as the conferees on the part of the Senate.[46]

The first report of the Conference Committee was printed as Senate Document No. 476, 59th Congress, First Session, and as House Report No. 4659, 59th Congress, First Session, being dated June 2, 1906.

With respect to the Commodities Clause, the Conference Report said:

> [2] Amendment numbered 6;
>
> That the House recede from its disagreement to the amendment of the Senate numbered 6, and agree to the same with an amendment as follows:
>
> In line 2 strike out "shall promptly."
>
> In line 2, after "of," insert *any lateral, branch line of railroad, or of.*
>
> In line 3, after "transportation," insert *shall.*
>
> In line 5, after "any," insert *such lateral, branch line of railroad, or.*
>
> And the Senate agree to the same.

In the "Statement of Managers on Part of the House," the Conference Report said:

> "[5] Amendment No. 5 as it passed the Senate prohibited any common carrier, after May 1, 1908, from transporting its own commodity, making an exception of timber and the manufactured products thereof. As agreed to in conference, this exception is eliminated, so

[44] 40 Cong. Rec. 7528-7529 (1906).

that the amendment as now agreed to prevents the carrier from carrying its own commodity, without exception.

Amendment No. 6 made provision for the compulsory installation of switch connections with rail where application was made therefor and [6] the Interstate Commerce Commission deemed the installation sufficiently important to warrant the same, the installation to be done at the expense of the applicant. As agreed to in conference, the amendment is broadened so as to require the compulsory installation of a connecting switch, not merely with a present or prospective shipper, but with any lateral or branch line of railroad.

The Conference Report not being agreed to, the bill was returned to conference, and a new Conference Report submitted on June 23, 1906, as House Report No. 5003, 59th Congress, First Session.

With respect to amendments numbered 5 and 6, that Report said:

[2] Amendment numbered 5:

That the House recede from its disagreement to the amendment of the Senate numbered 5, and agree to the same with an amendment as follows:

In line 2 strike out "common carrier" and insert *railroad*.

* * * * *

And the Senate agree to the same.

Amendment numbered 6:

That the House recede from its disagreement to the amendment of the Senate numbered 6, and agree to the same with an amendment as follows:

In line 2 strike out "shall promptly".

In line 2, after "of", insert *any lateral, branch line of railroad, or of*.

In line 3, after "transportation", insert *shall*.

In line 5, after "any", insert *such lateral, branch line of railroad, or*.

And the Senate agree to the same.

The Statement of Managers on the Part of the House, as contained in that report said:

> "[4] Amendment No. 5, as passed by the Senate, provided that after May 1, 1908, no common carrier could transport any commodity produced by itself, except from the provisions "timber, and the manufactured products thereof." As agreed to in conference the words "common carrier" are stricken out and the word "railroad" is substituted in lieu thereof.
>
> Amendment No. 6 made provision for the compulsory installation of switch connections with rail where application was made therefor and the Interstate Commerce Commission deemed the installation sufficiently important to warrant the same, the installation to be done at the expense of the applicant. As agreed to in conference, the amendment is broadened so as to require the compulsory installation of a connecting switch, not merely with a present or prospective shipper, but with any lateral or branch line of railroad."

When this Conference Report was called up for consideration by the Senate, on June 26, 1906, the following statements were made:[47]

> Mr. TILLMAN. I ask the Senate to proceed to the consideration of the conference report on the railroad rate bill.
>
> The Senate resumed the consideration of the report of the committee of conference on the disagreeing votes of the two Houses on the bill (H. R. 12987) to amend an act entitled "An act to regulate commerce," approved February 4, 1887, and all acts amendatory

[47] 40 Cong. Rec. 9250 (1906).

thereof, and to enlarge the powers of the Interstate Commerce Commission.

"Mr. ELKINS. Mr. President, in view of the fact that there is a great desire on the part of Senators to vote on the conference report and possibly return it to the committee of conference, I will not detain the Senate long.

"The cause of difference about substituting the word "railroad" for "common carrier" in amendment 5 of the conference report grows out of the amendment that I introduced, having for its purpose to divorce transportation from production on the part of the railroads engaged in transporting coal they mined and sold in competition with their shippers, which was a great abuse. Of late the railroads in West Virginia and in other States have acquired large holdings of coal lands and become extensive miners of coal as well as shippers, and in competition with shippers on their lines. This abuse grew into a grievous wrong to independent shippers. I sought to correct this abuse by an amendment confining railroads to their legitimate business of transporting freight and passengers and prohibiting them from engaging in the transportation of any commodity which they might own except for their own use.

In the adoption of this amendment and the discussion of it the wording was changed, and "common carrier" was substituted in place of "railroads," with the limitation that I have just stated of not allowing a common carrier to transport its own products. This produced the confusion that a pipe line is not permitted to transport its own products. West Virginia is probably the largest oil-producing State in the Union. I believe the sale of oil averages $50,000 per day in West Virginia. It is a very large income to our people. So far as I know, there has never been a complaint of any kind by anybody against pipe lines. The fact is, the pipe lines purchase all or nearly all the oil produced in West Virginia and transport it as their own oil, the Standard Oil being the largest pipe-line company in the State. So far as I am advised, none

of the pipe lines condemned the right of way or exercised the right of eminent domain in building their pipe-line stations—"pumping stations," as they call them."

The bill was again returned to conference, and a final Conference Report submitted on June 28, 1906, printed as House Report No. 5076, 59th Congress, First Session. As to amendments numbered 5 and 6, this report said:

[2] Amendment numbered 5:

That the House recede from its disagreement to the amendment of the Senate numbered 5, and agree to the same with an amendment as follows:

In line 2 strike out "common carriers" and insert *railroad company.*

Amendment numbered 6:

That the House recede from its disagrement to the amendment of the Senate numbered 6, and agree to the same with an amendment as follows:

In line 2 strike out "shall promptly".

In line 2, after "of", insert *any lateral, branch line of railroad, or of.*

In line 3, after "transportation", insert *shall.*

In line 5, after "any", insert *such lateral, branch line of railroad, or.*

And the Senate agree to the same.

The Statement of Managers on part of the House, as contained in this Conference Report, said:

"Amendment No. 5 as passed by the Senate provided that after May 1, 1908, no common carrier should transport any commodity produced by itself excepting from such prohibition timber and the manufactured products thereof. As agreed to in conference

the words "common carrier" are stricken out, and the words "railroad company" substituted in lieu thereof.

"Amendment No. 6 made provision for the compulsory installation of switch connections with rail where application was made therefor and the Interstate Commerce Commission deemed the installation sufficiently important to warrant the same, the installation to be done at the expense of the applicant. As agreed to in conference, the amendment is broadened so as to require the compulsory installation of a connecting switch, not merely with a present or prospective shipper, but with any lateral or branch line of railroad."

On June 28, 1906, when the Conference Report was again called up for consideration by the Senate, Senator TILLMAN said:[48]

"At the last conference the only thing considered was the pass amendment, and what is known as the "commodity amendment," and the other matters are the same as we reported at the preceding conference. The bill as it will become a law is in print, and Senators who want to examine it can do so by getting copies.

"Mr. President, the commodity amendment has been modified by inserting the word "company;" so that it reads:

"From and after May 1, 1908, it shall be unlawful for any railroad company to transport from any State, Territory, etc.

"The Senate amendment made it unlawful for any common carrier to transport, etc. The effect of this change from "common carrier" to "railroad" and now to "railroad company" is easily understood, and I shall not say much about it. The words "common carrier" embraced pipe lines. The words "railroad companies," of course, leave those out. The prohibition against the transportation by any common carrier or anything produced by it is now limited to railroad companies. It was a disagreement, and yet not a dis-

[48] 40 Cong. Rec. 9641 (1906).

agreement, but it was an effort on my part to hold on to the Senate provision and not to submit to the contention of the House conferees that the words "common carrier" should be stricken out and the word "railroad" inserted, and that caused me to refuse to sign the last report. I have not signed this one for the same reason, because, as I said the other day, I felt that the influences behind this change were sinister, and that the large number of telegrams, I will not say all of them, but a large proportion of them, had been sent here through the instrumentality and at the instance of the Standard Oil Company."

The Commodities Clause, as thus agreed to in conference, was adopted by both Houses of the Congress, by reason of the final adoption of the report of the Conference Committee.[49] The bill was signed by the President on June 29, 1906.[50]

[49] 40 Cong. Rec. 9655 (1906).
[50] 40 Cong. Rec. 9807 (1906).

PROPOSALS TO AMEND COMMODITIES CLAUSE DURING CONSIDERATION OF MANN-ELKINS ACT OF 1910

When H. R. 17536, Sixty-First Congress, Second Session, which eventuated into the Mann-Elkins Act of June 18, 1910,[1] was under consideration by Congress, several proposals for the amendment of the Commodities Clause were offered.

Mr. CRUMPACKER, on April 29, 1910, offered the following amendment, which was rejected:[2]

> "After the word "indirect," line 1, page 51, insert "or any such article or commodity manufactured, mined, owned, or produced by or under the authority of any company, association, or corporation in which such railroad company, either directly or indirectly, owns or holds any stock or other right or interest."

On the same day Mr. WANGER offered the following amendment which was rejected:[3]

> "Amend by striking out the paragraph beginning with line 18, on page 50, and insert the following:
>
> "From and after May 1, 1908, it shall be unlawful for any railroad company to transport from one State, Territory, or district of the United States, to any other State, Territory, or district of the United States, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, or after May 1, 1912, (*a*) owned in whole or in part by any corporation (which corporation may be referred to as a 'holding company') owning at

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[1] Act of June 18, 1910, 36 Stat. L. 539 (1910).
[2] 45 Cong. Rec. 5590-5591 (1910).
[3] 45 Cong. Rec. 5594-5595 (1910).

the time of such transportation one-half or more of the capital stock of such railroad company or having any other form of ownership of such railroad company, or (*b*) owned in whole or in part by any corporation one-fifth or more of whose capital stock is at the time of such transportation owned by a corporation (which may be referred to as a 'holding company'), which also owns one-third or more of the issued capital stock of such railroad company, or has any other ownership of such railroad company, or (*c*) owned in whole or in part by any corporation one-half or more of whose capital stock is at the time of such transportation owned by a corporation (which may be referred to as a 'holding company') which also owns one-fifth or more of the issued capital stock of such railroad company, or in which article or commodity any of said corporations at the time of such transportation may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for the use of such railroad company in the conduct of its business as a common carrier.

"From and after May 1, 1912, a railroad company owning any capital stock, or having any other form of ownership, in whole or in part, of any other corporation which manufactures, mines, produces, owns, or has any interest, direct or indirect, at the time of transportation, in any such articles or commodities, shall be deemed to have an interest in such articles or commodities within the meaning of this act.

"Any act or duty required to be done or performed by any provision of this section may be compelled by mandamus, and anything declared in any provision of this section to be unlawful may be prevented by injunction by any court of competent jurisdiction at the suit of the United States or of any citizen thereof."

When the bill was under consideration in the Senate, Senator BAILEY, on June 1, 1910, offered the following amendment, which was rejected:[4]

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[4] 45 Cong. Rec. 7207-7208, 7218 (1910).

"That the fifth paragraph of the first section of the act approved June 29, 1906, entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," be amended to read as follows:

From and after the 1st day of May, 1912, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity manufactured, mined, or produced by it, or under its authority, or by any corporation, joint stock company, or partnership in which said railroad holds, owns or controls, directly or indirectly, any stock or interest; and it shall also be unlawful from and after the 1st day of May, 1912, for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity which it may own, in whole or in part, or in which it may have an interest, direct or indirect, or which is owned in whole or in part by any corporation, joint stock company, or partnership in which the said railroad company holds, owns, or controls any stock or interest: *Provided, however,* That any railroad company may transport any such articles or commodities as may be necessary and intended for its own use in conducting its business as a common carrier.

On the following day, June 2, 1910, Senator CRAWFORD, of South Dakota, offered the following amendment, which was rejected:[3]

"From and after May 1, 1912, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity which

[3] 45 Cong. Rec. 7251-7252 (1910).

it owns in whole or in part, or in which it may have any interest, direct or indirect; or which is owned in whole or in part by a corporation in which it is the owner, legally or equitably, of the capital stock or any part thereof; or any article or commodity which at the time such article or commodity is presented to it for transportation, as aforesaid, was owned by it in whole or in part: *Provided*, That this act shall not apply to such articles or commodities as may be necessary and intended for the use of said railway company in the conduct of its business as a common carrier."

The only changes made in the language of the Commodities Clause, by the Mann-Elkins Act of 1910, were the removal of the comma after the word "whole" and the insertion of commas after the words "interest" and "direct." As earlier indicated, no change was made in the purpose and intent of the statute.[6]

[6] Act of June 18, 1910, 36 Stat. L. 547 §7 (1910).

REPORT OF ATTORNEY GENERAL—1910

In his Annual Report to Congress for the fiscal year ending June 30, 1910, dated December 10, 1910, the Attorney General said, with respect to the Commodities Clause that:[1]

MATTERS ARISING UNDER THE INTERSTATE-COMMERCE LAWS.

COMMODITIES-CLAUSE CASES.

"In deciding the appeals involving the construction of the clause in the Hepburn Act of 1906 (34 Stat. 584) making it unlawful for any railroad company to transport in interstate or foreign commerce any article or commodity (other than timber and its manufactures) manufactured, mined, or produced by it or under its authority, or owned by it in whole or in part, or in which it may have an interest, direct or indirect, except such commodities as may be necessary for use in its business, the Supreme Court held that this prohibition did not apply to the transportation by a carrier of commodities owned by another corporation, where the only interest which the carrier had therein at the time of such transportation arose out of its ownership of capital stock in a *bona fide* corporation owning the commodities so transported. The Department interpreted this decision as not necessarily determining the application of the statute to cases where the commodities transported are owned by a corporation, *all*, or substantially all, of whose stock is owned by the carrier corporation at the time of transportation, and especially where the carrier shall have transferred all of its interest in such commodities to a corporation formed for the express purpose of evading the prohibition of the commodities clause. When the mandates of the Supreme Court in

[1] Report of Attorney General, 1910, pp. 6-7.

these cases were filed in the circuit court, that court in two cases granted injunctions to the Government but dismissed the other case. In such other cases the Government sought leave to file an amended bill for the purpose of testing the application of the principle of these decisions to the case above referred to. The Circuit court denied the application, as well as a further motion that the cases be dismissed without prejudice, holding that the decision of the Supreme Court was conclusive against the Government on these points. An appeal was thereupon taken to the Supreme Court, where the cases will be argued in January, 1911.

As I pointed out in my last annual report, if the prohibition of the statute can be successfully evaded by the simple device of transfer of ownership of the property to a corporation, all of whose stock shall be owned or controlled by the carrier Congress should amend the statute so as to make it an effectual and not a merely illusory prohibition; or else repeal it."

PROPOSALS FOR AMENDMENT OF COMMODITIES CLAUSE SUBSEQUENT TO MANN-ELKINS ACT OF 1910 AND PRIOR TO TRANSPORTATION ACT OF 1940.

On June 18, 1910, the day the Mann-Elkins Act became law, Mr. HULL of Tennessee made this statement on the floor of the House:[1]

> "Mr. Speaker, during the last year, immediately after the Supreme Court of the United States rendered what is known as the "commodities-clause" decision, in which it refused to hold that feature of the Hepburn amendment to the interstate-commerce law constitutional and valid, but, in effect emasculated it, I drafted a bill in the nature of an amendment to the interstate-commerce law as originally enacted and from time to time amended, the purpose of which bill was to so frame the commodities clause as to fully and clearly raise and oblige the court to determine the constitutional questions involved and at the same time to secure an effective regulation and control of this class of our interstate commerce.
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> • • • •
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> "The proposed amendment undertakes not only to divorce transportation from production, but also to divorce it from trading in any article or commodity prior to or during its interstate shipment, to the end that the producer and the consumer may have transportation by a disinterested carrier. The amendment prohibits the interstate shipment of any commodity that has been manufactured, mined, or procured by the interstate carrier or by any joint-stock company or corporation in which such interstate carrier owns or controls, directly or indirectly, any stock or interest; also, a railroad company is prohibited from tran. port-

[1] 45 Cong. Rec. 8479-8480 (1910).

ing in interstate commerce any commodity which it owns in whole or in part, or which it has owned in whole or in part, at any time subsequent to the passage of this act and since such article or commodity was manufactured, mined, or produced, or which is, or was, so owned by any joint-stock company or corporation in which the railroad company owns or controls any stock or interest; also, such carrier is prohibited from so transporting any commodity in which it has any interest, direct or indirect, or in which it has had any such interest at any time subsequent to the passage of this act and since such commodity was manufactured, mined, or produced, or in which any joint-stock company or corporation in which the railroad company owns or controls any stock or interest has, or has had, any such interest. I am frank to say that, if possible, one or two features of the bill I have offered should be somewhat liberalized, but thus far I have been unable to formulate suitable changes; however, it is my purpose to draft and offer, at some future time, such modification in the form of amendments as will fully accomplish the purposes of the present bill and at the same time work no injustice to the railroads to be affected in performing its provisions."

On the same day, Mr. HULL introduced a bill[2] to provide as follows:

A Bill

"To amend an Act approved June twenty-ninth, nineteen hundred and six, and entitled "An Act to amend an Act entitled 'An Act to regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission."

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

[2] H. R. 26983, 61st Cong., 2d Sess. (1910).

gress assembled, That section one, paragraph one, of an Act approved June twenty-ninth, nineteen hundred and six, and entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," be so amended as to read as follows:

"From and after July first, nineteen hundred and twelve, it shall be unlawful for any railroad company to transport from any State or Territory or the District of Columbia to any other State, Territory, or the District of Columbia, or to our insular possessions, or to any foreign country, any article or commodity other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or by any firm, joint stock company, or corporation in which it owns or controls, directly or indirectly, any stock or interest, or which it (the railroad company) may own in whole or in part, or which it has owned in whole or in part at any time subsequent to the passage of this Act and since such article or commodity was manufactured, mined, or produced, or in which it may have an interest, direct or indirect, or in which it has had an interest direct or indirect, at any time subsequent to the passage of this Act and since such article was manufactured, mined, or produced, or which is owned in whole or in part by any firm, joint stock company, or corporation in which it (the railroad company) owns or controls, directly or indirectly, any stock or interest, or which has been owned in whole or in part at any time subsequent to the passage of this Act and since such article or commodity was manufactured, mined, or produced, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The bill was referred to the Committee on Interstate and Foreign Commerce, and no action taken on it.

OPINION OF ATTORNEY GENERAL

Under date of November 29, 1912, Attorney General Wickersham gave the following opinion to the Secretary of the Interior:[3]

"Sir: I have your favor of 26th instant, in which you ask my opinion with respect to the legality of the transfer of certain coal-mining leases which you are asked to approve, and which embrace lands in the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations in the Indian Territory, now Oklahoma, from the Western Coal & Mining Co., (the present lessee under assignment with your approval, from the Atoka Coal & Mining Co., the original lessee), all of whose capital stock is owned by the Missouri Pacific Railway Co., to the Folsom Morris Coal Mining Co., a corporation, all of whose capital stock is owned by the Cherokee and Pittsburgh Coal & Mining Co., all of whose capital stock is in turn owned by the Atchison, Topeka & Santa Fe Railway Co. (excepting in each case directors' qualifying shares).

* * * *

"The specific inquiry arises out of the possible application to the case of the fifth paragraph of the first section of the act to regulate commerce, as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn act.

* * * * *

"The report in 220 U. S. gives in detail the allegations made in the amendment to the bill there tendered which the Supreme Court accepted as satisfactory *prima facie* proof of such identity. In the case which you have under consideration the determination whether or not the commodities clause as construed

[3] 29 Opinions of Attorney General, pp. 588-592 (1912).

by the Supreme Court in 220 U. S. would apply to the shipment of coal over the Atchison, Topeka & Santa Fe road by the proposed assignee of a lease, being a corporation all of whose stock it owns, must depend upon whether or not the railroad company uses the coal company merely as an artificial legal entity which it completely dominates and controls, operating the coal company as an integral part of its own business, the corporation being a mere artificial division of the work which is in effect carried on by the railroad company; or whether, although the owner of all its stock, the coal company is operated separately and distinct from the railroad, and is not used by it merely as a part of department of its general business, and is not in effect a mere device to escape the prohibition of the statute."

REPORT OF ATTORNEY GENERAL—1914

In his Annual Report to Congress for the fiscal year ended June 30, 1914, dated December 7, 1914, the Attorney General said, under the heading "Recommendations"[4]:

1. AMENDMENT OF COMMODITY CLAUSE OF INTERSTATE COMMERCE ACT.

"In *United States* v. *Delaware & Hudson Co.* (213 U. S., 366) the Supreme Court construed the commodities clause as prohibiting a railroad from transporting articles in which at the time of transportation it has any interest, direct or indirect, in a legal or equitable sense. It further held that a railroad does not necessarily have an interest, direct or indirect, in a legal or equitable sense, in articles manufactured or produced by a bona fide corporation of which the railroad is a stockholder. In a later case (*United States* v. *Lehigh Valley Railroad Co.*, 220 U. S., 257) the court held that if the corporation owning the articles transported by

[4] Report of Attorney General, 1914, pp. 5-6.

the railroad was so identified with the railroad as in fact to be but an arm of the railroad, then the railroad would have an interest in the articles in the sense of the statute. Under this construction it has been claimed that the statute is not violated unless the railroad has the required interest in the articles at the very time of transportation. Thinking to bring themselves within this construction of the act, the following plan has been devised:

"A railroad company engaged, say, in mining coal, either directly or indirectly through a controlled corporation which is but a part of itself, organizes a new corporation the stock of which is distributed ratably amongst the stockholders of the railroad and the management of which will be dominated by officers of the railroad company. Thereupon the railroad will sell to the new corporation at the mouth of the mines its production of coal under a contract which puts the new corporation largely, if not completely, within the power of the railroad. This plan has been challenged in the case now pending in the Supreme Court of the United States against the Delaware, Lackawanna & Western Railroad Co. and the Delaware, Lackawanna & Western Coal Co. The Government lost in the district court. Even though it should be successful in the Supreme Court, the commodities clause will still fall short of the purpose of Congress in enacting it, which was, I think, to divorce transportation from production. I recommend an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or produced, or which were manufactured or produced by any corporation controlled by it or affiliated with it by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transportation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated merely as a plant facility, from transporting in interstate commerce articles produced or owned by such

corporation, and I recommend appropriate legislation to that end."

The next legislative proposal did not come until December 31, 1914, when Mr. ADAMSON introduced a bill[5] reading as follows:

A BILL

"To divorce transportation in interstate and foreign commerce from manufacture, mining, production, and dealing, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That "commerce" as used herein means commerce between any State or Territory of the United States or the District of Columbia and any other State or Territory of the United States or the District of Columbia or any foreign nation, or within any Territory of the United States or the District of Columbia.

"SEC. 2. That from and after January first, nineteen hundred and seventeen, it shall be unlawful for any railroad company subject to the Act to regulate commerce to transport in commerce any articles or commodities thereafter manufactured, mined, or produced, first, by such railroad company or under its authority directly or indirectly, or, second, by any person, firm, or corporation subject to its control, or to whose control it is subject through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as it has or is otherwise subject to the same control. This prohibition shall apply irrespective of whether there is any relation, direct or indirect, between the railroad company and the articles or commodities at the time of transportation.

"SEC. 3. That from and after that date it shall also be unlawful for any railroad company subject to the

[5] H. R. 20470, 63d Cong., 3d Sess. (1914).

Act to regulate commerce to transport in commerce any articles or commodities the control of which, or any interest in which, direct or indirect, shall have been thereafter acquired in any other manner for the purpose of dealing therein, first, by such railroad company or under its authority, directly or indirectly, or, second, by any person, firm, or corporation subject to its control or to whose control it is subject through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as it has or is otherwise subject to the same control. This prohibition also shall apply irrespective of whether there is any relation, direct or indirect, between the railroad company and the articles or commodities at the time of transportation.

"SEC. 4. That from and after that date it shall also be unlawful for any railroad company subject to the Act to regulate commerce to transport in commerce any articles or commodities as to which there is at the time of transportation any contract, option, or understanding for the subsequent acquisition of control thereof, or of any interest therein, direct or indirect, first, by such railroad company or under its authority, directly or indirectly, or, second, by any person, firm, or corporation subject to its control, or to whose control it is subject, through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as it has or is otherwise subject to the same control.

"SEC. 5. That from and after January first, nineteen hundred and eighteen, it shall be unlawful for any railroad company subject to the Act to regulate commerce to transport in commerce any articles or commodities thereafter mined or produced from lands which at the time of production were owned or controlled, directly or indirectly, wholly or in part, first, by such railroad company, or, second, by any person, firm, or corporation subject to its control, or to whose control it is subject through stock ownership or otherwise, or, third, by any corporation or association which has the same controlling shareholders or members as

it has or is otherwise subject to the same control. This prohibition shall apply irrespective of whether there is any relation, direct or indirect, between the railroad company and the articles or commodities at the time of transportation.

"SEC. 6. That this Act shall not apply to the transportation by a railroad company of such articles or commodities as may be necessary and intended for its own use in the conduct of its business as a common carrier.

"SEC. 7. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Where a corporation is a defendant such proceedings may be brought not only in the district whereof it is an inhabitant but also in any district wherein it may be found or transacts business. The provisions of the Act approved February eleventh, nineteen hundred and three, commonly known as the expediting Act, as amended by an Act approved June twenty-fifth, nineteen hundred and ten, and by section two hundred and ninty-one of the Judicial Code, approved March third, nineteen hundred and eleven, together with all other provisions of law relating to procedure in suits in equity to enforce the Federal antitrust laws, shall be applicable to suits in equity to enforce this Act.

"SEC. 8. That a violation of this Act shall be a misdemeanor and shall be punishable by fine not exceeding $5,000 or by imprisonment not exceeding one year, or both, in the discretion of the court. A violation by a corporation shall be deemed to be also a violation by the individual directors, officers, receivers, trustees, or agents of such corporation who shall have authorized ordered, or done any of the acts constituting the violation in whole or in part.

"SEC. 9. That nothing herein contained shall be taken as repealing the sixth paragraph of section one.

of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended by the Act of June twenty-ninth, nineteen hundred and six, and subsequent Acts, and commonly known as the commodities clause, unless and except where inconsistent therewith."

The Committee on Interstate and Foreign Commerce held hearings on this bill on January 15, 1915, at which time Assistant Attorney General Todd appeared before the Committee representing Attorney General Gregory. During the course of his presentation, Mr. SIMS, a member of the Committee, asked him the following question:

"Has any case arisen where the coal company owned the railroad and shipped its product over its own railroad and in that way evaded the effect of the law?"

To this inquiry, Mr. TODD made the following reply:[6]

"That is my third point. I have stated two reasons why the present law fails to accomplish the object which apparently it is conceded Congress had in mind. The third reason is that the law itself, apparently, does not prohibit such a case as Mr. Sims stated, where the producing company owns and operates a railroad—at least it does not do so in terms. In the bill which the chairman has introduced that case is met.

"Perhaps I had better now summarize the three reasons why the present law does not accomplish a separation of transportation from production. The first reason is that under the decisions of the courts the act speaks as of the time of transportation, as it were, and does not prohibit a railroad company engaged in interstate commerce from transporting in interstate commerce articles which it produced, pro-

[6] Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, on H. R. 20470, 63rd Cong., 3d Sess., January 15, 1915, pp. 9-10. U. S. Senate Library Hearings, Volume 96, No. 5 (1915).

vided it parts with title before the transportation. The second reason is that it has been held that a railroad company has no interest, direct or indirect, in an article owned by a coal company whose stock in turn is owned by the railroad company, unless the railroad company has in the particular case so exerted its stock control over the coal company, so commingled with the affairs of the two as to make the coal company a mere department of the railroad company. The third deficiency is that under the existing law, by its terms at least, a producing or manufacturing company is not prohibited from owning and operating a railroad company. Of course, I take it that no one desires to prohibit a manufacturing company from owning a railroad company as a mere plant facility. What I mean is that under the existing law there is nothing to prevent a manufacturing company from owning what is virtually a trunkline railroad company."

The Committee took no action on the bill.

REPORT OF ATTORNEY GENERAL—1915

In his Annual Report to Congress for the fiscal year ended June 30, 1915, dated December 6, 1915, the Attorney General said, under the heading "Recommendations":[7]

1. AMENDMENT OF COMMODITIES CLAUSE OF INTERSTATE COMMERCE ACT.

"I renew my recommendation relating to the amendment of the commodities clause of the interstate commerce act.

* * * * *

"I therefore again recommend an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or pro-

[7] Report of Attorney General, 1915, pp. 7-8.

duced, or which were manufactured or produced by any corporation controlled by it or affiliated with by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transportation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated merely as a plant facility, from transporting in interstate commerce articles produced or owned by such corporation.

"A bill to carry out this recommendation was introduced in the last Congress by the chairman of the House Committee on Interstate Commerce (H. R. 20470)."

REPORT OF ATTORNEY GENERAL—1916

In his Annual Report to Congress for the fiscal year ended June 30, 1916, dated December 4, 1916, the Attorney General said, under the heading "Recommendations":[8]

"I renew the following recommendations contained in my last annual report:

* * * *

"I therefore urge an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or produced, or which were manufactured or produced by any corporation controlled by it or affiliated with it by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transportation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated

[8] Report of Attorney General, 1916, pp. 7-8.

merely as a plant facility, from transporting in interstate commerce articles produced or owned by such corporation.

"A bill to carry out this recommendation was introduced in the Sixty-third Congress, third session, by the chairman of the House Committee on Interstate Commerce (H. R. 20470)."

REPORT OF ATTORNEY GENERAL—1917

In his Annual Report to Congress for the fiscal year ended June 30, 1917, dated December 4, 1917, the Attorney General said, under the heading "Recommendations":[9]

"I therefore urge an amendment which will prohibit a railroad from transporting in interstate commerce articles which it manufactured or produced, or which were manufactured or produced by any corporation controlled by it or affiliated with it by having the same controlling stockholders, irrespective of whether such railroad or such controlled or affiliated corporation has an interest in the articles at the time of transportation. It is also necessary, if transporation and production are to be completely divorced, that Congress prohibit any railroad owned or controlled by a producing or trading corporation, and not operated merely as a plant facility, from transporting in interstate commerce articles produced or owned by such corporation.

"A bill to carry out this recommendation was introduced in the Sixty-third Congress, third session, by the chairman of the House Committee on Interstate Commerce (H. R. 20470)."

TRANSPORTATION ACT OF 1920

The Act to Regulate Commerce was given a thoroughgoing revision by the Transportation Act of 1920,[10] but no change was made in the Commodities Clause, except to make it par. (8) of Sec. 1 of the Interstate Commerce Act.

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[9] Report of Attorney General, 1917, pp. 7-8.

[10] Act of February 28, 1920, 41 Stat. L. 475 (1920).

The Report of the Attorney General to the Congress for the fiscal year ended June 30, 1927, dated December 5, 1927, contains the following statement with respect to the Commodities Clause, as contained in the Report of Assistant to the Attorney General, William J. Donovan, in charge of the Anti-Trust Division:[11]

"THE COMMODITY CLAUSE

"In the *Tap Line cases* (234 U. S. 1, 27) the Supreme Court held that by the enactment of the commodity clause (sec. 1 (8), interstate commerce act) Congress 'sought to divorce transportation from production and manufacture and to make transportation a business of and by itself unallied with manufacture and production in which a carrier was itself interested'; and in *United States* v. *Reading Company* (253 U. S. 26, 60) that 'the purpose of the commodity clause was to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent position of carrier and shipper.'

"In recent years industrial and manufacturing corporations have acquired ownership or control of numerous railroads, comparatively small in size, but important, nevertheless, because of their strategic locations and the large volume of interstate traffic hauled by them. While operating as and enjoying all the privileges and powers of common carriers, generally speaking, these roads are but mere departments of the industrial corporations which own or control them and whose traffic is transported by them. The statute does not forbid the ownership of the roads by corporation, yet the evils of discrimination and preference resulting from such ownership are equally detrimental as when the carrier owns the manufacturing or producing company.

[11] Report of Attorney General, 1927, pp. 26-27.

Amendment of the commodity clause was recommended in the annual reports for the years 1910 to 1917, and a bill for this purpose was introduced before the Sixty-third Congress, third session (H. R. 20470).

THE TAP LINE CASES

234 U. S. 1, 27-28, 34 Sup. Ct. Rep. 741, 58 L.ed. 1185 (1914)

[Extract From Opinion of Mr. Justice Day]

While Congress, in enacting the commodities clause amending §1 of the act to regulate commerce sought to divorce transportation from production and manufacture, and to make transportation a business of and by itself, unallied with manufacture and production in which a carrier was itself interested, the debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show that the situation in some of the states as to the logging industry and transportation was sharply brought to the attention of Congress, and led to the exemption from the commodities clause of timber and the manufactured products thereof, thus indicating the intention to permit railroads to haul such lumber and products although it owned them itself. And that Congress had the constitutional power to enact such exemption was held in *United States ex rel. Atty. Gen.* v. *Delaware & H. Co.*, 213 U. S. 366, 416, 417, 53 L. ed. 836, 852, 853, 29 Sup. Ct. Rep. 527. This declaration of public policy which is now part of the commerce act cannot be ignored in interpreting the power and authority of the Commission under the act. The discussion resulting in the action of Congress shows that railroads built and owned by the same persons who own the timber were regarded as essential to the development of the timber regions in the Southwest, and the necessity of such roads was dwelt upon and set forth with ample illustration by Commissioner Prouty in his concurring opinion in this case.

REPORTS OF INTERSTATE COMMERCE COMMISSION WITH RESPECT TO COMMODITIES CLAUSE

The Interstate Commerce Commission, in its Annual Report for 1931, said:[12]

> "Another important case pending in the same court [District Court for the Northern District of Illinois] is *United States* v. *Elgin, Joliet & Eastern Railway Company*, wherein the applicability of the commodity clause of the act is at issue. This proceeding is based upon a petition for an injunction to restrain the carrier from transporting the products of an industry which controls the carrier, and is different from all other cases brought under the commodity clause, in that in former instances the carrier controlled the industry whose products is transported whereas in this case the reverse situation is presented. The petition was filed during the preceding year, but has not yet been heard on its merits."

In its Annual Report for 1932, the Commission said:[13]

> "Another important case, which was referred to in our last report and which still is pending in the District Court for the Northern District of Illinois, is *United States* v. *Elgin, J. & E. Ry.* Co. This proceeding is based upon a petition for an injunction to restrain the carrier from violating the provisions of the commodity clause of the act by transporting the products of an industry which controls the carrier. No hearing on the merits of the petition has yet been had."

In its Annual Report for 1933, the Commission said:[14]

> "*United States* v. *Elgin, J. & E. Ry. Co.*, wherein we are seeking to restrain the carrier from violating the provisions of the commodity clause of the act by transporting the products of an industry controlled by the carrier, is another important case which also was re-

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[12] 45 Annual Report of I. C. C. 15-16 (1931).
[13] 46 Annual Report of I. C. C. 51 (1932).
[14] 47 Annual Report of I. C. C. 44 (1933).

ferred to on page 51 of our last report. It is still pending in the District Court for the Northern District of Illinois, but has been set for hearing January 8, 1934. A similar proceeding against the Montour Railroad Co., which was instituted on October 31, 1933, is pending in the District Court for the Western District of Pennsylvania."

In its Annual Report for 1934, the Commission said:[15]

"Two cases mentioned in our last report, namely, *United States* v. *Elgin, J. & E. Ry. Co.* and *United States* v. *Montour R. R. Co.*, wherein we are seeking to restrain the carriers from violating the provisions of the commodities clause of the act, still are pending in the District Courts for the Northern District of Illinois and the Western District of Pennsylvania, respectively. In the former case a hearing has been held and briefs filed, and a decision is expected at an early date. No hearing has yet been held in the latter case."

In its Annual Report for 1935, the Commission said:[16]

"In our last report we mentioned two cases, wherein we are seeking to restrain carriers from violating the provisions of the commodities clause of the act, which were pending in the District Courts for the Western District of Pennsylvania and the Northern District of Illinois, respectively. These cases are *United States* v. *Montour R. R. Co.* and *United States* v. *Elgin, J. & E. Ry. Co.* The former still is pending a hearing in the district court. In the latter the court, on July 1, 1935, rendered an opinion, 11 F. Supp. 435, in which it was held that the evidence failed to show that the defendant has any interest in the articles or commodities which it transports for the subsidiaries of the United States Steel Corporation, and that the bill should be dismissed for want of equity. An appeal to the Supreme Court has been perfected."

In its Annual Report for 1936, the Commission said:[17]

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[15] 48 Annual Report of I. C. C. 46 (1934).
[16] 49 Annual Report of I. C. C. 53 (1935).
[17] 50 Annual Report of I. C. C. 50, 30 (1936).

"In *United States* v. *Elgin, Joliet & Eastern Ry. Co.* (298 U. S. 492), the Supreme Court upheld the decree of the District Court for the Northern District of Illinois (*United States* v. *Elgin, J. & E. Ry. Co.*, 11 F. Supp. 435), that the bill for an injunction brought by the Government to restrain the carrier from alleged violations of the commodities clause of the act should be dismissed for want of equity because the evidence failed to show that the defendant has any interest in the articles or commodities which it transports for the subsidiaries of the United States Steel Corporation, a holding company which owns all of the stock of the carrier. The Supreme Court held that (1) it was impossible for it to declare as matter of law that every company, all of whose shares are owned by a holding company, necessarily becomes an agent, instrumentality, or department of the latter; (2) whether such intimate relation exists between the two corporations is a question of fact to be determined upon evidence; and (3) the evidence failed to support the claim of the Government that the carrier must be regarded as the alter ego of its sole stockholder.

"One other case, alluded to in our last report, wherein the Government is seeking to restrain a carrier from violating the provisions of the commodities clause, still is pending in the District Court for the Western District of Pennsylvania. That case is based upon the relation existing between the Montour Railroad Co. and the Pittsburgh Coal Co., the latter, a producing company, owning all of the stock of the former."

* * * *

"In addition to the matters stated by us in our previous report we have reason to believe that some railroads subject to our jurisdiction evade the intent of the commodities clause, section 1(8) of the act, by having subsidiaries not subject to the act serve as vehicles for carrier investments.

"We recommend that Congress, in the light of facts already made available in our reports and in

reports of investigations conducted by congressional committees, shall determine the appropriate limit of our jurisdiction in such cases and whether further legislation to extend that jurisdiction is necessary."

REPORTS OF FEDERAL COORDINATOR OF TRANSPORTATION

Section 13 of the Emergency Railroad Transportation Act, 1933,[18] provided that the Federal Coordinator of Transportation should submit to the Interstate Commerce Commission from time to time such recommendations for further legislation as he might deem necessary or desirable in the public interest, and required the Commission promptly to transmit such recommendations, together with its comments thereon, to the President and to the Congress.

Pursuant to these provisions of the law, the Interstate Commerce Commission transmitted four such reports of the Federal Coordinator of Transportation to the President and to the Congress.[19] In none of these was any recommendation made for amendment of the Commodities Clause of the Interstate Commerce Act.[20]

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[18] Public Law No. 68, 73d Congress, approved June 16, 1933.

[19] Senate Document No. 119, 73d Congress, 2d Session (1934); Senate Document No. 152, 73d Congress, 2d Session (1934); House Document No. 89, 74th Congress, 1st Session (1935); House Document No. 394, 74th Congress, 2d Session (1936).

[20] On November 4, 1933, the Federal Coordinator of Transportation submitted to interested parties, organizations, and associations, a questionnaire designed to elicit their views as to legislation needed for the proper regulation of the transportation industry. One of the questions propounded was—

> Should the present Commodities Clause (Section 1, paragraph (8), Interstate Commerce Act) be modified to forbid by specific enactment the ownership of railroads by industries?

The returns to the questionnaire were almost unanimous in their views that there should be no such amendment. Consequently, there was no recommendation for any amendment.

CONSIDERATION OF COMMODITIES CLAUSE IN CONNECTION WITH TRANSPORTATION ACT OF 1940.

On September 20, 1938, President Roosevelt appointed a committee to consider the transportation problem and recommend legislation. That committee was composed of Mr. Carl R. Gray, Vice-Chairman, Union Pacific Railroad, who was Chairman of the Committee; Mr. M. W. Clement, President of the Pennsylvania Railroad; and Mr. Ernest E. Norris, President of the Southern Railway, representing management; Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, Etc., and Chairman of the Railway Labor Executives Association; Mr. B. M. Jewell, President of the Railway Employees Department of the American Federation of Labor; Mr. D. B. Robertson, President of the Brotherhood of Locomotive Firemen and Enginemen. This Committee has been generally referred to as the "Committee of Six." That Committee submitted its report to the President of the United States on December 23, 1938.[1]

A bill designed to carry out the recommendations of the Committee of Six was prepared. Section 12 of that bill, relating to the Commodities Clause, initially read as follows:[2]

> "Sec. 12. It shall be unlawful for any carrier by railroad and, on and after January 1, 1941, it shall be unlawful for any carrier, to transport in commerce subject to this Act any article or commodity, other than timber and the manufactured products thereof,

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[1] This report was never printed as a Congressional document. However, it was submitted to the Committees of Congress during the consideration of the legislation which resulted in the Transportation Act of 1940, and is frequently referred to in the hearings, etc. It is filed in the Library of Congress, and carries notation "L. C. Card No. A 39-1."

[2] Committee Print No. 1, March 1, 1939, Transportation Bill proposed by the Committee of Six, 79th Congress, First Session, H. R. House Committee on Interstate and Foreign Commerce.

manufactured, mined, or produced by it or under its authority, or which it may own, in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for use in the conduct of its business as a carrier."

When the bill was introduced in the House, on March 8, 1939, by Chairman Lea of the Committee on Interstate and Foreign Commerce, no change had been made in this language.[3]

When the bill was being drafted for introduction in the Senate, the foregoing language was changed. In Confidential Committee Print No. 2, dated March 18, 1939, Section 12, relating to the Commodities Clause, was redrafted to read as follows:

"Sec. 12. *It* shall be unlawful for any *common carrier subject to the provisions of this Act* to transport from any State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by *or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or any such article or commodity in which such carrier, subsidiary, affiliate, or controlling person has any personal, direct or indirect, legal or equitable, interest,* except such articles or commodities as may be necessary or intended for use in the conduct of *the carrier* business of such carrier."[4]

In Confidential Committee Print No. 3, dated March 28, 1939, Section 12, relating to the Commodities Clause, was changed to read as follows:

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[3] H. R. 4862, 76th Congress, First Session, pp. 39-40.

[4] Confidential Committee Print No. 2, S. 2009, 76th Congress, First Session, March 18, 1939, p. 50. Senate Committee on Interstate Commerce.

"Sec. 12. It shall be unlawful for any carrier by railroad and, on and after January 1, 1941, it shall be unlawful for any carrier, other than a carrier by air, to transport, in commerce subject to this Act, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by or under the authority of such carrier or any subsidiary, affiliate, or controlling person of such carrier, or any such article or commodity in which such carrier, subsidiary, affiliate, or controlling person has any interest, direct or indirect, legal or equitable, except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier." [5]

The foregoing text remained unchanged when S. 2009 was introduced in the Senate on March 30, 1939.[6]

Hearings on S. 2009 (along with S. 1310, S. 1869 and S. 2016) were held by the Senate Committee on Interstate Commerce from April 3 to April 14, 1939.

Chairman Wheeler, at the beginning of the hearings, on April 3, 1939, said that one of the purposes of the bill, S. 2009, was:

"To make effective the intent of Congress in prohibiting railroads, or other carriers after January 1, 1941, from transporting products not utilized in the conduct of their transportation business but in which they have an interest, direct or indirect." [7]

On April 10, 1939, during the course of the hearings, a witness before the Committee, representing paper manufacturers, said: [8]

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[5] Confidential Committee Print No. 3, S. 2009, 76th Congress, First Session, March 28, 1939, pp. 44-45. Senate Committee on Interstate Commerce.

[6] S. 2009, 76th Congress, First Session, March 30, 1939, pp. 44-45.

[7] Hearings before the Committee on Interstate Commerce, United States Senate, 76th Congress, First Session; Transportation Act of 1939, p. 3.

[8] Hearings, Note 7, *supra*, p. 427.

"With reference to section 12, the so-called commodities clause, extends to water carriers the same provisions which now apply to rail carriers, that they shall not carry any commodities in which they have an interest, other than timber and the manufactured products thereof.

"In addition, the carrier is prohibited from carrying any commodity in which an industry or a person has any interest, where such industry or person has any interest whatsoever, even equitable, in the carrier.

"This is a new and far-reaching theory of regulation of water carriers in particular.

"The exemption of timber and manufactures thereof, we assume, is carried over from the Hepburn Act of 1908, which, we understand, was designed to permit the land-grant railroads to cut and ship timber and its manufactures from their land grants. We assume that this exemption would also apply to pulp and paper made from timber, but we would like to be sure. We would like to ask the question as to whether you can give us an answer on that. Pulp and paper are made from timber. Would they also come under that exemption?"

Thereupon, Chairman Wheeler made the following statement:[9]

"Let me say this to you with reference to the commodities clause, so that there will not be a lot of time wasted on it. I am speaking for myself and not for the committee. I think the commodities clause will have to be changed; and if we are going to make such drastic changes in the commodity clause as this bill would suggest, I think it ought not to be incorporated in this particular piece of legislation, but should come up as a separate piece of legislation so that we can devote considerable time and thought to that particular subject. This would so change the economic structure of a lot of industries that I think it is something that would have to have particular consideration in a separate piece of legislation."

[9] Hearings, Note 7, *supra*, p. 427.

Then the following colloquy occurred:[10]

"The Witness. I am very glad to hear that, sir.

"The Chairman. I want to make my position clear upon it.

"The Witness. Would you like me to continue with my statement as to the commodity clause?

"The Chairman. It is all right; but I want to say that I think it is foolish for a lot of people to come in here and waste our time and their own time talking about that, and for that reason I wanted to make it clear by that statement."

On the following day, April 11, 1939, President J. M. Hood, of The American Short Line Railroad Association, appearing before the Committee as a witness, said:[11]

"Yesterday a Senator stated for the record that the commodities clause, as now contained in the bill at page 44, in section 12, would be materially modified before the bill would receive the serious attention of the committee. Based on that reservation we are not going to have much to say in opposition of the inclusion of the commodities clause as now written. Had we not been in a position to rely upon that statement of the Chairman, and similarly indicated positions of other members of the committee, it would have been our purpose to oppose with considerable emphasis the extension of the commodities clause as now contained in the bill.

"You do not need to go out of Washington to ascertain just how serious and far-reaching it would have been. The State of Virginia owns one-seventh of the Richmond, Fredericksburg & Potomac Railroad. The commodities clause, as contained in this bill, if it were enacted, would make it unlawful for the Richmond, Fredericksburg & Potomac Railroad to carry any traffic in which the State of Virginia had an interest.

[10] Hearings, Note 7, *supra*, p. 427.
[11] Hearings, Note 8, *supra*, pp. 541-542.

"It would be impossible for many communities which need rail facilities to develop raw materials or a labor market, or to take advantage of some climatic condition which permits processing of a particular nature, to provide, with the aid of those particularly interested, rail facilities.

"Had this clause been before you in a serious manner I would have gone into detail on behalf of 135 common carriers by railroad, who would be directly affected by the terms of this clause. Their total mileage is 6,310; their investment in rail property is $570,000,000, and they have 31,400 employees.

"Should this committee decide to give further consideration to an extension of the commodities clause as applicable to rail transporation, we ask that we be permitted to make further appearance, either orally or in the form of a brief in opposition thereto.

"We frequently have railroads incorporated and organized to operate a branch line which has been abandoned by a trunk line. Invariably the investors in that newly organized property are the people whose private business are threatened with elimination through the lack of rail facilities.

"To be specific, five wine distilleries in the State of New York, in the so-called champagne belt, took over a branch line of the Erie Railroad following the 1935 flood, not because they wanted to go into the rail business, but because they wanted to stay in the wine business. Each contributed 20 percent of the capital necessary to incorporate and operate the railroad, and now they are very much worried about this commodities clause.

"Senator REED. What is the name of that railroad?

"Mr. HOOD. Bath & Hammondsport, Hammondsport, N. Y. Five owners of wineries, each owns 20 percent of the railroad.

"Now, that is one circumstance of many, I think a fair statement of the number of those similar solutions to the rail-abandonment problem, of which we

have records in our office, and with whom we are corresponding, is at least 50, where threatened abandonment is facing us today, in which farmers, the coal producers and haulers, the petroleum distributors, wholesalers, and manufacturers have gotten together and are prepared to make substantial investments of the amount of money necessary to retain and provide rail facilities.

"Your commodities clause would make that an illegal carrier. I am sure you would not give that serious consideration, but if you are, we will want the privilege of telling you the history of the clause, what it did correct, its purpose, and any abuses which may prevail in the carrier business are amply guarded against through other sections of the Interstate Commerce Act and other acts of the Federal Government, and it is not necessary to amputate the patient below the chin just to get rid of an ingrown toe nail."

Thereupon, there was no further discussion of the commodities clause during the course of the hearing.

When the Senate Committee on Interstate Commerce began consideration of S. 2009 in the light of the hearings which had been held, the proposed change in the language of the Commodities Clause was stricken from the bill, and the existing language restored to it.[12]

No further change was made in this language in Committee Print No. 5, dated May 9, 1939, or in Committee Print No. 6, dated May 12, 1939.

Consequently, when S. 2009 was reported to the Senate, by the Committee on Interstate Commerce, on May 16, 1939, the proposed change in the Commodities Clause had been eliminated and the existing language retained.[13]

Commenting on this, the Committee said:

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[12] Committee Print No. 4, S. 2009, 76th Congress, First Session, May ——, 1939, pp. 50-51. Senate Committee on Interstate Commerce.

[13] S. 2009, 76th Congress, First Session, as reported by Senate Committee on Interstate Commerce, May 16, 1939, pp. 52-53.

"Section 12. Commodities Clause.—This provision retains the Commodities Clause (Sec. 1 (8) of Interstate Commerce Act), now applicable only to railroads, in its present form. The rewritten Commodities Clause was considered far too drastic and the subcommittee early decided against any change therein." [14]

After three days of debate, S. 2009 was passed by the Senate on May 25, 1939, by a vote of 70 to 6, without any change being made in the Commodities Clause.[15]

S. 2009, as passed by the Senate, was under consideration by the Committee on Interstate and Foreign Commerce of the House of Representatives from May 29, 1939, to July 18, 1939, at which time it was reported. The bill as passed by the Senate rewrote and codified the Interstate Commerce Act, and provided for a combined statement of the regulatory law for carriers by rail, highway and water. The bill as reported by the House Committee on Interstate and Foreign Commerce omitted the codification of the Interstate Commerce Act, made certain amendments to the then-existing railroad provisions and motor vehicle provisions and wrote a new part providing for regulation of water carriers.[16]

The bill as reported proposed no change in the Commodities Clause.[17]

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[14] Senate Report No. 433, 76th Congress, First Session, May 16, 1939, to accompany S. 2009, p. 15.

[15] S. 2009, 76th Congress, First Session, as referred to the Committee on Interstate and Foreign Commerce of the House of Representatives, May 29, 1939, pp. 49-50.

[16] Mimeographed statement by Chairman Lea of the House Committee on Interstate and Foreign Commerce, July 18, 1939.

[17] House Report No. 1217, 76th Congress, First Session, July 18, 1939, to accompany S. 2009; Comparative Print, July 20, 1939, showing changes in existing law proposed by the Committee substitute for S. 2009, pp. 9-10. House Committee on Interstate and Foreign Commerce.

and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake & Ohio bought it, and the cost of transportation from Newport News to Connecticut, would aggregate $2.47 per ton, thus leaving to the Chesapeake & Ohio only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton.

Referring to the developments before the Commission, and annexing as part thereof the testimony taken on such hearing and the documents connected therewith, the petition further alleged that the Chesapeake & Ohio asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, and was not a discrimination, for two reasons: First. Because if such difference existed, it was a loss suffered

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by the Chesapeake & Ohio, not from taking less than its published rates, but because it had received less as seller than the coal had cost. Second. That even if it had not the lawful right thus to impute the payment of the price of the coal, the Chesapeake & Ohio had, in fact, received much more for the coal than the price in money agreed on, because, at the time the verbal agreement to sell was made, the New Haven had a claim exceeding $100,000 against the Chesapeake & Ohio, arising from a previous written contract to deliver coal, which was to be extinguished by the completion of the delivery of the coal, and this caused that price largely to exceed the cost of the coal to the Chesapeake & Ohio, including its published rates. Averring

that the prior contract was in itself void because it also embodied an agreement to take less than the published rates, and was discriminating, it was charged that the New Haven had entered into both agreements with the Chesapeake & Ohio, knowing that they were in violation of the interstate commerce law. The prayer was that the Chesapeake & Ohio and the New Haven be made parties; that both roads be enjoined, the one from further executing the verbal agreement to deliver coal, and the other from seeking to enforce it; that the Chesapeake & Ohio be enjoined from "accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it," and be, moreover, enjoined from "doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported . . . at a less rate than named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce and acts amendatory thereof or supplementary thereto, or whereby any other advantage may be given or discrimination practised." And that the New Haven road "be enjoined and restrained from accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it."

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A preliminary restraining order was issued, conforming to the prayer of the petition. The Chesapeake & Ohio by its answer admitted that it had made, in the spring of 1903, a verbal agreement with the New Haven road for about 60,000 tons of Kanawha coal for the price alleged in the petition, to be transported by it to Newport News, and thence delivered by ocean transportation to the New Haven in Connecticut. It was admitted that the purchase price agreed to be paid was less than the market price of the

The bill was passed by the House on July 26, 1939, without change being made in the Commodities Clause.[18]

No change was made in the Commodities Clause by the Transportation Act of 1940.[19]

[18] 84 Cong. Rec. 14029 (1939); S. 2009 prints, with amendments of House of Representatives, July 26, 1939. Senate of the United States.

[19] Act approved September 18, 1940, 54 Stat. L. 898.

NEW YORK, NEW HAVEN & HARTFORD R. CO. v. INTERSTATE COMMERCE COMMISSION

200 U.S. 361, 26 Sup. Ct. Rep. 272, 50 L. ed. 515 (1906).

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, *Appt.*,

v.

INTERSTATE COMMERCE COMMISSION. (No. 24.)

INTERSTATE COMMERCE COMMISSION, *Appt.*,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY, and New York, New Haven, & Harford Railroad Company. (No. 27.)

1. **Commerce — Federal regulations — maintenance of published rates by interstate carrier—undue preferences and discrimination.**—An interstate carrier not empowered by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce to mine and market coal violates the mandate of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery.

2. **Commerce — Federal regulations — maintenance of published rates by interstate carrier — undue preferences and discrimination.**—Deliveries of coal by an interstate carrier not empowered to mine and market coal by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce, under a contract to sell and transport such coal at a stipulated price, come within the requirement of that

act respecting the maintenance of published rates, and its prohibitions against undue preferences and discrimination whenever, from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the contract may not have been open to that objection when made.

3. **Statutes—construction by the body charged with enforcement.**—The prohibitions of the act to regulate commerce as to rebates, favoritism, and discrimination having been construed by the Interstate Commerce Commission, charged with its execution, to be inapplicable to the freight rates for coal charged by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of that act, this construction, which has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, must be treated as read into the statute.

4. **Injunction — extent of relief — general injunction.**—A carrier which has been adjudged to have violated the act to regulate commerce in a specific particular may be restrained from further like violations of the act, but should not be enjoined in general terms from violating the act in the future in any particular.

[Nos. 24, 27.]

Argued October 25, 26, 1905. *Decided February* 19, 1906.

CROSS APPEALS from the Circuit Court of the United States for the Western District of Virginia to review a decree enjoining an interstate carrier from violating prohibitions of the act to regulate commerce against undue preferences and discriminations. Modified by enjoining the taking of less than the published tariff of

freight rates by means of dealing in the purchase and sale of coal, and as *modified, affirmed.*

See same case below, 128 Fed. 59.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

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Mr. Justice White, delivered the opinion of the court:

Following an inquiry, begun in consequence of a complaint to it made, the Interstate Commerce Commission, through the Attorney General of the United States, filed under the act to further regulate commerce (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1905, p. 599), in the circuit court of the United States for the western district of Virginia, this proceeding against the Chesapeake & Ohio Railway Company, a Virginia corporation, and the

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New York, New Haven, & Hartford Railroad Company, a corporation of the state of Connecticut. In this opinion we shall hereafter respectively speak of the parties as the Commission, the Chesapeake & Ohio, and the New Haven. The petition averred that the Chesapeake & Ohio was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven, in Connecticut, and charged that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others, all in violation of the act to regulate commerce and the amendments thereto. Specifying the grounds of the complaint, it was alleged that in the spring of 1903 the Chesapeake & Ohio made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News,

coal, plus the published rates and the cost of transportation and delivery from Newport News to Connecticut, but it was averred that this was only apparently the case, because the contract to sell included the discharge of a debt of about $100,000, arising from the previous written contract to which the petition referred. The validity of both the previous written contract and the later verbal agreement was averred. The right of the Chesapeake & Ohio to buy and sell coal, and to impute any loss on the sale of the coal to itself as dealer instead of to itself as a carrier, was averred. Both the original contract and the one of 1903 were averred to have been made in good faith, not with any intention to avoid the published rates, and it was charged that, at about the time the original contract was made, arrangements had been made by the railroad for a rate of transportation from Newport News to Connecticut which would have caused the contract price to be adequate to pay the market price of the coal and all other charges, including the published rates, but that, subsequently thereto, the persons with whom this contract for transportation was made had violated their agreement, and that by strikes the price of coal had advanced, and thereby the loss of $100,000 to the Chesapeake & Ohio was occasioned.

The New Haven road, in its answer, asserted its good faith in making both the original contract and the verbal agreement. It alleged that by the original contract it was a mere purchaser of coal from the Chesapeake & Ohio, and not a shipper over that road; that the coal bought was intended for its own use in the operation of its rail-

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road; that it had no knowledge of the price which the Chesapeake & Ohio would be obliged to pay for the coal, or the sum which it would cost that road to deliver it, and therefore had no knowledge that the total cost would not

equal the market price of the coal, the cost of delivery, and the published rate of the Chesapeake & Ohio. It averred the validity of the agreement, the legality of the debt of $100,000 which resulted from it, and charged that, taking that debt into consideration, the sum which it paid the Chesapeake & Ohio for the coal under the 1903 verbal agreement largely exceeded the market price and the cost of delivery, including the published rates of the Chesapeake & Ohio. It denied that there was any departure from the published rates or any discrimination, asserted that at the time the original contract was made the price was sufficient to have enabled the Chesapeake & Ohio to perform the contract without losing anything either as a seller or as a carrier, and that if, in execution of the contract, a condition arose where a loss as suffered by the Chesapeake & Ohio in either capacity, it was caused by subsequent events which could not effect the validity of the contract when made, and especially denied that in any way, directly or indirectly, had it knowingly lent itself to any discrimination, or any taking by the Chesapeake & Ohio of less than its published rates.

The case was heard on the testimony taken in the proceeding before the Commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel.

For reasons to which we shall hereafter have occasion to advert, the court held that, considering both the original contract and the verbal agreement of 1903, there was no violation of the provisions of the 2d and 6th sections of the act to regulate commerce, forbidding the taking of less than the published rates. [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154.] It, however, held that the contracts amounted to an undue discrimination and a violation of the 3d section of the act. The court, hence, permanently enjoined the Chesapeake & Ohio from dis-

charging any obligation arising from the original contract of 1896, and from further executing or attempting to execute, in any manner whatever, directly or indirectly, the verbal agreement of 1903, and it permanently enjoined the New Haven from asserting or attempting to enforce any claim arising from the contract of 1896, or in any manner, directly or indirectly, attempting to enforce the verbal agreement of 1903. Thereafter the court denied a request made by the Commission, that the injunction be expanded so as, in general terms, to command the Chesapeake & Ohio perpetually to observe in the future its published rates.

The New Haven appealed. The Commission also prosecuted a cross appeal because of the refusal of the court to grant its prayer to make the injunction against the Chesapeake & Ohio general in its nature, and that company, in an elaborate and separate printed argument in its own behalf, assails the judgment below on the merits, and in effect asks its reversal on the merits.

It is apparent from the case as thus stated that, in order to decide the issues which arise, we may not confine our attention to the verbal agreement of 1903, the execution of which it was the immediate object of the proceeding to enjoin, but must consider the prior contract of 1896, since primarily the rights, if any, which arose under the verbal agreement, are inextricably involved in and dependent upon the contract of 1896. In other words, the controversy, as considered by the Commission on the inquiry by it conducted, and as decided below, and as here presented, involves an analysis of all the dealings under both contracts, and the legal rights, if any, which arose from them. We must, therefore, consider the subject in this aspect, and to do so we state at once the facts which are admitted or which are undisputably established, reserving such questions of fact as are in dispute for separate consider-

ation when we approach the legal propositions which arise from the undisputed facts.

The Chesapeake & Ohio, chartered by the state of Virginia, operates a road which reaches both the New River

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and the Kanawha coal fields of West Virginia, and extends to Newport News. The New Haven, chartered by the state of Connecticut, operates a road principally situated in New England. On December 3, 1896, these two roads entered into a written contract, the one to sell and the other to buy, between July 1, 1897, and July 1, 1902, not to exceed 2,000,000 gross tons of bituminous coal, to be taken from the line of the Chesapeake & Ohio road; deliveries to be made not exceeding 400,000 tons per annum. The price agreed upon was $2.75 per gross ton, New Haven basis, settlement to be made monthly. The coal was to be delivered by the seller on the line of the New Haven. The contract is reproduced in the margin.[1]

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[1] Contract Made between the Chesapeake & Ohio Railway Company and the New York, New Haven, & Hartford Railroad Company.

Said Chesapeake & Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed 2,000,000 gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding 400,000 tons per annum.

And said Chesapeake & Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed.

And said Chesapeake & Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake & Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundredths dollars per gross ton. New Haven basis, settlement to be made monthly.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

The Chesapeake & Ohio, not in its own name, but through others who really, although not ostensibly, acted for it, made a contract with operators in the New River district of West Virginia, for the delivery to it of the coal to fulfil the contract which had been made with the New Haven. In consequence of failure of some of the operators to per-

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form their part of the contract, changes were made at various times, which it is unnecessary to note. Deliveries of the coal were made to the New Haven as required up to the winter of 1900-1901, when, because of strikes and other difficulties, delivery ceased, and the New Haven bought coal in the open market and presented to the Chesapeake & Ohio a bill for the increased price which it had paid, and the Chesapeake & Ohio paid $160,000 to cover such loss. Subsequently, in 1902, further strikes supervened and deliveries again ceased, at a time when about 60,000 tons remained yet to be delivered. The New Haven again presented a bill for damages amounting to $103,000. Thereupon the verbal agreement of 1903 was made, by which it was provided that the shortage of 60,000 tons upon the original contract might be discharged by delivery on the part of the Chesapeake & Ohio of that amount of coal from the Kanawha district at the contract price of $2.75, and when this delivery was consummated it was agreed that the Chesapeake & Ohio would be absolutely relieved from the payment of the damage claim just referred to.

Witness the names of the parties hereto this, the 3d day of December, 1896.

Chesapeake & Ohio Railway Company,
By. M. E. Ingalls, President.

The New York, New Haven, & Hartford Railroad Company.
By C. E. Mellen, Second Vice President.

For value received, I hereby guarantee that the Chesapeake & Ohio Railway Company shall not fail to deliver coal on account of strikes.

J. Pierpont Morgan.

At the time this verbal agreement was made the contract price was, leaving out of view the claim for damages, inadequate to pay the market price, as admitted by the pleadings, of the coal plus the published rates of the Chesapeake & Ohio to Newport News, and the charges thence to the point of delivery. To put itself in a position to carry out the agreement, an individual who represented

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the Chesapeake & Ohio made contracts in its own name with the operators in the Kanawha district to furnish the desired coal. Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake & Ohio bore the loss arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery.

Undoubtedly, long prior to the making of the first contract the Chesapeake & Ohio, besides its business as a carrier, bought and sold coal. This business was carried on by the company from about 1874 up to the time of the making of the contract of 1896, as testified by the president who made that contract, as follows:

"The coal was handled by a separate and distinct department of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the selling price of the coal representing the freight earned by the railway company."

And the same official testified that he made the contract of 1896 as a continuation of this system.

In 1895, however, the state of West Virginia passed "An Act to Prevent Railroad Companies from Buying or Selling Coal or Coke and to Prevent Discrimination." The

1st section of this act made it unlawful for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke. In consequence of this act, prior to the making of the contract of 1896, the coal department of the railroad was abolished. And it was the existence of the West Virginia statute which caused the Chesapeake & Ohio, when it contracted with operators in West Virginia to procure as to both contracts the coal for delivery to the New Haven, to do so not in its own name, but through another.

Before applying to these undisputed facts the legal question arising for decision, we must determine a question

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of fact as to which there is some dispute; that is, was the price at which the Chesapeake & Ohio contracted in 1896 to sell the coal to the New Haven sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate? Without stopping to go into the evidence, we content ourselves with saying that we think the court below correctly held that the price was not adequate to accomplish these purposes, and that from the inception of delivery under the contract, and during the whole period thereof, except for a brief time, caused by a lowering of the freight rates, the contract price was inadequate to net the railroad its proper legal tariff.

We are brought, then, to determine whether the contract made in 1896 for the 2,000,000 tons of coal was void because in conflict with the act to regulate commerce and its amendments. In approaching the consideration of the act to regulate commerce, we, for the moment, put out of view the provisions of the West Virginia statute, and its influence upon the validity of the contract made in West Virginia for the purpose of acquiring the coal which the Chesapeake & Ohio had obligated itself to deliver. We

shall also assume, for the purpose of the inquiry, that the Chesapeake & Ohio, although not expressly authorized, was not prohibited by its Virginia charter from buying and selling and transporting the coal in which it dealt. The case, therefore, will be considered solely in the light of the operation and effect of the provisions of the act to regulate commerce, and we shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions.

The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the con-

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tract does not pay the cost of purchase, the cost of delivery, and the published freight rates?

The previous decisions of this court concerning the interstate commerce act do not afford much aid in determining this question: This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions, against discrimination, favoritism, or rebates, but have mainly concerned the meaning of the act in other respects; that is, involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission.

There are several leading cases decided by the Commission, which are relied upon by the two railroads, di-

rectly relating to the question we have stated, but, as we shall have occasion hereafter to weigh their import, we shall not now pause to analyze and apply them.

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the 2d section of the act, that no departure from the published rate shall be made, "directly or indirectly,"

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how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be

brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may, by becoming a dealer, buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must

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result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as, by the departure from the tariff

rates, the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person, so selected by the carrier, would have a monopoly in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately, and not merely remotely, to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts undisputably shown on this record. For here it is unquestioned that the Chesapeake & Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law, and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of *Atty. Gen.* v. *Great Northern R. Co.* 29 L. J. Ch. N. S. 794. In that case Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was illegal, because incompatible with its duties as a public carrier and calculated to inflict an injury upon the public. In deciding that the act of Parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, the reason for the rule was thus expressed (p. 798):

> "These large companies, joint-stock companies generally,* for whatever purpose established, and more
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> particularly railway companies, are armed with powers of raising and possessing large sums of money,—amounts of property,—and if they were to apply that

money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways."

Illustrating the danger to the public, as established by the case before him, the Vice Chancellor said (p. 799):

"Here we find this company, having the traffic from the north of England, where the great coal fields are (at least, some of the principal coal fields), supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has)—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic; that is, the dealing in all the coal in the large districts supplying coal to the country. They have, to a considerable extent, done so, and there is no reason why it should not go on progressing. I observe that in the eight [?] years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agriculture produce, and become great dealers in the supply of edibles to the markets of London and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore," great detriment to the interests of the

public, for this reason, taking merely the article of coal."

It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers, as between themselves and in their dealings with the carrier, would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism and other causes. Interpreting the prohibition of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier, and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage," and "unjust discrimination," are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and, as such dealer, to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute, the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates would not only destroy the remedy intended to be afforded by the

provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions * urged at bar to establish the right of the car-

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rier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions.

(*a*) It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer, and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.

(*b*) It is said that, as in the case in hand, it is shown that there was no intention on the part of the carrier in making the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proof shows an arrangement made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate, therefore an honest contract made by the carrier should not be stricken down because of things over which

the carrier had no control." The proposition involves both an unfounded assumption of fact and an unwarranted implication of law. It is true the court below found that the proof did not justify the inference that the Chesapeake & Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. Whilst it may be that the proof establishes that the contract for the sale of coal was not made as a mere device for avoiding the operation of

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the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake & Ohio was wholly indifferent to and did not concern itself with, the prohibitions of the statute, of which, of course, it must be assumed to have had full knowledge. As we have seen, the president of the Chesapeake & Ohio, by whom the corporation was represented in making the contract, expressly testified that from the beginning that corporation had pursued the policy of acquiring all the coal mined on its line, and sold it, relying upon the net result of such sales for its freight compensation, and that the particular contract was made in continuation of that policy. We find it impossible to conclude, from the proof, that the Chesapeake & Ohio could have made a contract for so large an amount of coal, to be delivered over so long a period, without taking into view the existing prices and the cost necessarily to be occasioned by the delivery of the coal, if the full published freight rates were to be realized. Indeed, the proof leaves no doubt upon our minds that in making the contract, the Chesapeake & Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the interstate commerce act. In other words, we think it is established beyond doubt that, desir-

ing to stimulate the production of coal along its line, and thereby, as it conceived, to increase the carriage of that commodity, and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake & Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have done so would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would * besides have caused

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other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake & Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake & Ohio of the economic conceptions upon which the interstate commerce law rests, and a substitution in their stead of the conceptions of the Chesapeake & Ohio as to what was best for itself and for the public. Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc.,

the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depends not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute.

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(*c*) It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of ap-

plying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

But it is in effect said, conceding this to be true as an original question, the prohibitions of the act ought not now to be interpreted as applying to a carrier who is a dealer in commodities, because of an administrative construction long since given to the act by the interstate commerce commission, the body primarily charged with its enforcement, and which has become a rule of property, affecting vast interests, which should not be judicially departed from, especially as such construction, it is asserted, has been impliedly sanctioned by Congress by frequently amending the act without changing it in this particular.

Passing, for the present, the legal conclusion, let us first ascertain whether the premise itself is well founded. The two rulings of the Interstate Commerce Commission upon which the premise is based are *Haddock* v. *Delaware L.*

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& W. R. Co. 4 I. C. C. Rep. 296, 3 Inters .Com. Rep. 302, and *Coxe Bros. v. Lehigh Valley R. Co.* 4 I. C. C. Rep. 535, 3 Inters. Com. Rep. 460, decided respectively in 1890 and 1891.

Without going into detail, we content ourselves with saying that in both of the cases complaints were made to the Interstate Commerce Commission concerning the defendant railroads, and it was charged that whilst acting as common carriers they were dealing in coal, and as a

result violating the prohibitions of the interstate commerce act as to rates and undue preferences and discriminations. It was shown in both cases that the carriers, prior to the adoption of the interstate commerce act, were authorized by their charters or legislative authority to carry on both the business of mining and selling the coal so mined, and transporting the same to market. Indeed, it was found in both cases that the functions of producing and transporting, as authorized, were so interblended that it was impossible to separate one from the other. Whilst it is true that in both of the cases it was also shown that the carriers bought, sold, and transported some coal which was not produced in the mines which they owned, this fact was evidently treated, in view of the other circumstances of the case, as of minor importance, since the commingled powers of producing, selling, and transporting were alone made the basis of the conclusion reached by the Commission as to the character of relief which could be afforded. Solely in view of the lawful power of the carriers to mine, sell, and transport, existing before the passage of the act to regulate commerce, the Commission decided that its authority, under that statute and under the circumstances of the case, was confined to compelling the exaction of rates which were just and reasonable. The fact that the rulings in the two cases just referred to were solely placed upon the peculiar powers of the defendant corporations possessed by them prior to the passage of the interstate commerce act was pointed out by the Commission in *Re Alleged Unlawful Rates*, 7 I. C. C. Rep. 33. In that case, in deciding that the defend-

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ant carrier was without power to purchase grain for the purpose of securing the right to transport it, and thus evade the law which would have applied to its transportation had it been owned by any other party, the Commission,

in distinguishing the case before it from the *Haddock* and *Coxe Bros. Cases*, said (p. 38):

> "Those cases are in no respect similar to this. In both the common carrier was also the owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act, and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property; and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to inquire whether the rate charged the complainant was a reasonable one."

Now, without at all intimating that, as an original question, we would concur in the view expressed in the case last cited, that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the *Haddock* and *Coxe Bros. Cases* would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases, and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least, until Congress has legislated on the subject. We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been

impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight, and was not lightly to be interfered with. The concessions thus made, however, are wholly irrelevant to the case before us. This follows since the Chesapeake & Ohio was, neither by its charter nor by legislative grant existing at the time of the adoption of the act to regulate commerce, possessed of the commingled attributes of carrier and producer, which was the controlling consideration in the decisions made in the *Haddock* and *Coxe Bros. Cases.*

Concluding therefore, that both the contracts made by the Chesapeake & Ohio with the New Haven were contrary to public policy, and void because in conflict with the prohibitions of the act to regulate commerce, it obviously follows that such contracts were not susceptible of being enforced by the New Haven, and afforded no legal basis for a claim of the New Haven against the Chesapeake & Ohio, and therefore the court below was correct in so doing.

This leaves only for consideration the question raised by the cross appeal of the Interstate Commerce Commission. That proposition is thus stated in the first of the assignments of error filed on behalf of the Commission:

> "That the circuit court of the United States for the western district of Virginia, after finding that the claim of the New York, New Haven, & Hartford Railroad Company against the Chesapeake & Ohio Railway Company for $103,910.69, asserted as damages arising

from a partial nonperformance by said railway company of a contract of December 3, 1896, set out in the

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record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59966 tons of coal, to be transported from West Virginia to Newport News, Virginia, over the lines of said railway company, and thence transported by vessels to certain New England ports, said coal to be delivered at said ports at the price of $2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake & Ohio Railway Company, its officers, agents, and employees from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further joined and restrained the Chesapeake & Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake & Ohio Railway Company from transporting coal from one state to or through any other state for the New York, New Haven, & Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven, & Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable preference or advantage; and said decree, entered by the court on the 19th day

of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven, & Hartford Railroad Company and its

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officers and agents from seeking or accepting, in any manner, any direct or indirect rebate of the duly established freight rates of the Chesapeake & Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage."

The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from further like violation of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Co.* v. *United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the antitrust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was

granted in the case of *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, was not open to such an objection as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.

As the court below did not decide that the 2d and 6th

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sections of the act, relating to the maintenance of rates, had been violated, the injunction by it issued was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed in its published tariff of frieght rates, by means of dealing in the purchase and sale of coal. And, *as thus modified, the decree below is affirmed.*

UNITED STATES v. DELAWARE & HUDSON CO., 213 U.S. 366, 29 Sup. Ct. Rep. 527, 53 L.ed. 836 (1909)

UNITED STATES EX REL. ATTORNEY GENERAL OF THE UNITED STATES, Pl'ff in Err.,

v.

DELAWARE & HUDSON COMPANY. (No. 559.)

SAME

v.

ERIE RAILROAD COMPANY. (No. 560.)

SAME

v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY. (No. 561.)

SAME

v.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY. (No. 562.)

SAME

v.

PENNSYLVANIA RAILROAD COMPANY. (No. 563.)

SAME

v.

LEHIGH VALLEY RAILROAD COMPANY. (No. 564.)

UNITED STATES, Appt.,
v.
DELAWARE & HUDSON COMPANY. (No. 565)

SAME
v.
ERIE RAILROAD COMPANY. (No. 566.)

SAME
v.
CENTRAL RAILROAD COMPANY OF NEW JERSEY. (No. 567.)

SAME
v.
DELAWARE, LACKAWANNA ,& WESTERN RAILROAD COMPANY. (No. 568.)

SAME
v.
PENNSYLVANIA RAILROAD COMPANY. (No. 569.)

SAME
v.
LEHIGH VALLEY RAILROAD COMPANY. (No. 570.)

Statutes—construction—favoring constitutionality.

1. In construing a statute reasonably susceptible of two interpretations, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, it is the court's duty to adopt the latter intrepretation.

Carriers — governmental control — association with commodity carried.

2. The dissociation of railway companies prior to transportation from the articles or commodities transported, whether such association results from manufacture, mining, production, or ownership, or interest, direct or indirect, is the common purpose of the provisions of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

Carriers — governmental control — association with commodity carried.

3. Transportation when the thing to be transported has been manufactured, mined, or produced by the carrier or under its authority, and at the time of transportation the carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the thing to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, is all that is forbidden by the provisions of the Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

Carriers — governmental control — interest in commodity carried — stock ownership.

4. The ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or owning the commodity carried is not the "interest, direct or indirect," in such commodity, forbidden to the carrier by the Hepburn act of June 29, 1906, but such words are to be taken as embracing only a legal or equitable interest in the commodities to which they refer.

Commerce — regulation of interstate carrier — association with commodity carried.

5. Congress could properly enact, as a regulation of commerce, so much of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier, or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, although, by existing state legislation, such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate.

Constitutional law — due process of law — governmental regulation of carrier.

6. Railway companies enjoying the right, under existing state legislation, of ownership of or association with the articles or commodities carried, are not denied the due process of law guaranted by U. S. Const. 5th Amend. by so much of the provisions of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles or

commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense.

Commerce — congressional regulation — discrimination.

7. The exception in favor of timber and manufactured products thereof, contained in the provisions of the Hepburn act of June 29, 1906, forbidding railway carriers from transporting in interstate commerce articles or commodities with which they are associated, or in which they are interested, does not render the statute invalid for discrimination.

Statutes — when validity may be assailed.

8. The Federal Supreme Court will not consider the question of the constitutionality of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought.

Statutes — invalid in part.

9. The possible invalidity of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested cannot affect

the validity of these provisions, since the penalty clause is wholly separable therefrom.

Carriers — governmental regulation — what is a railway company.

10. The Delaware & Hudson company, chartered to secure coal lands and mine coal, and to construct a canal and railroad for the purpose of transporting the products of its mines, being also engaged as a carrier by rail in the transportation of coal in the channels of interstate commerce, is a "railroad company" within the meaning of the Hepburn act of June 29, 1906, prohibiting such companies from transporting in interstate commerce commodities with which they are associated, or in which they are interested.

[Nos. 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570.]

Argued January 19, 20, 1909. Decided May 3, 1909.

SIX WRITS OF ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review judgments denying mandamus to compel certain railway carriers to refrain from interstate transportation of coal from the Pennsylvania anthracite regions. Reversed and remanded for further proceedings. Also

SIX APPEALS from the Circuit Court of the United States for the Eastern District of Pennsylvania to review decrees dismissing bills in equity seeking to accomplish the same result by injunction. Reversed and remanded for further proceedings.

See same case below, 164 Fed. 215.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

Mr. Justice White delivered the opinion of the court:

We dismiss for the present a contention made by one of the corporations, that it is not a railroad company within the meaning of that term as used in the statute, which we shall have occasion to consider, because it is merely a coal company, whose transporting operations are but incidental to its mining operations. With this contention put aside, it is true to say, speaking in a general sense, that the corporations, parties to this record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other states. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines, and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads, not only owned but also leased and operated coal mines, and carried the coal produced from such mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal so produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for persons to whom the coal had been

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sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the

case as to some of the railroad companies who, as we have previously stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been possessed by them for a long time, and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other states, in which the companies likewise, in part, carried on their business. We insert in the margin a summary which the court below made concerning the situation of the respective corporations, taken from the answer or return made by each corporation.†

† It is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and, in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interests possessed by them in the coal so transported, or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware & Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated by an act of the legislature of the state of New York, April 23, 1823 . . . and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson river in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the legislature of the state of Pennsylvania, between the years of 1823 and 1871, and that these acts of the state of Pennsylvania resulted from the desire and policy of said state to create and foster the industry of mining such coal and developing the transportation thereof; that, under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the state of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware river to the Hudson river; that later, under statutes of both states, it invested additional capital in the construction of railroads in the state of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the state of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be

paid, not only for those mining lands, but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it; viz., the Northern Coal & Iron Company, the Jackson Coal Company, and the Hudson Coal Company; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company; and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware & Hudson Company, that this said "commodities clause" does not apply to it, because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes, as thereafter stated), "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal."

(2) The answer of the Erie Railroad Company states that it was originally organized under the laws of the state of New York in 1832 . . . that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities, and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the states of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838 . . . its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 . . . the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857 . . . 1864 . . . 1867 . . . and 1868 . . . ; that in pursuance of these various acts of the legislature, the Pennsylvania Coal

Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the state of Pennsylvania in 1869 . . . for the purposes and with powers similar to those of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania the said Erie Railroad Company, long prior to the passage of the said amendment to the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that, for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the state of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect, therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the state of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the state of Pennsylvania, one of which, approved April 15th, 1869 . . . was entitled "An Act to Authorize Railroad and Canal Companies to Aid in the Development of Coal, Iron, Lumber, and Other Material Interests of This Commonwealth;" that, pursuant to the authority of these several acts, it had, long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkesbarre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkesbarre Coal Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than $1,414,400, and not to exceed $2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to $9,812,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna, & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal

lands and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849 . . . that all the lines of railroad owned by it are wholly within the state of Pennsylvania, extending from the Delaware river, at the boundary line of the state of New Jersey, in a northwesterly direction across the state of Pennsylvania to the boundary line between the state of Pennsylvania and the state of New York, with a branch line extending from Scranton, in the state of Pennsylvania, to Northumberland, in said state. Said defendant also admits and alleges that, under express authority of acts of the legislature of the states of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and, long prior to May 1st 1908, has operated, various lines of railroad in the two last-mentioned states, by which it has direct traffic connection with the city of Buffalo and other cities in the said states. Defendant also admits that for many years it has owned in fee extensive tracts of coal land in the state of Pennsylvania; that it has also leased large tracts of coal land in the said state, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom, has been, and continues to be, under and by virtue of the authority of the laws of the state of Pennsylvania.

That, in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said state of Pennsylvania, have been merged into said defendant corporation; that, by an act of the general assembly of the state of Pennsylvania, approved April 15th, 1869, entitled, "An Act to Authorize Railroad and Canal Companies to Aid in the Development of the Coal, Iron, Lumber, and Other Material Interests of This Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That, by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes, $1,103,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its lands owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other states as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "interstate

commerce act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the state of Pennsylvania April 13th, 1846 . . . that, as early as 1871, under authority of two general statutes of the state of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one third of the shares of the Mineral Railroad Mining Company, corporations of the state of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the state of Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon or so contiguous to the system of railroads operated by said defendant as to render transporation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the state of Pennsylvania. Under the authority of various acts of assembly of the said state, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that, by means of its own and of said leased lines of railroad, it conducts, and for many years had conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York & Middle Coal Field Railroad & Coal Company, a corporation of the state of Pennsylvania; also the entire capital stock of Coxe Bros. & Company a corporation of said state; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority interest of the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the state of Pennsylvania, organized for the purpose of mining coal, some of them more than a half century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the company whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defendant, under which mortgage bonds to the amount of $23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Company, Incorporated, owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of $18,000,000 have been issued under said agreement and are now out standing in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies

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After the first day of May, 1908, the government of the United States commenced these proceedings by bill in equity against each of the corporations, to enjoin each from carrying in interstate commerce any coal produced under the circumstances which we have stated. At the same time a petition in mandamus was filed against each corporation, seeking to accomplish the same result. Both the equity causes and the mandamus proceedings were based upon the assumption that the 1st section of the act to regulate commerce, as amended and re-enacted by the law usually referred to as the Hepburn act, approved June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. C. Comp. Stat. Supp. 1907, p. 892), contained a provision, generally known as the commodities clause which caused it to be illegal for the corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of the modes above stated. Except as we have said, in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities

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whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the state of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of $36,068,431 for the last fiscal year, or $15,110,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependant upon the operation of the mines and collieries of said coal companies, and that, if said defendant were deprived of the earnings derived from the transporation of the coal of said coal companies, its business could not be continued, except at a net loss of many millions of dollars per annum.

clause, they all defended substantially upon the ground, that, when correctly interpreted, the commodities clause did not forbid the interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution, because the right to enact it was not embraced within the authority conferred upon Congress to regulate commerce. In addition it was contended that even if, abstractly considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the 5th Amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws. It was besides insisted that, in any event, the clause was repugnant to the Constitution because of the discrimination caused by the exception as to timber and the manufactured products thereof. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause as having the meaning which the government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject * was at least formally ap-

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proached, but for the purpose of deciding whether inherently the commodities clause was within the compentency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the corporations were found to enjoy as a result of valid state laws. In this aspect the issue which the court deemed it was called upon to determine was thus by it epitomized:

"The fundamental and underlying question, however, which presents itself at the threshold of all the

cases for our consideration, is whether the so-called 'commodities clause' amendatory of the act to regulate commerce, passed June 29, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole, and in relation to the concrete facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized, and the relevant industrial conditions," which, being matters of common

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knowledge, may be judicially noticed."

The situation which it was considered should be kept in mind for the purpose of passing upon the constitutional question was thus stated:

"The general situation is that for half a century or more it has been the policy of the state of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other states. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other states. It is not questioned that, pursuant to this general policy, investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different states

of the Union and Canada for the year 1905 (the last year for which there are authoritative statistics) was 61,410,201 tons; that approximately four fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets and other states and Canada, and of this four fifths, from 70 to 75 per cent was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

"It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any * point where there may be

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a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the Constitution and laws of the state of Pennsylvania, and that their right to the enjoyment of the same has never been doubted or questioned by the courts or people of that commonwealth, but has been fully recognized and protected by both."

It was decided that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce. 164 Fed. 215. A member of the court dissented and expressed his reasons in a written opinion. Without adverting to all the reasoning expounded in that opinion, we think it accurate to say that, in a large and ultimate sense, it proceeded upon the assumption that, as the commodities clause provided, to quote the summing up of the opinion, for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of Congress to enact, and when enacted was operative upon the defendants, and therefore required them

to conform to the regulation, even although to do so might in some way indirectly affect valid rights derived from prior state legislation.

Judgments and decrees were entered denying the applications for mandamus and dismissing the bills of complaint.

The text of the commodities clause upon which the cases depend is as follows:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any

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> interest, direct, or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined, or produced by them or under their authority, or which they own or may have owned, in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined, or produced by a corporation in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the meaning which the government insists should be given to its text, but on the significance of the

text as illumined by what it is insisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced, or owned by them, etc., but moreover to divorce the business of transporting commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing, or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the government: "It (the clause) forbids the carrier who owns the mines and sells coal, to transport that coal in interstate commerce. . . . This is not trifling with the question. It states the exact fact and the reality." And, in accordance with this principle, the insistence in argu-

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ment is that it was the duty of the carriers who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the government: "This is undoubtedly a searching and radical law, and was meant to be so." True, the government, in argument, suggests that the radical result of the statute may be assuaged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which

it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation. Besides, to do so would be repugnant to the asserted spirit and purpose of the statute which lies at the foundation of the construction upon which the government relies.

Let us, as a prelude to an analysis of the clause, for the purpose of fixing its true construction, and determining the constitutional power to enact it when its signifiance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the government is a correct one.

We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the government has placed upon it. We do this because, obviously, mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.

Let it be conceded at once that the power to regulate commerce * possessed by Congress is, in the nature of things,

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ever-enduring, and therefore the right to exert it today, tomorrow, and at all times in its plentitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be, in and of themselves, lawful regulations of commerce, if prospectively applied, nevertheless they cannot

be so considered, because of their retroactive effect upon the rights of the defendants, alleged to have been secured by valid state laws. We further concede, for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although, by existing state laws, the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the government as to the meaning of the commodity clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: 1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production, or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in inter-

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state commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced, or owned them, etc? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide: (a) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the states of the authority to endow a carrier

with the attribute of producing as well as transporting particular commodities,—a power which the states from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several states have been developed, their enterprises fostered, and vast investments of capital have been made possible? (b) Although the government of the United States, both within its spheres of national and local legislative power, has in the past, for public purposes, either expressly or impliedly, authorized the manufacture, mining, production, and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave question thus stated must necessarily, as we have said, arise for decision if the contention of the government, as to the meaning of the commodity clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights

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Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108. And un-

less this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman v. Interstate Commerce Commission, 211 U. S. 407, ante, 253, 29 Sup. Ct. Rep. 115.

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions; that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined, or produced; 2, which have been so mined, manufactured, or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect.

It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining, or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present, and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if, at the time of the transportation, they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this

it follows that the construction which the government places upon the clause as a whole is in direct conflict with the literal meaning * of the prohibitions as ownership

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and interest, direct or indirect. If the first two classes of prohibitions as to manufacturing, mining, or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute a self-annihilative meaning. This is the case, since, in practical execution, it would come to pass that where a carrier had manufactured, mined, and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequences, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal, and buys and sells the coal thus bought to the same person, A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that, as thus

construed, it would lead to the conclusion that it was the intention, in the enactment of the statute, to prohibit manufacturing and production by a carrier, and, at the same time, to offer an incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the govervent, in view of the purpose of Congress to prohibit railroad companies engaged in * interstate commerce from being, at the same

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time, manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions, they should all be construed so as to accomplish the result intended; and therefore their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation and because of the causes stated, irrespective of the particular relation of the railroad company to the commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, cannot be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining, and production from the clause, as ownership in

whole or in part or interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining, and production, if the proposed reconciliation of the conflict between the prohibition be brought about. We think, however, that a brief reference to a ruling of this court concerning the effect of the interstate commerce law prior to its amendment by the Hepburn act, will serve to make clear the unsoundness of the proposition. The case referred to is that of New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 5 L. ed. 515, 26 Sup. Ct. Rep. 272. In that case, after much consideration, it was held that the prohibitions of the interstate commerce * act as to uniformity of rates and against rebates

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operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pp. 399, 400) to refer to rulings of the Interstate Commerce Commission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing, and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in sofar as the requirement of reasonableness of rates was concerned. While referring to those administrative rulings, and declaring that, in view of their long standing, the construction which had been thus given to the act should not be departed

from, "at least, until Congress has legislated on the subject" (p. 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined, or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to disassociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the New York, N. H. & H. R. Co. Case, to assume that the provisions as to manufacturing, mining, and production, while they may be somewhat redundant, were nevertheless expressed * for the purpose of leaving no possible room for

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the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine, and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce. Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is essential to be adopted in order that the statute may have a harmonous operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should

treat the prohibitions as having a common purpose; that is, the dissociation of railroad companies, prior to transportation, from articles or commodities, whether the association resulted from manufacture, mining, production, or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute, we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and, as we think, doubtful prohibitions, so as make them accord with the narrow and more reasonable provisions, and thus harmonize the statute.

Nor is there force in the contention that because the going into effect of the clause was postponed for a period of nearly two years, therefore the far-reaching and radical effects which the government attributes to the clause must have been contemplated by Congress. We think, on the contrary, it is reasonable to infer, in view of the facts disclosed in the statement which we have previously excerpted, that the delay accorded * is entirely consistent with

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the assumption that it was so granted to afford the time essential to make the changes which would be required to conform to the commands of the clause as we have interpreted it, such as providing the facilities for dissociation by sale at the point of production before transportation or segregation by means of the organization of bona fide manufacturing, mining, or producing corporations.

It remains to determine the nature and character of the interest embraced in the words "in which it is interested, directly or indirectly." The contention of the government

that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 588, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the government that, if the clause embraces only a legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined, or produced, or is owned by a corporation in * which the carrier is a stockholder. The

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contention of the government substantially rests upon the assumption that, unless the words be given the meaning contended for, they are without significance. That this is clearly not the case is well illustrated by the New York,

N. H. & H. R. Co. Case, supra. In that case the Chesapeake & Ohio Railway Company it was shown at one time not only directly engaged in buying, selling, and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that, in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured. mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 40 Cong. Rec. pt. 7, pp. 7012-7014. And the considerations just stated, we think, completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense, upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the * statement taken from the answers and

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returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not, in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported, in whole or in part; (c) When the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent; and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New York, N. H. & H. R. Co. Case, to which we have previously referred. We do not say this upon the assumption that, by the grant of power to regulate commerce, the authority of the government of the United States has been unduly limited, on the one hand, and inordinately extended, on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the states of lawful commodities, or to destroy the governmental power of the states as to subjects within their juris-

diction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind,

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the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all pre-existing rights of the railroad companies were subordinated. Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

We think it unnecessary to consider at length the contentions based upon the due process clause of the 5th Amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause, interpreted as the government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that, in substance and effect, the argument really asserts that the clause, as construed by the government, is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappears as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore,

in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so.

Without elaborating, we hold the contention that the clause under consideration is void because of the exception

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as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation, when adopted, should be applied to all commodities alike. It follows that even if we give heed to the many reasons of expedience which have been suggested in argument against the exception, and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.

With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in Ex parte Young—a question which we do not feel called upon to decide,—nevertheless the proposition is without merit, because (a) no penalties are sought to be recovered in these cases, and (b) the question of the constitutionality of the clause relating to penal-

ties wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effor to enforce such penalties be made.

There is a contention as to one of the defendants, the Delaware & Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the states of New York and Pennsylvania, it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines; and, undoubtedly, vast sums of money have been invested in carrying out these

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purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that, by the true construction of its charters, the Delaware & Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause, and subject to the regulations which are embodied therein, as we have interpreted them.

As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that, in view of the public and private interests which were concerned, the

United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it, as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it.

And it is so ordered.

Mr. Justice **Harlan**, dissenting:

As these cases have been determined wholly on the construction of those parts of the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892] which are here in question, and as Congress if it sees fit,

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may meet that construction by additional legislation, I deem it unnecessary to enter upon an extended discussion of the various questions arising upon the record, and will content myself simply with an expression of my nonconcurrence in the view taken by the court as to the meaning and scope of certain provisions of the act. In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured, or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the

purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.

UNITED STATES v. LEHIGH VALLEY R. CO., 220 U.S. 257, 31 Sup. Ct. Rep. 387, 55 L.ed. 458 (1911)

UNITED STATES OF AMERICA, Appt.,

v.

LEHIGH VALLEY RAILROAD COMPANY.

Appeal — discretionary matters — amendment.

1. Abuse of discretion which may be reviewed on appeal is committed by the trial court when it refuses to permit an amendment to the bill in a suit by the Federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they are interested, where such amendment is germane to the original cause of action and was not foreclosed by the decision of the Federal Supreme court, which on appeal, had reversed a prior decree of dismissal founded upon the alleged unconstitutionality of the statute upon which the suit was based, and had remanded the cause for further proceedings.

Pleading — amendments — when germane to original cause of action.

2. A proposed amendment to the bill in a suit by the Federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated or in which they are interested is germane to the original cause of action where its allegations tend to show such an exercise by the carrier of its power as a stockholder in the corporation manufacturing, mining, producing, or owning the commodity carried, as to deprive the latter of all independent existence, and to make it vir-

tually but an agency, or dependency, or department of the carrier.

Judgment — res judicata — what matters concluded.

3. An adjudication that the ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or owning the commodity carried is not the interest in such commodity forbidden to the carrier by the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150), is not *res judicata* of the right of such carrier to exert its power as a stockholder so as to deprive the other corporation of all real independent existence, and to make it virtually but an agency, or dependency, or department of the carrier.

Carriers — governmental control — interest in commodity carried — stock ownership in sham corporation.

4. The exercise by a railway carrier of its power as a stockholder in a corporation manufacturing, mining, producing, or owning the commodity carried in such manner as to deprive the latter corporation of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier, is forbidden by the provisions of the Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

[No. 536.]

Argued January 5, 1911. Decided April 3, 1911.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania to review a decree

refusing to allow an amendment to the bill, and dismissing a suit by the Federal government to enjoin a railway carrier from interstate transportation of a commodity with which it is associated or in which it is interested. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

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Mr. Chief Justice **White** delivered the opinion of the court:

This case is one of what were known as the Commodity Cases, previously decided and reported in 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527. The controversy now is but a sequel to that disposed of in the previous cases. To understand the question now for consideration it is essential to have in mind the contentions which arose for decision upon the previous appeal and the disposition which was made of them. We therefore refer to those subjects.

The United States proceeded, both by suits in equity and mandamus, against certain railroad companies, including the Lehigh Valley, to prohibit them from transporting coal in interstate commerce in violation of what were deemed to be prohibitions of the fifth paragraph of the 1st section of the act to regulate commerce, as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn act. The clause is as follows:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District

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> of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any art-

cle or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or intended for its use in the conduct of its business as a common carrier." 34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1150.

In effect, the contention of the government was that the clause in question prohibited railroad companies from moving in the channels of interstate commerce articles or commodities other than the articles excepted by the provision, which had been manufactured, mined, or produced by the companies or under their authority, or which were, at the time of the transportation, owned by them, or which had been previously owned by them in whole or in part, or in which the companies then or previously had any interest, direct or indirect. The government, moreover, insisted that these general propositions embraced the movement by the companies in interstate commerce of a commodity which had been manufactured, mined, or produced by a corporation in which the transporting railroad company was a stockholder, irrespective of the extent of such stock ownership. The railroad companies in effect defended the suits upon the ground that the statute, as construed by the government, was repugnant to the Constitution. Each of the cases was submitted upon bill and answer and petition and return to the circuit court of the United States for the eastern district of Pennsylvania, held by three circuit judges under the expediting act of February 11, 1903, 32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1909, p. 1211. The submission in each case was made as a result of a stipulation between counsel "that the submission on bill and answer and any averment or admission in the pleadings of either party shall in no

wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purpose thereof."

Treating the commodities clause in question as having the significance attributed to it by the United States, the court held it to be repugnant to the Constitution. Judgments and decrees were accordingly entered, denying the applications for mandamus, and dismissing the bills of complaint. The reasons which led to this action were expounded in one opinion, made applicable to all the cases, the court briefly but comprehensively stating the facts in each case which were relied upon by the government as bringing the defendant corporation within the clause as the government construed it. The cases were then brought here.

As was done in the lower court, the cases here were all disposed of by one opinion, the facts in each case as summarized by the court below being stated. In deciding the cases, it became necessary first to ascertain the meaning of the commodities clause. In performing this duty, the conclusion was reached that the clause did not have the far-reaching significance attributed to it by the government, and which had been substantially adopted by the court below, but, on the contrary, had a much narrower meaning. Attention was directed to the fact that the statute disjunctively applied four generic prohibitions; that is, it forbade a railway company from transporting in interstate commerce articles or commodities, 1, which it had manufactured, mined, or produced; 2, which have been so mined, manufactured, or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect. All these prohibitions, however, were held to have but a common purpose, "that is, the dissociation of railroad companies prior

to transportation from articles or commodities, whether the association resulted from manufacture, mining, pro-

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duction, or ownership, or interest, direct or indirect."

In coming to determine whether the government was correct in its contention that these prohibitions operated to prevent a railroad company from transporting a product because it was owned by or had been mined, manufactured, or produced by a corporation in which the railroad company was the owner of stock, irrespective of the amount of such stock ownership, it was expressly decided that the prohibitions of the statute were addressed only to a legal or equitable interest in the commodities to which the prohibitions referred; that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced, or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation.

Summing up its review as to the true construction of the commodities clause, the court held (p. 415) that it prohibited "a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported, in whole or in part; (c) when the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, or produced or owned, etc., by a

bona fide corporation in which the railroad company is a stockholder.

Thus construed, the clause was held to be within the

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power of Congress to enact. As this conclusion rendered it necessary to reverse the action of the court below, which had been exclusively predicated upon the unconstitutionality of the statute, the question arose as to what disposition should be made of the cases. That is to say, the constitutionality of the statute being settled and its true meaning being expounded, the question was whether the cases should be finally disposed of or should be left in such a position as to give the government the right to proceed to apply and enforce the prohibitions of the statute against the various corporations which were defendants, if it deemed a good case existed for so doing. Disposing of this subject in the light of the consent upon which the cases had been tried in the court below, and of the error which had obtained as to the true meaning of the statute, and of the consequent concentration of the attention of the court and of the parties to the question of the constitutionality of the statute, instead of its application to the facts, when correctly construed, it was determined that the decree should not conclude the right of the United States in the respective causes to further proceed to enforce the statute as construed, and hence that that subject should be left open for future action. Referring to this matter, it was said (p.418):

> "As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that, in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these pro-

ceedings with the object and purpose of settling the differences between it and the defendants concerning the meaning of the commodities clause and the power of Congress to enact it, as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that

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the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we interpreted it."

Accordingly, the mandate of this court provided that the cause "be, and the same is hereby, remanded to the said circuit court for further proceedings in conformity with the opinion of this court."

Upon the filing of the mandate, the court below vacated its decree dismissing the bill in this (the equity) cause, and reinstated the case upon the docket. The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the actual relations existing between the railroad company and one of the coal companies mentioned in the original bill, *viz.*, the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company, the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence, and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere

device to enable the railroad company to violate the provisions of the commodities clause. It was expressly charged that in consequence of these facts:

> "The coal company is not a bona fide mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of* and has a pecuniary interest in the coal
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>
> mined by the coal company, and which is transported by the defendant."

Not only was it thus charged that the railroad company used its stock ownership to so commingle the operating of the affairs of the mining company with its own as to render it impossible to distinguish as a matter of fact between them, but it was moreover expressly in substance charged that, exerting its influence as the owner of all the stock of the coal company, the railroad company caused the coal company to buy up all the coal produced by other mining areas in the area tributary to the railroad, and fixed the price at which such coal was bought, so as to control the same and the transportation thereof, and establish the price at which the coal thus ostensibly acquired by the coal company by purchase should be sold when it reached the seaboard.

It was charged that by these abuses the production, shipment, and sale of all the coal within the territory served by the railroad company was brought within the dominion of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows:

> "That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the opera-

tions of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows:

"First. That the coal company, not being in substance and in good faith a bona fide corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect,

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in a legal or equitable sense, in said coal.

"Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant, at the time of transportation and before the act of transportation, has not in good faith dissociated itself from all exercise of authority over said coal, but continues to exercise authority over said coal at the time of transportation, and over the subsequent sale thereof."

On the objection of the railway company, the court denied the request of the United States for leave to file the amended bill. The United States then moved for a decree dismissing its original bill without prejudice, and after argument that motion also was denied. Thereupon counsel for the railroad company moved to dismiss the bill absolutely, and upon the statement of counsel for the United States that it "would not proceed any further, in view of the fact that the proposed amendment had been disallowed," the court reached the conclusion "that the bill should be dismissed absolutely upon the allegations of the bill and answer." A decree to that effect was entered, and the government prosecutes this appeal, relying for reversal upon the error which it is insisted was committed in refusing to allow the proposed amended bill to be filed, and in dismissing the suit.

At the threshold it is insisted by the railroad company that the action of the court below in refusing to permit the proposed amendment, however germane that amendment

may have been to the cause of action stated in the original bill, and even although the subject-matter of the amendment was not foreclosed by our previous decision, is not susceptible of being reviewed, because the allowance of amendments to pleadings is discretionary with a trial court, and the action of the court below in refusing to permit the amendment, even though erroneous, may not be reversed for error unless a gross abuse of discretion was

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committed. The principle is elementary, but is inapplicable to this case for a twofold reason: First, because the analysis which we have hitherto made of the opinion of this court on the prior hearing makes it certain that the undoubted object was not to foreclose the right of the government to enforce in the pending causes the commodities clause as correctly construed, and therefore in this regard the discretion of the court before was controlled by the action of this court. Second, because, in view of the express reservations in the opinion and the explicit language of the mandate of this court, the conclusion cannot be escaped that an absolute abuse of discretion resulted from refusing to permit the amendment, even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate.

It remains only to consider, first, whether the proposed amendment was germane to the original cause of action, and if it was, whether it was foreclosed by our previous decision.

As to the first question. When it is borne in mind that the suit was brought by the government to enforce as against the defendant the commands of the commodities clause, the fact that the proposed amendment was germane to such cause of action is too apparent to need anything

but statement. Indeed, in the argument at bar on behalf of the railroad company this is in effect conceded, since it is insisted that the amendment should not have been allowed, because in substance its averments virtually constituted part of the original cause of action. And we think it is equally clear that the grounds of the amendment were not foreclosed by our former decision. While that decision expressly held that stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured,

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mined, produced, or owned by such corporation, nothing in that conclusion foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned, or produced by a corporation in which the railroad held stock, and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so expected, because any control which is exerted or interest

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which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a bona fide exercise of such ownership, and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation, for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company was a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in effect urged as the railroad company held all the stock in its coal company, and therefore any gain made

or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate judicial beings, because, ultimately, considered, they were but one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership,—particularly to a case where the ownership embraced all the stock of a producing company,—and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this

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duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest, not to abuse such power so as virtually to do by indirection that which

the commodities clause prohibits,—a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable.

Deciding, as we do, that error was committed in denying leave to file the proposed amended bill, the decree below is reversed and the cause remanded with directions for further proceedings in conformity with this opinion.

DELAWARE, LACKAWANNA AND WESTERN R. CO. v. UNITED STATES
231 U.S. 363, 34 Sup. Ct. Rep. 65, 58 L.ed. 269 (1913)

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

No. 275. Argued October 17, 1913.—Decided December 1, 1913.

The commodity clause of the Hepburn Act applies not only to the carrier's goods from the point of production to the market but also to goods from market to that point.

While the power to regulate interstate commerce is subject to the provisions of the Fifth Amendment, an enactment, such as the commodity clause, which does not take property or arbitrarily deprive the carrier of a property right, does not violate that Amendment.

In dealing with interstate carriers, the fact that some of them are also engaged in private business does not compel Congress to legislate concerning them as carriers in such manner as not to interfere with such private business.

The commodity clause is general and applies to all shipments, even if innocent in themselves, which come within its scope; its operation is not confined to particular instances in which the carriers might use its power to the prejudice of shippers. Supplies, purchased for use in operating a carrier's mines, 75 per cent of the product of which

is intended for sale and only 25 per cent intended for the carrier's own use, are not necessary for the conduct of its business as a carrier and fall within the prohibition of the commodity clause of the Hepburn Act.

Although the purchaser may have the right to rescind for a condition subsequent, title may pass on delivery; and so *held* in this case that title to hay purchased by, and delivered to, a railroad company, passed to it although payment was postponed until after inspection and acceptance.

THE facts, which involve the construction of the Commodities Clause of the Hepburn Act of June 29, 1906, are stated in the opinion.

[Appearances and summaries of arguments omitted.]

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MR. JUSTICE LAMAR delivered the opinion of the court.

The Delaware, Lackawanna & Western Railroad Company was indicted for hauling, over its lines, between Buffalo, New York, and Scranton, Pennsylvania, twenty carloads of hay, belonging to the Company, but not necessary for its use as a common carrier. This transportation

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was charged to be in violation of the Commodities Clause of the Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 585, which makes it unlawful "for any railroad company to transport in interstate commerce any article . . . it may own . . . or in which it may have any interest . . . except such . . . as may be necessary . . . for its use in the conduct of its business as a common carrier."

On the trial it appeared that the defendant was not only chartered as a Railroad, but had also been authorized to operate coal mines. The hay, referred to in the indictment,

had been purchased for the use of animals employed in and about the mines at Scranton—all the coal taken therefrom being sold for use by the public, except the steam coal which was used as fuel for the Company's locomotives.

The defendant was found guilty and sentenced on each of the twenty counts. It brought the case here, insisting that the Commodities Clause violated the Fifth Amendment; deprived the Company of a right to contract, and prevented it from carrying its own property needed in a legitimate intrastate business, conducted under authority of a charter granted by the State of Pennsylvania, many years before the adoption of the Hepburn Bill.

1. This contention must be overruled on the authority of *United States* v. *Delaware &c. Co.*, 213 U. S. 366, 416. It is true that the decision in that case related to shipments of coal from mine to market, while here the merchandise was transported from market to mine. But the statute relates to "all commodities, except lumber, owned by the Company" and includes inbound as well as outbound shipments. Both classes of transportation are within the purview of the evil to be corrected and, therefore, subject to the power of Congress to regulate interstate commerce. The exercise of that power is, of course, limited by the provisions of the Fifth Amendment. (*Monongahela*

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Co. v. *United States*, 148 U. S. 312, 336; *McCray* v. *United States*, 195 U. S. 27; *Union Bridge Co.* v. *United States*, 204 U. S. 364), but the Commodities Clause does not take property nor does it arbitrarily deprive the Company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier

hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered. The Commodities Clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the Company occupied the dual and inconsistent position of public carrier and private shipper.

It was suggested that the case is not within the statute because, as the Company could buy, in Scranton, hay that had already been transported over its line, no possible harm could come to anyone if it brought the same hay at Buffalo and then hauled it to Scranton for use at the mine, but not for sale in competition with other dealers in stock food. But the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented.

2. In this case the hay was purchased for use in operat-

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ing mines where 75 per cent. of the coal produced was "assorted sizes" intended to be sold for domestic purposes. The remaining 25 per cent was steam coal—all of which was used as fuel on the Company's locomotives. This steam coal was in the nature of a by-product from a mine operated primarily for the purpose of obtaining coal for sale. Hay purchased for the use in such mining cannot be

said to have been necessary for the use of the Company in the conduct of its business as a common carrier.

3. Lastly, it was contended that the hay did not belong to the Railroad Company at the time of the transportation and, therefore, the conviction should be set aside since the statute only prohibits the hauling of commodities owned by the carrier.

This contention is based upon the terms of the contract, by which the Vassar Company, of Millington, Michigan, agreed to sell to the Railroad Company 3,000 tons, No. 1 timothy hay, at $15.40 per ton, f. o. b. Buffalo, payment to be made as follows: Upon the delivery of the hay to the purchaser, at Buffalo, same will be transported by the purchaser to various points on its line of railroad to be determined by the purchaser, at which places the purchaser shall have the right to inspect such hay before acceptance, and if upon such inspection said hay shall prove to be of the kind specified, the purchaser shall accept such hay and pay for the same within 30 days after such acceptance. Each of the twenty carloads of hay mentioned in the indictment was received by the Company at Buffalo. Each was then reconsigned to itself at Scranton. The waybills were marked "Freight free—Co. use." After arrival at Scranton it was inspected, accepted and used.

On these facts the defendant insists that the title did not pass until after acceptance, and many authorities are cited to support the proposition that, in a contract for the sale of personal property not only delivery by the

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seller, but acceptance by the buyer, is necessary for the transfer of title. But there are two kinds of acceptance—one of quality and the other of title. They are not necessarily contemporaneous. There may be an acceptance of quality before delivery, as where goods are selected by

the purchaser—delivery and transfer of title being postponed until a later time. Or, there may be an acceptance of title without an acceptance of quality; so that in many cases, after the title has passed, the purchaser may recover damages if the goods, upon inspection, prove to be of a quality inferior to that ordered. *Day* v. *Pool*, 52 N. Y. 416; *Zabriskie* v. *Central R. R.*, 131 N. Y. 72; *Bagley* v. *Cleveland Co.*, 21 Fed. Rep. 159 (3), 164; *Miller* v. *Moore*, 83 Georgia, 684. Again, though there may be such an acceptance as will transfer the title, the purchaser may, under the contract, have the right to rescind, as for a condition subsequent, if the goods do not correspond with the specifications. Such was the case here. When the hay was received by the purchaser at Buffalo there was such an acceptance as to transfer title to the Railroad, which accordingly took possession and exercised control in fixing when and to what point on its line the hay should be shipped. Title *prima facie* passes when delivery is made and if such possession followed by acts of ownership did not transfer the title to the Railroad Company, it left the risk of unknown dangers, at unknown points, for an indefinite time, upon the seller. So hard and unusual an incident is not, under facts like these, necessarily to be implied from the use of the ambiguous phrase, "pay after inspection and acceptance," and no such construction should be given unless demanded by the explicit terms of the contract. The parties, by their conduct, showed that they did not understand that the hay remained the property of the seller after it had been delivered to the buyer, for the hay after being received was consigned by the Company to itself and went

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forward from Buffalo to Scranton on waybills containing the entry "Freight free—Company use." If the hay did, in fact, then belong to the Vassar Company, such a shipment on such a waybill would have been a departure from the published tariff, contrary to the provisions of the Act

to Regulate Commerce. No such offense however was committed, for the contract, both by its terms and in the light of the conduct of the parties, meant that the title should pass when delivery was accepted by the defendant at Buffalo, but that the Railroad Company might rescind if, on later inspection, the quality was found to be different from what had been described in the contract of sale. But after such delivery and before such rescission, the title was in the Railroad Company. *Allen* v. *Maury*, 66 Alabama, 10; *Burrows* v. *Whitaker*, 71 N. Y. 291; *Kuppenheimer* v. *Wertheimer*, 107 Michigan, 77. As the hay belonged to the defendant and was intended for use in its private business of mining, the transportation over its lines, in interstate commerce, was a violation of the Commodity Clause.

Judgment affirmed.

UNITED STATES v. DELAWARE, LACKAWANNA AND WESTERN R. CO.,

238 U.S. 516, 35 Sup. Ct. Rep. 873, 59 L.ed. 1438 (1915)

UNITED STATES *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 517. Argued December 9, 10, 1914.—Decided June 21, 1915.

A railroad corporation engaged at the time of the passage of the Hepburn Act in the business of mining, buying, transporting and selling coal, in order to divest itself of title after the coal had been mined and before transportation began, caused a coal company to be incorporated having stockholders and officers in common with itself; thereupon the two corporations having a common management entered into a contract prepared by the railroad company under which the railroad company did not go out of the mining and selling business, but when the coal was brought to the surface it lost title by sale to the coal company f. o. b. the mines and instantly as carrier regained possession and retained it until delivery to the coal company which subsequently paid the contract price; the price paid was a fixed percentage of the price at a stated terminal on the day of delivery at the mines, and the railroad agreed to sell all of the coal it produced or purchased from others to the coal company and the latter company agreed to buy only from the railroad company and subject to the contract; the stockholders of the railroad company were allowed to take *pro rata* the stock of the coal company and practically all availed of the option, and the coal company declared a dividend on each share of stock sufficient to pay for the amount of stock allotted to the holder thereof. In

a suit brought by the Government alleging that the two corporations were practically one and that the contract was invalid, *held* that:

The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent position of public carrier and private shipper; and, in order to separate the business of transportation from that of selling, the statute made it unlawful for the carriers to transport in interstate commerce any coal in which the carrier had any interest, direct or indirect.

It is not improper for a carrier engaged in mining coal to institute the organization of a coal company to buy or produce the coal so as to comply with the terms of the Commodity Clause and to give its stockholders an opportunity to subscribe to the stock, but it must dissociate itself from the management of the coal company as soon as the same starts business.

Mere stock ownership by a railroad company or by its stockholders in a producing company is not the test of illegality under the Commodity Clause but unity of management and *bona fides* of the contract between the carrier and the producer.

The Commodity Clause and the Anti-trust Act are not concerned with the interest of the parties, but with the interest of the public; and if a contract between a carrier and a producer is as a matter of law in restraint of trade, or if the producing company is practically the agent of the carrier, the transportation of the article produced by the carrier is unlawful.

The contract in this case enables the railroad company to practically control the output, sales and price of coal and to dictate to whom it should be sold and as such is illegal under both the Commodity Clause and the Anti-trust Act.

In order to comply with the Commodity Clause in regard to the transporation of coal a carrier engaged also in mining coal must absolutely dissociate itself from the coal before the transportation begins, and if it sells at the mouth of the mine, the buyer must be absolutely free to dispose of it and have absolute control, nor should a carrier sell to a corporation managed by the same officers as itself—that is contrary to the policy of the Commodity Clause.

While there might be a *bona fide* and lawful contract between a carrier mining coal and a buying company by which the latter buys all of the coal of the former, the contract to be not illegal must leave the buyer free to extend its business elsewhere as it pleases and to otherwise act in competition with the carrier.

213 Fed. Rep. 240, reversed.

Statement of the Case.

THE appellee was chartered not only as a Railroad Company, but was authorized to mine and sell coal. The Commodity Clause of the Hepburn Act of 1906 made it unlawful for the carrier to haul its own coal beyond the limits of the State of Pennsylvania, and desiring to continue the business of mining and transporting coal, the Railroad adopted a plan under which it was to make a sale and divest itself of title to the coal, at the mouth of the mines, before transportation began. Accordingly it caused to be incorporated, under the laws of New Jersey, the Delaware, Lackawanna and Western *Coal* Company with a capital stock of $6,800,000,—divided into shares of $50 each. The Railroad Company then invited its own stockholders to subscribe to the capital stock of the Coal Company at the rate of one share of the latter for each four shares of the former. Ninety-nine per cent. of these stockholders did, as was expected, subscribe for the stock of the Coal Com-

pany—their subscriptions being paid for in full out of a cash dividend of $13,600,000 previously declared by the Railroad Company. The new corporation was then organized by electing the Vice-President of the Railroad Company as President of the Coal Company and other officers and directors of the Coal Company were also officers and directors of the Railroad Company.

As soon as the organization was completed, the Railroad Company prepared and submitted to the Coal Company a contract by which the Railroad Company reserving what it needed for its railway locomotives 'agreed to sell and the Coal Company agreed to buy, f. o. b. the mines, all coal which, during the term of the contract, the Railroad Company should produce from its own mines or purchase from any one else.' The price for prepared sizes—the more important commercial coal—was fixed at 65 per cent. of the price in New York on the day of delivery at the mines. The Railroad Company also leased to the Coal Company all its trestles, docks and shipping facilities.

The contract—thus prepared by the Railroad Company—was then signed by both corporations and, on August 2, 1909, the Coal Company took possession of the leased property; those who had been Agents of the Railroad in its Sales Department became Agents of the Coal Company in its Sales Department and the two corporations, with managing officers in common, also had offices in common in the City of New York.

Thereafter the Railroad Company continued its mining business, annually producing about 7,000,000 tons and purchasing about 1,500,000 tons from operators whose mines were located on its railway. After retaining what was needed for use on its railway engines, it sold the balance, aggregating about 7,000,000 tons, to the Coal Company at the contract prices f. o. b. the mines. The coal thus sold by the Railroad Company was then transported by the

Railroad Company to destination where it was delivered to the Coal Company which paid the regular tariff freight rate and the contract prices on the 20th of each month. This course of dealing continued until February, 1913, when the Government filed a Petition, against both corporations, alleging that the two were practically one and attacking the validity of the contract.

The Petition alleged that the coal business was extremely profitable and in order to continue it, in all its branches, the Railroad Company (which was controlled by a group of 25 persons, owning a majority of its stock), had determined "to cause the organization of a new corporation to be under their own control—whose stockholders would be substantially the same as those of the Railroad Company—and through it to conduct the business theretofore carried on by the Railroad Sales Department, thus securing, in effect, the continued unity of mining, transporting and selling, in substance, as theretofore and depriving the public of the benefits which the Commodity Clause was intended to produce."

The Petition alleged that when the contract was made, in August, 1909, the stockholders of the two corporations were practically identical; that a large majority of the stock in both is still owned by the same persons and that by virtue of the terms and provisions of the contract the Railroad had such an *interest* in the coal as to make it unlawful for it to transport such commodity in interstate commerce.

It was further charged that the transportation of the coal sold to the Coal Company was not only a violation of the Commodity Clause, but that the contract tended to create a monopoly and unlawfully to hinder and restrain trade in coal in violation of the provisions of the Anti-Trust Act. In this connection it was also charged that the Railroad Company not only mined coal, but purchased

the product of other mines located along its railway and had acquired the output of other collieries on its line, giving to it the disposition of more than 90 per cent. of the market, with power to arbitrarily fix prices. The Petition averred:

"By reason of the arrangements described, the support of the Railroad Company, and the peculiar advantages and facilities acquired, the Coal Company at once secured and has ever since maintained an unlawful monopoly of the sale of coal produced along defendant's railroad, and has completely dominated the markets at all points thereon not reached by any other railroad. Its position, power, and support render effective competition with it practically impossible, and the monopoly which it now holds will continue indefinitely unless restrained."

Both defendants answered. There was practically no dispute as to the facts, though both corporations contended that the facts alleged and proved did not support the legal conclusions sought to be drawn therefrom by the Government. Each insisted that the two corporations were separate in law and in fact; contended that the Railroad Company had no interest in the coal and insisted that the Coal Company acted independently of the Railroad Company and was not subject to its control.

At the hearing there was evidence that at the date of the making of the contract all except 2,249 shares in the Coal Company were held by those who held stock in the Railroad Company. By reason of sales of both stocks, it appeared that in October, 1913, 88,116 shares of the Railroad stock were held by those who were not then interested in the Coal Company and 6,907 shares of stock in the Coal Company were held by those who were not owners of the Railroad stock.

There was also evidence that many of the officers of the Coal Company were not officers of the Railroad Com-

pany; that the management of the two corporations was separate and distinct; that the Coal Company kept its own books, deposited its funds in its name in banks of its own choosing, and that the profits went solely to its own stockholders. The Coal Company paid the same rates of freight and demurrage as other shippers and received no discriminating favors from the Railroad Company. In 1910 the amount paid to the Railroad for the purchase price of coal under the contract was about $20,000,000, and for the freight thereon about $14,000,000. Since the contract was made the Coal Company has bought coal from other persons, the quantity being 3,347 tons in 1909; 2,267 tons in 1910; 6,600 tons in 1911; 92,004 tons in 1912; 310,645 tons in the first ten months in 1913.

There are about 70,000,000 tons of anthracite coal produced annually of which 20,000,000 tons are sold at tidewater. Of the 7,000,000 tons sold by the Delaware, Lackawanna and Western Railroad Company about 2,000,000 tons are transported to tidewater points and of this 500,000 tons are prepared sizes. The Coal Company at large expense bought land, built trestles and storage facility at various points in addition to those leased to it by the Railroad Company.

The District Court held that the business of the two corporations had not been so commingled as to make their affairs indistinguishable; that they are two distinct and separate legal beings actually engaged in separate and distinct operations and that the Railroad does not own the coal, either in whole or in part, during its carriage but has in good faith dissociated itself therefrom before the beginning of the act of transportation.

In answer to the claim that 'the Railroad will be the gainer from a high price at tide, since this will necessarily increase the price at the mines and therefore that this interest in the price is such an interest in the coal itself as is condemned by the statute,' the court said: "Un-

doubtedly it is correct to say that the Railroad has an interest in the price, but that 'interest' merely means that the Railroad will gain by a higher price at tide and does not mean that the Railroad has power to control the coal or the price for which it sells." The alleged power to increase the price by increasing the freight was held to be ineffective because freight rates were controlled by the Commerce Commission. "The Railroad Company does not fix prices. It does not decide how much coal is to go to New York Harbor, and it does not determine the sum for which the coal is to be sold at that point." 'The 65 per cent. basis had its origin many years ago and affords a convenient basis for calculating the price to be paid for future deliveries.' . . . The Railroad retains nothing more after the title passes to the Coal Company at the mines than an interest in the price and this is not the same thing as an interest in the coal. The Commodity Clause deals with an "interest direct or indirect" in the commodities themselves and this must mean some kind or degree of ownership in the thing transported or some power to deal with it or to control it. The Railroad Company neither owns nor controls the coal after it has been loaded on the cars at the breakers. Thereafter the Coal Company is the owner and the master, and fixes prices, routes and destination at its own will.

The court further said that 'the bill of complaint makes a formal charge against both defendants under the Anti-Trust Act, but the oral argument left us under the impression that this charge was not much insisted on. For that reason the Anti-Trust Branch of the complaint was regarded as comparatively unimportant, and for that reason we shall not undertake what we think would be the needless task of discussing the evidence bearing upon the charge of restraining or monopolizing commerce. If we are mistaken in this supposition the error can easily be corrected.'

The Petition was thereupon dismissed without prejudice to the Government's right to begin a second proceeding whenever it may be so advised. 213 Fed. Rep. 240. The Government then brought the case here by appeal.

In the Government's brief it is stated that while it did not now ask for a ruling as to the right of the Railroad Company to purchase and sell coal produced in mines along its Railroad, it did ask that if the decree was affirmed it should be without prejudice to the right of the United States to institute such proceedings.

[Appearances and summaries of arguments omitted.]

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Mr. Justice Lamar, after making the foregoing statement of facts, delivered the opinion of the court.

The Commodity Clause of the Hepburn Act was intended to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper; and, in order to separate the business of transportation from the business of selling, that statute made it unlawful for railroads to transport in interstate commerce any coal in which the company had "*any interest, direct or indirect.*"[a] *United States* v. *Delaware & Hudson*, 213 U. S. 415; *Delaware &c. R. R.* v. *United States*, 231 U. S. 363, 371.

As will be seen from the statement of facts, the Delaware, Lackawanna and Western Railroad Company was at the time of the passage of the Hepburn Act of 1906, one of the great coal roads engaged in the fourfold busi-

[a] "From and after May 1, 1908, it shall be unlawful for any railroad company to transport" [in interstate commerce] "any article or commodity other than timber . . . manufactured, mined or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." 34 Stat. 585.

ness of mining, buying, transporting and selling coal. As the Commodity Clause made it unlawful to transport its own coal to market, the Railway Company decided to adopt a plan by which to divest itself of title after it had

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been mined but before transportation began. It thereupon caused a Coal Company to be incorporated having stockholders and officers in common with the Railroad Company. The two corporations, thus having a common management, then made a contract—prepared by the Railroad Company—under which the Railroad Company did not go out of the mining and selling business, but when the coal was brought to the surface the Railroad Company lost title by a sale to the Coal Company f. o. b. the mines and instantly regained possession as carrier. It retained that possession until delivery to the Coal Company, which subsequently paid therefor at the contract price.

The District Court held that it was illegal for the same person to own a majority of the stock in the two corporations and that their contract of sale was lawful.

From the decree, dismissing the Bill, the Government appealed to this court where much of the argument was directed to the question as to whether the fact that the two corporations had practically the same shareholders left the Railroad Company in a position where it could lawfully transport coal which it had sold at the mouth of the mine to the Coal Company.

1. But mere stock ownership by a Railroad, or by its stockholders, in a producing Company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at that time owned stock in

coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such Road to transport coal belonging to such Company. The amendment, however, was voted down; and, in the light of that indication of Congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful

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for a railroad comany to transport coal belonging to a Corporation in which the Road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414. For a stronger reason, it would not necessarily be illegal for the Road to transport coal belonging to a Corporation whose stock was held by those who owned the stock of the Railroad Company.

Nevertheless, the Commodity Clause, of the Hepburn Act of 1906, rendered unlawful many transactions which prior to that time had been expressly authorized by the statutes of the States which had chartered the Coal Roads. And, while the Hepburn Act provided that, in the future, interstate railroads should not occupy the dual position of carrier and shipper, there was, of course, no intent on the part of Congress to confiscate property or to destroy the interest of the stockholders. But, still, upon adoption of the Commodity Clause, this appellee Railroad was confronted with a difficult situation. To shut down the mines, because the coal could not be transported, would have meant not only a vast monetary loss to the Company and its stockholders, but would have been even more harmful to the interests of the public which required a constant supply of fuel. The character of coal property was such as to make it impossible to divide the same in kind among the railroad stockholders, while the value of the coal land was so great as to make it impracticable to find a purchaser in ordinary course of trade. It was, therefore, natural, if not necessary, to organize a corporation with which a

contract could be made, and out of cash received or stock issued to pay for or preserve the equity which the railroad shareholders had in the coal.

In this situation there may have been no impropriety in the Railroad Company taking the preliminary steps of organizing such a corporation. Neither was it illegal for the stockholders of the Railroad Company to take stock in the Coal Company, for there are many instances

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in which the law recognizes that there may be diversity of corporate interest even when there is an identity of corporate members. A city and the county, in which it is located, may both have the same population but different corporate interests. Many private corporations have both stockholders and officers in common, yet they may nevertheless make contracts which will bind both of the separate entities. But whenever two such companies, thus owned or managed, make contracts which affect the interest of minority stockholders, or of third persons, or of the public the fact of their unity of management must be considered in testing the validity and *bona fides* of the contracts under review.

2. That principle is to be specially borne in mind in the present case. For this is not an instance of a Coal Road and a Coal Company, both of which existed and had made contracts prior to the Commodity Clause;—but a case where a Coal Company was created with the express purpose that, with stockholders in common, it should be a party to a contract intended to enable the Railroad Company to meet the requirements of the Commodity Clause and at the same time continue the business of buying, mining, selling and transporting coal.

It is also to be noted that the Delaware, Lackawanna and Western Railroad Company did not part with title

to its coal lands, mines and mining machinery as seems to have been done, on terms not fully stated [*United States* v. *Delaware & Hudson*, 213 U. S. 366, 398 (5), 392], in some of the instances discussed in the Commodity Cases. In them the ownership of the mines had passed completely from the railroads to the producing companies and the coal property was no longer subject to the debts of the railroad companies. After such sale of the coal lands there was both a technical and a practical separation of the legal interest of the two corporations in the coal under the ground, on the surface, when it was transported, and

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when it was sold. The fact that the Railroad held stock in the producing company, and received dividends thereon, did not give to the Railroad Company, any more than to any other stockholder in any other corporation, a legal interest in the property of the Coal Company. Nor would the fact that the Railroad Company had once owned it, have made any difference, if,—by a normal and *bona fide* sale at the point of production,—the carrier had lost all power of control and all right, title and interest in the coal before the transportation began. *United States* v. *Delaware & Hudson*, 213 U. S. 413, top.

3. But the decisions construing the statute, recognize that one corporation can be an agent for another corporation and that by means of stock ownership one of such companies may be converted into a mere agent or instrumentality of the other. *United States* v. *Lehigh Valley R. R.*, 220 U. S. 257, 273. And, this use of one by the other—or this power of one over the other—does not depend upon the control by virtue of the fact that stock therein is held by the Railroad Company or by its shareholders. For dominance of the Coal Company may be secured by a carrier (*New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 363) not only by an express contract of agency,

but by any contract which in its practical operation gives to the Railroad Company a control or an "interest, direct or indirect" in the coal sold, at the mouth of the mines.

Assuming then that the incorporation and organization of the Coal Company under the auspices of the Railroad Company was legal; assuming that the election of railroad officers as the first managers of the Coal Company was not illegal; assuming that as officers of the Railroad they could contract with themselves as officers of the Coal Company; assuming that at the time of organization it was not unlawful for the Railroad Company and the Coal Company, not only to have officers but offices in common, and finally assuming that all these facts together

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did not, in and of themselves, establish an identity of corporate interest, still these facts taken together are most significant. They at least prove that the relation between the parties was so friendly that they were not trading at arm's length. And the further fact that one of the parties was under a statutory disability as to hauling coal makes it necessary to carefully scrutinize their arrangement in order to determine whether it was a *bona fide* and lawful contract of sale, or a means by which the Railroad though parting with the legal title retained an interest and control in what had been sold.

4. That contract is published in full in 213 Fed. Rep. 255-259. The provisions material in the present inquiry may be thus summarized:

(a) The Railroad Company agreed to sell and the Coal Company agreed to buy all of the coal mined or acquired by the Railroad Company during the continuance of the contract; (b) the price for the more important commercial grades was to be 65 per cent. of the New York price on the day of delivery; (c) the amount of coal to be sold and

delivered was at the absolute option of the Railroad Company as its interests might determine; (d) the Coal Company was not to buy coal from any other person or corporation without the written consent of the Railroad Company; (e) the Coal Company was to conduct the selling of the coal so as best to conserve the interests, good-will and markets of the coal mined by the Railroad Company; (f) the Coal Company was to continue to fill the orders of present responsible customers of the Railroad Company, even if some of such sales might be unprofitable; (g) the Railroad leased to the Coal Company all its trestles, docks and shipping facilities at a rental of 5 per cent. of their value; (h) the contract could be terminated by either party on giving six months' notice.

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The most cursory examination of the contract shows that—while it provides for the sale of coal before transportation begins—it is coupled with onerous and unusual provisions which make it difficult to determine the exact legal character of the agreement. If it amounted to a Sales Agency the transportation was illegal because the Railroad Company could not haul coal which it was to sell in its own name or through an agent. If the contract was in restraint of trade it was void because in violation of the Sherman Anti-Trust Law. The validity of the contract cannot be determined by consideration of the single fact that it did provide for a sale. It must be considered as a whole and in the light of the fact that the sale at the mine, was but one link in the business of a Railroad engaged in buying, mining, selling and transporting coal.

5. By virtue of the fact that the Railroad Company bought, mined and sold, it—like any other dealer—was interested in maintaining prices, since the contract did not fix a definite sum to be paid for all of the coal sold, but provided that the Railroad Company was to receive 65 per

cent. of the New York price on the day the coal was loaded into the cars. The higher the rate in New York the better for the seller. And, by the contract, the Railroad reserved a power which, when exercised, could not only curtail production but shipments. Thus by decreasing the amount transported the supply in New York could be lessened. This would tend to raise New York prices and thus increase the sum the Railroad was to receive.

The Railroad Company was in the business of selling, and it is not to be presumed that its power to limit deliveries or to prevent the Coal Company from obtaining coal elsewhere would be often exercised. Yet the power did exist and it was reserved for some purpose—not, as argued, to prevent controversy as to failure to deliver in

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cases of strikes or accidents, for such is not the language or intent of the contract. Nor is room left for the implication [necessary to the validity of such an exclusive contract, *Chicago &c. R. R.* v. *Pullman*, 139 U. S. 80 (3), 89, 90], that the seller would deliver reasonable amounts at reasonable times. All such defensive arguments are excluded by the express and emphatic terms of the contract that "the amount of coal to be so delivered and sold to the buyer by the seller shall be at the absolute option of the seller as its interests may determine, and the seller shall be subject to no liability whatsoever for failure to supply the buyer with such amount of coal as it may desire."

It might be said that if such a power was exercised the Coal Company could then go into the market and purchase from other coal dealers. But this contract deprives the buyer even of that ordinary business privilege, declaring that the Coal Company "will purchase all coal to be sold by it from the seller, and will purchase no coal from any other person or corporation, except with the written consent of the seller."

6. Reading these two clauses together, it is evident that the Coal Company was neither an independent buyer nor a free agent. It was to handle nothing except the Railroad's coal and was the instrument through which the Railroad sold all its product. The Coal Company, though incorporated to do a general coal business, was dependent solely upon the Railroad for the amount it could procure and sell and was absolutely excluded from the right to purchase elsewhere without the consent of the Railroad Company, which, however, was under no corresponding obligation to supply any definite amount at any definite date.

Restrictive contracts should at least be reciprocal and mutual—for if A is bound to purchase only from B the latter should certainly be bound to furnish what A wishes to buy [*Chicago &c. R. R.* v *Pullman*, 139 U. S. 80 (3),

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89, 90]—especially is this true when the subject of the contract is an article in which the public is interested. Even at common law, in passing upon the validity of contracts in restraint of trade, the "public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires the contract may be sustained." *Gibbs* v. *Baltimore Consolidated Gas Co.*, 130 U. S. 396, 409; *Fowle* v. *Park*, 131 U. S. 97.

In this case the subject of the contract was anthracite coal—an article of public necessity and of limited supply, one-tenth being controlled by the appellee. The Railroad Company might have justly insisted on contract provisions intended to secure payment for all that it produced. But going beyond what was required for its own protection, it restrained the Coal Company from buying from anyone else, and,—what is probably more significant in this case—thereby prohibited the Coal Company from

competing with the Railroad Company for the purchase of coal mined on the Railroad lines. And, this was not a mere perfunctory provision, because the Railroad Company was a buyer of coal and purchased 1,500,000 tons per annum from mines on its system. By this contract it excluded from that market the Coal Company, which, with its capital of $6,000,000, could have been a strong competitor. Such a provision may not have actually effected a monopoly. But considering the financial strength of the carrier; its control of the means of transportation; its powers to fix the time when transportation of the very coal sold was to begin; its power in furnishing cars to favor those from whom it bought or to whom it sold—such a contract would undoubtedly have that tendency. In that respect it was opposed to that policy of the law, which was the underlying reason for the adoption of the Commodity Clause. *New Haven R. R.* v. *Int. Com. Comm.*, 200 U. S. 373.

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7. There is another provision of the contract which shows that the Railroad had such an interest in the coal as enabled it to dictate to whom it should be sold, even at unprofitable prices. The agreement provides:

"Sixth. The buyer agrees that it will conduct the business of selling the coal of the seller in such manner as best to conserve the interests of and preserve the good will and markets of the coal mined by the seller, and to continue to fill the orders of all responsible present customers of the seller even though as to some of such customers the sales may be unprofitable, it being understood and agreed that at the prices above quoted the entire business of the buyer will be conducted at a profit."

This is not a mere stipulation that the Coal Company would not injure the reputation of the Railroad Com-

pany's coal; while the further provision that the Coal Company would 'continue to fill the orders of all responsible present customers, even though some of such sales might be unprofitable,' was a further indication of the fact that both parties recognized the Railroad had an interest in the coal and used the Coal Company to preserve and secure that interest even after transportation began.

The unusual, onerous and restrictive terms imposed by this contract may, as between the parties, have been negligible—certainly so as long as the stockholders remained the same, since a loss to the Coal Company would be presumably represented by a gain to the Railroad Company. But the Commodity Clause and the Anti-Trust Act are not concerned with the interest of the parties but with the interest of the public and it, therefore, makes no difference whether this contract dictated by the Railroad Company was for the permanent advantage of the Coal Company.

8. It is argued, however, that the contract has not operated to the injury of the parties or of the public.

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And, in answer to those urged by the Government, it is said that some of the objections now insisted on were not pressed in the lower court; that there is no complaint that the Railroad charged the Coal Company exorbitant prices; or, that it ever raised the New York prices; or, that it failed to make prompt deliveries; or, that it has prevented the Coal Company from buying coal from other operators; or, that the Railroad monopolized the coal mined on its railway, or that it deprived such mining companies of an open market. From this it is argued that the present objections to the contract are purely academic. But its validity depends upon its terms. And if, as a matter of law, the contract is in restraint of trade, or, if the Coal Company is practically the agent of the Rail-

road Company then the transportation of the coal by the latter is unlawful.

9. As already pointed out, the contract has in it elements of a sale and elements of a sales agency. It provides that the Railroad Company will sell and that the Coal Company will buy all coal that is mined during the continuance of the contract; but it prevents the Coal Company from buying from any one else. It requires it to sell to present railroad customers at the old price, even though those prices may be unprofitable. The seller is not bound to make deliveries of fixed quantities at fixed dates and by decreasing what it will sell and determining when it will ship it has a power in connection with its power as a carrier, which, if exerted, would tend to increase prices in New York. Besides all this, the contract prevents the Coal Company from competing with the Railroad Company in the purchase of coal along the railway line. Taking it as a whole and bearing in mind the policy of the Commodity Clause to dissociate the Railroad Company from the transportation of property in which it is interested and that the Sherman Anti-Trust Act prohibits contracts in restraint of trade,* there would seem to be no

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doubt that this agreement violated both statutes.

10. The Railroad Company, if it continues in the business of mining, must absolutely dissociate itself from the coal before the transportation begins. It cannot retain the title nor can it sell through an Agent. It cannot call that Agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet subject to the control of the Railroad Company. If the Railroad sells coal at the mouth of the mines to one buyer or to many it must not only part with all interest direct or indirect in the property but also with all control over it or over those to whom the coal is sold at the mines.

It must leave the buyer as free as any other buyer who pays for what he has bought. It should not sell to a corporation with officers and offices in common,—for the policy of the statute requires that instead of being managed by the same officers, they should studiously and in good faith avoid anything, either in contract or conduct, that remotely savors of joint action, joint interest or the dominance of one Company by the other. If the seller wishes—by a lawful and *bona fide* contract, whose provisions as to delivery and otherwise are not in restraint of trade—to sell all of its coal to one buying company, then that one buyer can be bound by reasonable terms and required to pay according to the contract. But such buyer should otherwise be absolutely free to extend its business to buy when, where and from whom it pleases, and otherwise to act as an independent dealer in active competition with the Railroad Company.

What has been said is sufficient to show that the contract was invalid. That makes it unnecessary to discuss other questions raised but not disposed of by the District Court, and the decision herein is without prejudice to the right of the United States to institute proceedings in

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reference thereto or to test the right of the Railroad Company to purchase coal for sale.

The decree is reversed with directions to enter a decree enjoining the Railroad from further transporting coal sold under the provisions of the contract of August 2, 1909, referred to in the Petition.

Reversed.

Mr. Justice McReynolds took no part in the decision of this case.

UNITED STATES v. READING COMPANY
253 U.S. 26, 40 Sup. Ct. Rep. 425, 64 L.ed. 760 (1920)

UNITED STATES OF AMERICA, Appt.,

v.

READING COMPANY, Philadelphia & READING RAILWAY COMPANY, et al., (No. 3)

READING COMPANY, Philadelphia & Reading Railway Company, et al., Appts.,

v.

UNITED STATES OF AMERICA (No. 4)

Monopoly — unlawful combination — lease of railroad — lessor's covenant as to shipments.

1. A covenant in a lease by a coal company of a railway owned by it to another railway company, which may be construed to require the coal company to ship to market over the leased line three fourths of all the coal it produces, cannot be said to impose an undue restriction upon the coal company in selecting its markets and in shipping its coal, in violation of the Sherman Anti-trust Act, where the lines of the two railway companies are in no sense competitive, the leased line serving as a natural extension of the lessee railway company's lines to the great tonnage-producing coal districts, and where the rental to be paid is one third of the gross earnings of the railway.

Injunction — against enforcement of monopolistic contract — covenant in lease of coal lands.

2. Attempts to enforce a covenant in leases for the operation of coal-producing lands that the lessee shall ship all coal mined by rail routes which are named, or

which are to be designated, are properly enjoined where such covenant was resorted to as part of a scheme in contravention of the Sherman Anti-trust Act to control the mining and transportation of coal.

Appeal — judgment — dismissal without prejudice.

3. Where a majority of the individual defendants in a suit to dissolve a combination found to contravene the Sherman Anti-trust Act have died since the suit was instituted, and their successors, in office have not been made parties, and the conclusion to be announced can be given full effect by an appropriate decree against the corporate defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

Monopoly — unlawful combinations — carriers and coal companies — dissolution.

4. An undue and unreasonable restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and a monopolization of such trade and commerce, forbidden by the Sherman Anti-trust Act, and calling for dissolution of the combination, results from a scheme whereby a holding company was created and placed by stock control in a position to dominate, not only two great competing interstate railway carriers, but also two great competing coal companies engaged extensively in mining and selling anthracite coal which must be transported to interstate markets over the controlled interstate railway lines, which power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully, until the Federal Supreme Court condemned certain percentage coal contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation, the holding company continuing, up

to the time the present dissolution suit was begun, in active dominating control of the carriers and coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings.

Carriers — association with community carried — stock ownership.

5. The combination in a single corporation of the ownership of all of the stock of a carrier and of all of the stock of a coal company violates the commodities clause of the Act of June 29, 1906, making it unlawful for any railway company to transport in interstate commerce any article mined or produced by it or under its authority, or which it may own, or in which it may have any interest, direct or indirect, where all three companies have the same officers and directors, and it is under their authority that the coal mines are worked and the railway operated, and they exercise that authority in the one case in precisely the same character as in the other; viz., as officials of the holding company, the manner in which the stock of the three is held resulting, as intended, in the abdication of all independent corporate action by both the railway company and the coal company, involving, as it does, the surrender to the holding company of the entire conduct of their affairs.

Carriers — association with commodity carried — stock ownership.

6. While the ownership by a railway company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful, under the commodities clause of the Act of June 29, 1906, for the railway company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for the purpose of partici-

pating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require.

Judgment — dissolution — monopoly — extent of relief.

7. A combination of competing interstate railway carriers and competing coal companies, found to violate both the Sherman Anti-trust Act and the commodities clause of the Act of June 29, 1906, must be so dissolved as to give each of such companies its entire independence, free from stock or other control.

[Nos. 3 and 4.]

Argued October 10 and 11, 1916. Restored to docket for reargument May 21, 1917. Reargued November 20 and 21, 1917. Restored to docket for reargument June 10, 1918. Reargued October 7, 1919. Decided April 26, 1920.

CROSS APPEALS from the District Court of the United States for the Eastern District of Pennsylvania to review a decree granting a part of the relief sought by the United States in a suit to dissolve a combination asserted to violate both the Sherman Anti-trust Act and the commodities clause of the Act of June 29, 1906. Affirmed in part and reversed in part, and remanded with directions to enter a decree of dissolution of the intercorporate relations existing between corporate defendants so as to give each company its entire independence.

See same case below, 226 Fed. 229.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

Mr. Justice **Clarke** delivered the opinion of the court:

These are appeals from a decree entered in a suit instituted by the government to dissolve the intercorporate relations existing between the corporation defendants, for the alleged reason that through such relations they con-

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stitute a combination in restraint of interstate commerce in anthracite coal, and an attempt to monopolize or a monopolization of such trade and commerce, in violation of the first and second sections of the Anti-trust Act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. §8820, 9 Fed Stat. Anno. 2d ed. p. 644); and also for the alleged reason that the defendants Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey are violating the commodities clause of the Act of Congress of June 29, 1906 (34 Stat. at L. 585, chap. 3591, Comp. Stat. §8563, 4 Fed. Stat. Anno. 2d ed. p. 359), by transporting over their lines of railroad, in interstate commerce, coal mined or purchased by coal companies with which they are associated by stock ownership.

It will contribute to brevity and clearness to designate the defendant corporations as follows: Reading Company, as the Holding Company; Philadelphia & Reading Railway Company, as Reading Railway Company; Philadelphia & Reading Coal & Iron Company, as Reading Coal Company; Central Railroad Company of New Jersey, as Central Railroad Company; Lehigh & Wilkes-Barre Coal Company as Wilkes-Barre Company; Lehigh Coal & Navigation Company as Navigation Company.

Practically all of the anthracite coal in this country is found in northeastern Pennsylvania, in three limited and substantially parallel deposits, located in valleys which are separated by mountainous country. For trade purposes

these coal areas are designated: the most northerly, as the Wyoming field, estimated to contain about 176 square miles of coal: the next southerly, as the Middle or Lehigh field, estimated to contain about 45 square miles; and the most southerly, as the Schuylkill field, estimated to contain about 263 square miles of coal.

The annual production of the mines in these three fields in 1896 was about 43,640,000 tons, and in 1913 it slightly exceeded 71,000,000 tons. The chief marketing centers for this great tonnage of coal are New York, distant by rail from the fields about 140 miles, and Philadelphia, distant

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about 90 miles. From these cities it is widely distributed by rail and water throughout New York and New England, and, to some extent, through the South.

Such a large tonnage was naturally attractive to railroad carriers, with the result that the Wyoming field has six outlets by rail to New York harbor, viz.: the Central Railroad of New Jersey and five others, known as initial anthracite carriers. The Lehigh field has three such rail outlets, but the largest, the Schuylkill field, has only two direct rail connections with Philadlephia and New York, viz.: the Reading and the Pennsylvania Railroads. Outlets by canal to Philadelphia and tidewater, at one time important, may here be neglected.

This description of the subject-matter and of its relation to the interstate transportation system of the country will suffice for the purposes of this opinion. It may be found in much greater detail in the cases cited in the margin.[1]

[1] United States v. Reading Co. 183 Fed. 427; United States v. Reading Co. 226 Fed. 229; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 878; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90.

The essential claims of the government in the case have become narrowed to these, viz.:

First: That the ownership by the Holding Company of controlling interests in the shares of the capital stock of the Reading *Railway* Company, of the Reading Coal Company, and of the Central Railroad Company, constitutes a combination in restraint of interstate trade and commerce, and an attempt to monopolize and a monopolization of a part of the same, in violation of the Anti-trust Act of July 2, 1890.

Second: That the Holding Company in itself constitutes a like violation of the act.

Third: That certain covenants and agreements between the Central Railroad Company and the Navigation Company,* contained in a lease, by the latter to the former, of

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the Lehigh & Susquehanna Railroad, constitute a like violation of the act.

Fourth: That the transportation in interstate commerce by the Reading Railway Company and by the Central Railroad Company, of coal mined or purchased by the coal companies affiliated with each of them, constitutes a violation of the commodities clause of the Act to Regulate Commerce.

Pursuant to the provisions of the Act of June 25, 1910 (36 Stat. at L. 854, chap. 428, Comp. Stat. § 8824, 6 Fed. Stat. Anno. 2d ed. p. 137), the case was heard by three circuit judges of the third circuit, who, while holding against the contention of the government on many of the prayers for relief in the bill; some generally and some without prejudice, also held that the Reading Coal Company and the Wilkes-Barre Coal Company were naturally competitive producers and sellers of anthracite coal, and that their union through the Holding Company and the Central

Company constituted a combination in restraint of trade within the Anti-trust Act, and for this reason the Central Company was ordered to dispose of all the stock, bonds, and other securities of the Wilkes-Barre Coal Company owned by it, and was enjoined from requiring the Coal Company to ship its coal over the lines of the Central Company.

The court also held that clauses in mining leases by the Reading Coal Company and by the Wilkes-Barre Coal Company, and their subsidiaries, requiring the lessees to ship all coal produced, over roads named or to be designated, were unlawful and void.

The case has been appealed by both parties, and is before us for review on all of the issues as we have thus stated them.

Reference to the history of the properties now controlled by the Holding Company will be of value for the assistance it will be in determining the intent and purpose with which

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the combinations here assailed were formed. Standard Oil Co. v. United States, 221 U. S. 1, 46, 76, 55 L. ed. 619, 639, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

The Philadelphia & Reading *Railroad* Company was chartered by special act of the Pennsylvania general assembly in 1833, and it conducted the business of a railroad carrier prosperously for about thirty years, when, as its annual reports show, it embarked upon the policy of attempting to control the anthracite tonnage of the Schuylkill field by acquiring extensive ownership of coal lands. Thus, the report of the company for 1870 contains the following:

> "Up to this time about 70,000 acres of the best anthracite coal lands in Pennsylvania have been acquired

and will be held by an auxiliary company known as the Philadelphia & Reading Coal & Iron Company, of which the Philadelphia & Reading Railroad Company *is the only stockholder.* The result of this action has been to secure—and *attach to the company's railroad* —a body of coal land capable of *supplying all the coal tonnage that can possibly be transported over the road for centuries.*"

And this is from the report for 1880:

"The transportation of coal has always been a source of great profit to the railroad company, and the only doubt in the past as to the permanency of the earning power of the company as a transporter was due to the *fear that rival companies would tap the Schuylkill region* and divert the coal tonnage to their own lines. *This danger was happily averted by the purchase of the coal lands.*"

And this from the report of 1881:

"The coal estates of the Philadelphia & Reading Company . . . consist of 91,149 acres (142 square miles) of coal lands, *which is 60 per cent of all the anthracite lands in the Schuylkill district, and 30 per cent of all in Pennsylvania.*"

This area of coal lands had increased by 1891 to 102,573 acres, of which the report said:

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"The coal lands comprise in extent about 33 per cent of the entire anthracite-coal fields of the state, and taking into account the aggregate thickness of the veins on the company's lands, and the greater proportionate depletion of the estates in the other regions, which has been going on for many years, it must be conceded that we have *at least* 50 *per cent of the entire deposit remaining unmined.*"

As if in further pursuit of this now settled purpose, in the following year, 1892, the Reading Railroad Company leased the Lehigh Valley Railroad and the Central Railroad of New Jersey for 999 years. These were both anthra-

cite carriers competing with the Reading, and each had an important coal mining subsidiary company. But the lease by the Central Railroad Company was assailed in the New Jersey courts, and all operations under it were enjoined, with the result that both leases were abandoned.

It is obvious that these reports show an avowed and consistently pursued purpose (not then prohibited by statute) to secure by purchase a dominating control over the coal of the Schuylkill field and over the transportation of it to market.

In the large financial operations incident to the expansion policy thus described, bonds were issued, secured by a mortgage on all of the property of the Reading Railroad Company and of the Reading Coal Company. In 1893 there was default in the payment of interest on these bonds, and receivers were appointed who operated both properties until 1896, when they were sold to representatives of the creditors and stockholders of the two companies, and under a scheme of reorganization, the validity of which is assailed in this suit, both properties were transferred to three corporations in the manner now to be described:

1st. To the Reading *Railway* Company, a corporation newly organized under the laws of Pennsylvania, were allotted about 1,000 miles of the railroad (but none of

the equipment) which had been owned or leased by the former Reading *Railroad* Company. The capital stock of this company was fixed at $20,000,000, and it issued $20,000,000 of bonds, all of which were given to the Holding Company. The property thus transferred was valued, in the representations made at the time to the New York Stock Exchange, at $90,000,000. In 1896 this railroad carried in excess of 9,000,000 tons of anthracite,— more than one fifth of the then total production of the country.

But by the plan of reorganization adopted it was disabled from performing its functions as a carrier, except with the aid of the Holding Company, for all of the equipment, engines, cars, and ships owned by the former railroad company, and its tidewater terminals at Philadelphia and on New York harbor, were allotted to the Holding Company.

2nd. By the decree of sale the Reading Coal & Iron Company was released from its former obligations and to it, thus freed, the principal part of the property (coal and other), owned by it before the sale, was allotted and retransferred upon condition that it would deliver all of its capital stock to the Holding Company, would become co-obligor with that company on bonds to be issued, and would join with it in executing a mortgage for $135,000,000 on all of its property to secure such bonds. This company thus came into possession of 102,573 acres of anthracite lands, owned and leased,— almost two thirds of the entire acreage of the Schuylkill coal field,—stocks and bonds in other coal companies, coal in storage, and other property, all of the estimated value of $95,000,000.

3d. To serve the purposes of the intended Holding Company, a charter granted in 1871 by special act of the general assembly of Pennsylvania, but unused for twenty years, was utilized. This charter was of the class denominated "omnibus" by the supreme court of Pennsylvania,

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and in terms it authorized the company to engage in, or control, almost any business other than that of a bank of issue,—this broad charter was the occasion for making use of the company in this enterprise. The corporate name was changed to "Reading Company," its capital stock was increased from $100,000 to $140,000,000, and the purchasers at the receivers' sale allotted and transferred to it railroad equipment, real estate, colliers and barges, formerly owned

by the Reading *Railroad* Company, together with stocks which gave it control of more than thirty short-line railroads, aggregating 275 miles of track, and other property of large value, in addition to all of the bonds and stock of the new Reading *Railway* Company, and all of the stock of the Reading Coal Company.

The result of this intercorporate transfer of the property, owned before the reorganization by the Reading *Railroad* Company and the Reading Coal & Iron Company, was that the Holding Company, without any outlay,—solely because the creditors and stockholders of the former Reading Railroad Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies,—became the owner of the title to railway equipment, real estate, colliers and barges of an estimated value of $34,400,000; plus all of the capital stock and bonds of the new Railway Company,— $40,000,000; plus all of the capital stock of the Coal Company,—$8,000,000,—and a contract by that company to mortgage, for the use of the Holding Company, its entire property; plus other stocks, bonds, and mortgages owned by the former Railroad Company of the estimated value of over $38,000,000,—making a total value, as represented at the time to the New York Stock Exchange, of $193,613,000.

Thus, this scheme of reorganization, adopted and executed six years after the enactment of the Anti-trust

Act, combined and delivered into the complete control of the board of directors of the Holding Company all of the property of much the largest single coal company operating in the Schuylkill anthracite field, and almost 1,000 miles of railway over which its coal must find its access to interstate markets. This board of directors, obviously,

thus acquired power: to increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act. United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53.

Obvously, also, it made the Coal Company and the Railway Company mere agents or instrumentalities of the Holding Company—the mining and transportation departments of its business—for producing, purchasing, and selling coal and for transporting it to market. The Reading *Railway* Company and the Reading Coal Company each had thereafter but one stockholder,—the Holding Company,—and their earnings were to be distributed not in proportion to the shares of their capital stocks, aggregating $28,000,000, but were to go to the creditors and shareholders of the Holding Company, with its mortgage debt of $135,000,000 and its capital stock of $140,000,000. The Holding Company thus served to pool the property, the activities, and the profits of the three companies. Northern Securities Co. v. United States, 193 U. S. 197, 327, 362, 48 L. ed. 679, 696, 710, 24 Sup. Ct. Rep. 436.

It will be profitable to consider next what use was made of the great power thus gathered into the one Holding Company.

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In 1898 this Holding Company entered into a combination with five other anthracite-carrying railroad companies to prevent the then contemplated construction of an additional line of railway from the Wyoming field to tidewater,

which independent miners and shippers of coal were promoting for the purpose of securing better rates on their coal to the seaboard. In a mere holding company, the Temple Iron Company, all six carriers combined, as stockholders, for the purpose of providing $5,000,000, with which the properties of the chief independent operators, Simpson and Watkins, were purchased, and thereby the new railroad project was defeated. The president of the Holding Company was active in the enterprise, and that company, although only one of six, became responsible for 30 per cent of the required financing. In United States v. Reading Co. 226 U. S. 324, 351, 57 L. ed. 243, 251, 33 Sup. Ct. Rep. 90, this court characterized what was done by this combination, under the leadership of the Holding Company, in these terms:

> "The New York, Wyoming, & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained."

And, again, at p. 355:

> "We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the states, in plain violation of the Act of Congress of July 2, 1890."

About the year 1900 the Holding Company and many other initial anthracite carriers and their controlled coal companies, pursuant to an agreement with each other, made separate agreements with nearly all of the independent producers of coal along their lines, to purchase at the mines "all the anthracite coal thereafter mined from any of their mines now opened or operated, or which might thereafter be opened and operated," and to pay therefor 65 per cent of the average price of coal prevailing at tide-

water points at or near New York, computed from month to month. In the case above cited, this court discussed these contracts and declared: that they were made for the purpose of eliminating the competition of independent operators from the markets, and thus removing "a menace to the monopoly of transportation to tidewater which the defendants collectively possessed;" that before these contracts, there existed not only the power to compete, but actual competition, between the coal of the independents and that produced by the buying defendants; but that, after the contracts were made, "such competition was impracticable;" that the case fell well within not only the Standard Oil Co. Case, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, and American Tobacco Co. Case, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; but was of such an unreasonable character as to be "within the authority of a long line of cases decided by this court;" and finally, that the defendants had combined, by and through the instrumentality of the 65 per cent contracts, with the purpose and design of unlawfully controlling the sale of the independent output of coal at tidewater.

Thus, this court held that once within two years, and again within four years after it was organized, this Holding Company used the great power which we have seen was centered in its board of directors, by adroit division of property and corporate agency, for the purpose of violating, in a flagrant manner, the Anti-trust Act of 1890.

Almost immediately after the two attempts to monopolize the trade in anthracite thus condemned by this court, the Holding Company, in January, 1901, purchased a controlling interest in the capital stock of the Central Railroad Company. When this suit was commenced, that company was operating 675 miles of track, over which it carried in 1913, 10,783,000 tons of anthracite,—almost one half

of its total freight traffic. Its capital stock was then $27,436,000, and its funded debt was $46,881,000.

This Central Company owned, at the time, in excess of

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eleven twelfths of the capital stock of the Wilkes-Barre Coal Company, with a capital stock of over $9,000,000, and a funded debt of about $17,000,000. And that company owned or had leased in excess of 14,000 acres of coal-bearing lands,—13,000 acres in the Wyoming field,—and in the year ending June 30, 1913, it shipped from its lands thus owned or controlled, 6,243,000 tons of coal, which was sold for over $20,000,000.

Immediately after this purchase, the president of the Holding Company, Mr. Baer, was made president of the Central Railroad Company and of the Wilkes-Barre Coal Company, and remained such until his death, after the commencement of this suit, and from one third to one half of the directors of each company were thereafter chosen from the board of the Holding Company. Thus from the time of this purchase both companies have been actively dominated by the Holding Company management.

It is argued that the Central Railroad, thus acquired, and the Reading system, were not competitors, but this question is put beyond discussion by the testimony of Mr. Baer, the president of the Reading Company, and his immediate predecessor in office, Mr. Harris. The former testified:

Q. You are president of the defendants, the Reading Company, Philadelphia & Reading Railway Company, Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and the Temple Iron Company?

A. I am. . . .

Q. What do you regard as the competitors of the Philadelphia & Reading now in New York harbor, as to anthracite coal?

A. All the companies that ship to New York. They would be the Pennsylvania Railroad, the Lehigh Valley, the Delaware & Lackawanna, the Delaware & Hudson,* the Erie,

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Ontario, & Western. I guess those are all the roads leading to New York directly or indirectly. (He did not name the Central Company because it was a part of the Reading system when he testified.)

Q. Those roads are all carrying anthracite coal to New York harbor?

A. Yes, sir.

Q. And you regard them as competitors who must be considered in fixing rates?

A. Yes, sir; unquestionably.

Mr. Harris testified:

Q. During the time that you were president of the Philadelphia & Reading Railroad Company, from 1893 to 1901, what were the competitive roads in the coal trade with which you came in competition?

A. We came in competition with all the roads that were carrying coal from Pennsylvania.

Q. Name the principal ones in reference to carrying coal from the coal mines to New York harbor.

A. The Reading, the Lehigh Valley, *the Central Railroad of New Jersey,* the Delaware, Lackawanna, & Western, the Erie, and the Pennsylvania Railroad.

That the Reading Coal Company and the Wilkes-Barre Coal Company were competitors before the latter passed under the control of the Holding Company is obvious, but Mr. Baer put this also beyond dispute by testifying:

Q. Prior to 1901, were the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Company competitors as sellers of coal in New York harbor?

A. Yes; and they are today.

Q. And generally throughout the eastern territory they were competitors at that time?

A. Yes, sir; through that northern territory. Not in this territory nor in the southern.

Thus, by this purchase, the Reading Holding Company

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acquired complete control, not only of one of the largest competitive anthracite carriers, but also of one of the largest competitive coal producing and selling companies in the country. The anthracite tonnage of the Central & Reading Railway Companies, thus combined, exceeded, at the time, 18,000,000 tons,—over one third of the then total production of the country,—and the revenue derived from it was more than one third of the total earnings of the two railroad companies.

In 1915 the Interstate Commerce Commission concluded an investigation of the "rates, practices, rules, and regulations governing the transportation of anthracite coal," which had been in progress for three years. The eleven initial anthracite carriers which have lines penetrating the coal-producing region were required to furnish special reports as to their anthracite coal transportation operations, and they appeared and participated in the hearing. The result of this exhaustive investigation was that the Commission found: that since about 1901, with variations and exceptions which are negligible here, the carriers have had the same fixed and flat rates to tidewater, regardless of the distance and character of the haul; that these rates were the result of co-operation or combination among the carriers; and that they were excessive to such an extent that material reductions by all of the carriers were ordered, including, of course, those of the Central and Reading companies. The Commission also found, and this appears in the record of this case, that the Reading Coal

Company had never paid any dividends on its stock, and that, while the books of the Holding Company showed the Coal Company to have been indebted to it in a sum exceeding $68,000,000 for advances of capital made by the Reading *Railroad* Company before the reorganization in 1896, it has paid interest thereon only occasionally and in such small amounts that up to 1913 it fell short by more than $30,000,000 of equaling 4 per cent per annum on the in-

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debtedness. In the meantime advances of large sums had been made by the Holding Company to the Coal Company, and unusual credits had been allowed the latter in the payment of its freight bills. This dealing of the Holding Company with the Reading Coal Company, and similar dealing of the Central Company with the Wilkes-Barre Coal Company and the Navigation Company, are denounced by the Commission as unlawful discrimination against other shippers of coal over the rails of these two companies, and, obviously, such favoritism tends to discourage competition and to unduly restrain interstate commerce.

Upon this history of the transactions involved, not controverted, save as to some findings of the Interstate Commerce Commission, we must proceed to judgment; and very certainly it makes a case calling for the application of repeated decisions of this court, which clearly rule it.

It will be convenient to first dispose of several minor contentions.

In 1871 the Navigation Company leased the Lehigh & Susquehanna Railroad, which it owned, to the Central Railroad Company, by an instrument containing a covenant which the government claims requires the Navigation Company to ship to market over the leased line three fourths of all the coal which it should produce in the future. This covenant has been amended and supplemented

by several agreements, but not so as to essentially modify it with respect to the contention we are to consider.

It is argued that this covenant necessarily imposed an undue restriction upon the Navigation Company in selecting its markets and in shipping its coal, in violation of the Anti-trust Act.

It is not entirely clear that the covenant will bear the restrictive interpretation as to shipments which the gov-

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ernment puts upon it, but, assuming that it may be so interpreted, nevertheless, the conditions and circumstances of the case considered, the result contended for cannot be allowed.

When the lease was made, in 1871, the Central Railroad extended from Jersey City to its western terminus at Phillipsburg, New Jersey, and it was without access to the coal fields. The Lehigh & Susquehanna Railroad was about 100 miles in length, and extended from Phillipsburg into the Wyoming field, where the Navigation Company owned extensive coal-producing properties and mines. The lines of the two companies were in no sense competitive, but, on the contrary, the Lehigh & Susquehanna line served as a natural extension of the Central Company's line's to the great tonnage-producing coal districts. The rental to be paid was one third of the gross earnings of the railroad, and it was natural and "normal" that the lessor should desire that the traffic should continue to be as large as possible. Plainly this covenant was not written with the purpose of suppressing interstate commerce, and the history of its operation shows that, instead of suppressing it, it has greatly promoted it. The claim is quite too insubstantial to be entertained, and the decree of the district court with respect to it will be affirmed and the bill, as to it, dismissed.

In many leases for the operation of coal-producing lands the Reading Coal Company and the Wilkes-Barre Coal Company incorporated a covenant that the lessee should ship all coal mined by rail routes, which were named or which were to be designated. Since this covenant was resorted to as a part of the scheme to control the mining and transportation of coal, which is condemned as unlawful in this opinion, the decree of the district court, enjoining the lessors and the other defendants herein from attempting to enforce such covenants, will be affirmed.

The other charges against the Lehigh Coal & Navigation

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Company and the case stated in the bill with respect to the Wilmington & Northern Railroad Company, the Lehigh & Hudson River Railway Company, and the Lehigh & New England Railroad Company, are substantially abandoned in the government's brief, and, having regard to the results arrived at with respect to the principal defendants, the ends of justice will be best served by dismissing the bill as to all of these defendants, without prejudice, as was done by the district court as to all but the Wilmington & Northern Railroad Company, as to which the dismissal was unqualified. A majority of the individual defendants have died since the suit was instituted, and their successors in office have not been made parties, and, since the conclusion to be announced can be given full effect by an appropriate decree against the corporation defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

We are thus brought to the consideration of what the decree shall be with respect to the really important defendants in the case, the three Reading companies, the Central Railroad Company of New Jersey, and the Wilkes-Barre Coal Company.

Before the reorganization of 1896, the gathering of more than two thirds of the acreage of the Schuylkill field into the control of the two Reading Companies was, as their reports show, for the frankly avowed purpose, then not forbidden by statute, of monopolizing the production, transportation, and sale of the anthracite coal of the largest of the three sources of supply.

When, in 1896, the problem was presented of reorganizing the financial affairs of the two companies, it was not solved, as it might have been, by creating separate coal and railroad companies to conduct independently interstate commerce in the two departments to which their railroad and coal properties were adapted, but, on the contrary, and

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very obviously for the purpose of evading the provision of the Constitution of Pennsylvania prohibiting any incorporated common carrier from, directly or indirectly, engaging in mining "articles" for transportation over its lines (Pa. Const. 1874, art. 17, § 5), and also of evading the provisions of the Federal Anti-trust Act against restraining and monopolizing interstate commerce, resort was had to the holding company device, by which one company was given unrestricted control over the other two, with the power, inherent in that form of organization, of continuing and carrying forward the restraint and monopoly which had previously been acquired over that large volume of interstate commerce which was to be conducted by the coal and railroad companies.

Again, when, in 1901, a rivalry, imaginary or real, arose for the control of the Central Railroad Company, the Holding Company, regardless of the law, did not hesitate to purchase control of that great competing anthracite coal-carrying system, with its extensive coal-owning and mining subsidiary. This acquisition placed the Holding Com-

pany in a position of dominating control not only over two great competing interstate railroad carriers, but also over two great competing coal companies, engaged extensively in mining and selling anthracite coal, which must be transported to interstate markets over the controlled interstate lines of railway.

Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce, within the meaning of the Anti-trust Act, has been frequently held by this court.

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Thus, in Northern Securities Co. v. United States, 193 U. S. 197, 327, 48 L. ed. 679, 696, 24 Sup. Ct. Rep. 436, when dealing with a holding company, such as we have here, this court, in 1903, held:

"No scheme or device could more certainly come within the words of the act—'combination in the form of a trust or otherwise . . . in restraint of commerce among the several states or with foreign nations,'—or could more effectively and certainly suppress free competition between the constituent companies . . . *The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect*, and which the public is entitled to have protected."

And again, in United States v. Union P. R. Co. 226 U. S. 61, 88, 57 L. ed. 124, 134, 33 Sup. Ct. Rep. 53, decided nine years later, in 1912, this court held:

"The consolidation of two great competing systems of railroad engaged in interstate commerce by transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates . . . Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. *It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.*"

It will suffice to add that this doctrine was referred to as the settled conclusion of this court, in 1914, when, discussing a similar state Anti-trust Act in International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859, it was said:

> "The specification under this head is that the supreme court [of Missouri] found, it is contended, benefit—not injury to the public had resulted from the al-
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> leged combination. Granting that this is not an overstatement of the opinion, the answer is immediate. *It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and had some good effect* . . . The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

Thus, this record clearly shows a group of men selecting the Holding Company with an "omnibus" charter, and not only investing it by stock control with such complete dominion over two great competing interstate carriers and over two great competing coal companies extensively engaged in interstate commerce in anthracite coal as to bring it, without more, within the condemnation of the Anti-

trust Act, but it also shows that this power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully until this court condemned the 65 per cent contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation. To this it must be added that up to the time when this suit was commenced, this Holding Company had continued in active, dominating control of the Reading Railway Company and of the competing Central Railroad system, and also of the two coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings. It is difficult to imagine a clearer case, and in all essential particulars it rests on undisputed conduct and upon perfectly established law. It is ruled by many decisions of this court, but specifically and clearly by United States v Union P. R. Co. supra.

For flagrant violation of the first and second sections of the Anti-trust Act, the relations between the Reading Com-

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pany, the Reading Railway Company, and the Reading Coal Company, and between these companies and the Central Railroad Company of New Jersey, must be so dissolved as to give each of them a position in all respects independent and free from stock or other control of either of the other corporations.

With respect to the contention that the commodities clause of the Act of June 29, 1906 (34 Stat. at L. 584, 585, chap. 3591, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. pp. 337, 359), is being violated by the Reading Railway Company and the Central Railroad Company.

The circuit judges, centering their attention upon the fact that the Reading Railway Company did not own any of the stock of the Reading Coal Company; that the two companies had separate forces of operatives and separate

accounting systems; and upon the importance of maintaining "the theory of separate corporate entity" as a legal doctrine, concluded, upon the authority of United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 413, 53 L. ed. 836, 851, 29 Sup. Ct. Rep. 527, that the evidence did not justify holding that, in transporting the products of the Reading Coal Company's mines to market, the Reading Railway Company was carrying a commodity "mined or produced by it or under its authority," or which it owned "in whole or in part," or in which it had "any interest, direct or indirect."

But the question which we have presented by this branch of the case is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.

The purpose of the commodity clause was to put an end

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to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper. Plainly, in such a case as we have here, this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury,—any discriminating practice which would harm the general shipper would pro-

fit the Holding Company. Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute.

In terms the act declares that it shall be unlawful for any railroad company to transport in interstate commerce "any article or commodity . . . mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same "authority" that transported it over the railroad. All three of the Reading companies had the same officers and directors, and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other,—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action, by both the Railway Company and the Coal Company, involving, as it did, the surrender to the Holding Company of the entire conduct of their affairs.

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It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same "authority" that operated the Reading Railway lines. The case falls clearly within the scope of the act, and for the violation of this commodity clause, as well as for its violation of the Anti-trust Act, the combination between the Reading Railway Company and the Reading Coal Company must be dissolved.

The relation between the Central Railroad Company and the Wilkes-Barre Coal Company presents a different question, for here the Railroad Company owns over eleven twelfths of the stock of the Coal Company, and therefore the holding in 213 U. S. 366, supra, is especially pressed in argument,—that the ownership of stock by a railroad company in a coal company does not cause the former to have such an interest in a legal or equitable sense in the product of the latter as to bring it within the prohibition of the act. But this holding was considered in United States v. Lehigh Valley R. Co. 220 U. S. 257, 272, 55 L. ed. 458, 463, 31 Sup. Ct. Rep. 387, and it was there held not applicable where a railroad company used its stock ownership for the purpose of securing a complete control over the affairs of a coal company, and of treating it as a mere agency or department of the owning company. This rule was repeated and applied in United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 529, 59 L. ed. 1438, 1443, 35 Sup. Ct. Rep. 873. It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two, such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for the purpose of partici-

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pating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require. United States v. Lehigh Valley R. Co. 220 U. S. 257, 272,

273, 55 L. ed. 458, 463, 464, 31 Sup. Ct. Rep. 387; United States v. Delaware, L. & W. R. Co. supra; Chicago, M. & St. P. R. Co. v. Minneapolis Civic & C. Asso. 247 U. S. 490, 501, 62 L. ed. 1229, 1237, 38 Sup. Ct. Rep. 553.

Applying this rule of law to the relation between the Central Railroad Company and the Wilkes-Barre Coal Company, with the former owning over eleven twelfths of the capital stock of the latter, and using it as the coal mining department of its organization, we cannot doubt that it falls within the condemnation of the commodities clause, and that this relation must also, for this reason, be dissolved.

It results that the decree of the District Court will be affirmed, as to the Lehigh Coal & Navigation Company, the Lehigh & New England Railroad Company, the Lehigh & Hudson River Railway Company, as to the restrictive covenants in the mining leases with respect to the shipping of coal, as to the dissolution of the combination between the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Coal Company, maintained through the Reading Company and the Central Railroad Company of New Jersey. As to the Wilmington & Northern Railroad Company and as to the individual defendants, the bill will be dismissed without prejudice. As to the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, and the

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Central Railroad Company of New Jersey, the decree of the District Court will be reversed and the cause remanded with directions to enter a decree in conformity with this opinion, dissolving the combination of the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, existing and maintained

through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other, of the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, and also that such disposition shall be made by the decree of the stocks and bonds of the Lehigh & Wilkes-Barre Coal Company, held by the Central Railroad Company of New Jersey, as may be necessary to establish entire independence between these two companies, to the end that the affairs of all of these now combined companies may be conducted in harmony with the law.

Affirmed in part; reversed in part, and remanded, with direction to enter a decree in conformity with this opinion.

Mr. Chief Justice **White**, Mr. Justice **Holmes**, and Mr. Justice **Van Devanter**, dissenting:

Except in so far as the decree below commanded a separation of interest between the Central Railroad of New Jersey and the Lehigh & Wilkes-Barre Coal Company, the court below dismissed, for want of equity, the bill of the United States, brought to sever the existing relations be-

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tween the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and other corporations, on the ground that the relations between those companies resulted in a monopoly or combination in restraint of trade, in violation of the Sherman Act, and gave rise to a disregard of the commodities clause of the act of Congress.

By the opinion now announced, this action of the court below, in so far as it directed a dismissal, is reversed, and virtually the full relief prayed by the government is therefore granted. We are unable to concur in this conclusion, because, in our opinion, neither the contentions as to the Sherman Act, nor the reliance upon the commodities clause, except to the extent that in the particulars stated they were sustained by the court below, have any foundation to rest upon. We do not state at any length the reasons which lead us to this view, because the court below, composed of three circuit judges, in a comprehensive and clear opinion announced by McPherson, Judge, sustains the correctness of the action which it took, and also demonstrates the error involved in the decree of this court, reversing its action. United States v. Reading Co. 226 Fed. 229. To that opinion we therefore refer as stating the reasons for our dissent.

UNITED STATES v. LEHIGH VALLEY R. CO., 254 U.S. 255, 41 Sup. Ct. Rep. 104, 65 L.ed. 253 (1920)

UNITED STATES OF AMERICA, Appt.,
v.
LEHIGH VALLEY RAILROAD COMPANY, Lehigh Valley Coal Company, et al.

Monopoly — unlawful combination — carrier and coal company.

1. A railway company which, in combination with a subsidiary coal company controlled by it through stock ownership and common officers, deliberately enters upon a policy of making extensive purchases of anthracite land tributary to the railway company's lines, for the purpose of controlling the mining, transportation, and sale of coal to be obtained therefrom, and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and continues this policy after the passage of the Anti-trust Act of July 2, 1890, with increasing energy and tenacity of purpose, with the result that a practical monopoly is attained of the transportation and sale of anthracite coal derived from such lands, violates the provisions of §§ 1 and 2 of such act, forbidding restraints of interstate trade or commerce, and monopolization of or attempts to monopolize a part of such trade or commerce.

Carriers — association with commodity carried — sale to carrier's agent — monopolistic contract.

2. A contract which an anthracite coal company, controlled by an interstate railway carrier through stock ownership and common officers, made with a sales com-

any, the stockholders in which were practically identical with those in the railway company, whereby the coal company is to sell the coal mined by it to the sales company, the latter to pay therefor at 65 per cent of the New York prices, and to sell no other coal than that purchased from the coal company, there being further provisions that the coal company shall lease all its facilities, structures, and trestles to the sales company; that either party shall have the right to abrogate and cancel the contract upon giving six months' notice, and that the sales company shall not buy coal except from the coal company,—violates both the commodities clause of the Act of June 29, 1906, making it unlawful for any railway company to transport in interstate commerce any article which it may own or in which it may have any interest, and the Sherman Anti-trust Act of July 2, 1890, prohibiting contracts in restraint of trade.

Judgment — dissolution — monopoly — relief — injunction.

3. A combination effected through intercorporate relations between an interstate railway carrier, an anthracite coal company, and a sales company, which is found to violate both the Sherman Anti-trust Act of July 2, 1890, and the commodities clause of the Act of June 29, 1906, must be so dissolved as to give each of such companies its entire independence, and all contract relations between the coal company and the sales company which would serve in any manner to prevent the sales company from extending its business of buying and selling where and from and to whom it chooses with entire freedom and independence must be enjoined, so that the sales company may in effect, as well as in form, become an independent dealer, free to act in competition with the coal company or railway company.

[No. 1.]

Argued October 12 and 13, 1916. Restored to docket for reargument May, 21, 1917. Reargued November 7, 1917. Restored to docket for reargument June 10, 1918. Submitted October 7, 1919. Restored to docket for oral argument May 17, 1920. Reargued October 5, 1920. Decided December 6, 1920.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree which dismissed the bill in a suit by the United States to dissolve intercorporate relations between corporations alleged to violate the Sherman Anti-trust Act and the commodities clause of the Hepburn Act. Reversed and remanded for the entry of a decree in conformity with the opinion.

See same case below, 225 Fed. 399.

The facts are stated in the opinion.

[Appearances and summaries of arguments omitted.]

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Mr. Justice **Clarke** delivered the opinion of the court:

This is an appeal from a decree entered in a suit to dissolve the intercorporate relations existing at the time it was commenced in March, 1914, between the defendant corporations, other than Girard Trust Company, for the reason, it is averred, that they were so united that they constituted a combination in restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and an actual monopolization of a part of such commerce, in violation of the Anti-trust Act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644); and also for the alleged reason that the Lehigh Valley Railroad Company was transporting over its lines of railway anthracite coal in which it had an interest, in violation of the commodities

clause of the Act of June 29, 1906 (34 Stat. at L. 585, chap. 3591, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 359).

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It will be necessary to consider only the relations and activities of the Lehigh Valley Railroad Company, hereinafter designated the Railroad Company, the Lehigh Valley Coal Company, designated the Coal Company, and the Lehigh Valley Coal Sales Company, designated the Sales Company.

A condensed history, chiefly admitted, of the organization, stock ownership, and conduct of these three companies, and the application to the fact thus developed of fully established principles of law, will be decisive of the case.

The limited area of anthracite-producing territory, its relation to the interstate transportation system and markets of our country, and the various attempts to monopolize and control the great railway tonnage originating therein, have all been so often described in reported cases, that they need not be repeated here in detail.[1]

It will suffice for our present purpose to say that the anthracite-producing territory is very restricted in area, it all being within seven counties of eastern Pennsylvania, with the known deposits underlying only 309,760 acres of land. For trade purposes it is divided into three fields; the northerly is called the Wyoming field, the next southerly the Lehigh or Middle field, and the southerly the Schuylkill field. The lines of the Railroad Comany extend

[1] United States v. Reading Co. 183 Fed. 427; United States v. Reading Co. 226 Fed. 229; United States v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; United States v. Reading Co. 253 U. S. 26, 64 L. ed. 760, 40 Sup. Ct. Rep. 425.

into the Wyoming and Lehigh fields, but to only one colliery in the Schuylkill field. Much the greater part of its tonnage is derived from the Wyoming field, and four fifths of it moves in interstate commerce.

The Railroad Company in 1913 owned 1,438 miles of main line and a total trackage of 3,354 miles, its capital

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stock was $60,600,000, its funded debt was $85,800,000, its total assets had a book value of $182,700,000, but a much greater actual value, and it carried a larger tonnage of anthracite coal than any other railroad in the country,—over 13,000,000 tons in 1913, this being 18.84 per cent of the total 69,000,000 tons shipped over all railroads in that year.

In 1864 the Railroad Company, by merger with a coal company, acquired a small acreage of anthracite-containing land, and thereupon added the mining, shipping, and selling of coal to its duties as a carrier.

The annual reports of the Railroad Company show that, as early as 1868, it entered upon the policy of acquiring by purchase and lease the control of as much as possible of the anthracite-coal-containing lands tributary to its lines of railroad, for the purpose of preventing, or, when it had become established, of suppressing, competition in the carrying of coal over its interstate lines to interstate markets.

Thus the annual report of the Company for 1868 shows that, it having been determined that it was of "the utmost importance" to the future welfare of the company to secure "control of tonnage from regions having other outlets to markets," the Company, by merger of two coal companies, obtained coal lands which secured to it the whole trade of the Hazelton coal field, and "the withdrawal from

competition" of a business so large as to greatly strengthen the "future prospects of the road."

In 1869 the policy of securing a proportion of the coal trade from each region by the purchase of interests in companies owning lands on or near the several branches of the Company was approved and continued.

In 1871 it is reported: "We have continued to acquire interests in coal lands situated in our various regions."

In 1872, after detailing the purchase for $2,000,000 of 5,800 acres of land having upon it ten collieries, the report of the Company declares that, "should there be a corresponding increase for a year or two more, the total

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consumption will so nearly equal the full capacity of the mines for production as to *render unnecessary all attempts to regulate or control the trade.*"

After reciting that a contract had been entered into granting to the Delaware, Susquehanna, & Schuylkill Railroad Company trackage rights to tidewater, the report of the Railroad Company for 1894 continues, saying that there is thereby assured to the Company "an important traffic . . . for which several outlets existed, and which had been in contention for some time previous. It also removes an incentive to the construction of further new lines into the territory tributary to the Lehigh Valley system."

Although in 1875 it caused the Coal Company (hereinafter discussed) to be organized for the purpose of taking title to coal lands then owned or which might thereafter be purchased, and although the Anti-trust Law was enacted in 1890, nevertheless, the Railroad Company continued its policy of purchasing for control, and from time to time it acquired and took in its own name the title to

extensive tracts of coal lands and to stocks in coal companies. Thus, in 1885 it acquired the entire capital stock of the Wyoming Valley Coal Company, the owner of 1,657 acres of anthracite land; in 1900 it acquired the entire capital stock of the Westwood Coal Company, a considerable owner of anthracite land; in 1901 it acquired the entire capital stock of the Connell Coal Company; and in the same year the entire capital stock of the Seneca Coal Company, the owner of 1,308 acres of anthracite land.

In the years prior to 1905 the Railroad Company made a number of other purchases of coal land, but in that year it made its largest single and most significant purchase, when it acquired, for the sum of $17,440,000, all of the capital stock of Coxe Brothers & Company, Inc. This company was the largest independent coal operator then

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on the line of the Railroad Company, and its production for 1905 exceeded 1,100,000 tons. It not only owned extensive areas of coal land, on which were located eight collieries, but it was also owner of all of the capital stock of the Delaware, Susquehanna, & Schuylkill Railroad Company, which owned 50 miles of railway which served other large independent mines in addition to those of Coxe Brothers & Company, Inc. This railroad had connections with the Reading, Pennsylvania, and New Jersey Central lines, which were taken up or fell into disuse when the control of it passed to the defendant Lehigh Valley Railroad Company. The Railroad Company continued to own all the capital stock of Coxe Brothers & Company, Inc., to the time the testimony was taken in this suit, and it is admitted that that company then held in fee or under long lease 36,490 acres of land in the anthracite field, 7,169 acres of which were known to contain anthracite coal. This purchase was confessedly made to prevent the diversion of traffic to other lines, and, while the company was

continued in form as a separate corporation, the officers and directors of the Coal Company were made its officers and directors, and in June following the year of the purchase its directors by resolution provided that the net earnings of the company should be paid to the Railroad Company without the formality of declaring a dividend, and this practice continued until 1911.

Thus, this important coal company and its railroad became a mere coal-producing and transporting agency of the defendant Railroad Company.

In 1874 the state of Pennsylvania adopted a constitution containing the provision that

"No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works." (Pa. Const. 1874, art. 17, § 5.)

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Prior to this time the Railroad Company had been a large owner, miner, shipper, and seller, as well as carrier of anthracite coal, and, as if for the purpose of complying with the new constitution of the state from which it derived its franchise, it caused the Lehigh Valley Coal Company to be created in 1875 by the consolidation of two smaller companies. This company, which was organized for the purpose of taking title to coal lands and stocks in coal companies, then owned or thereafter to be acquired by the Railroad Company, and to conduct the business of mining, shipping, and selling coal, had an original capital of $650,000, which was afterwards increased to $1,965,000, all of which has been owned by the Railroad Company from the beginning. Coal-producing lands and stocks in various coal companies were purchased from time to time by the Railroad Company, directly or through advances of money to the new coal company for that purpose, title thereto

being taken in the Coal Company; with the result: that when this suit was commenced that Company admitted itself to be the owner of 54,229 acres of land in the anthracite-producing regions, of which 24,748 acres were located along the lines of the Railroad Company; that the funded debt of the company had become $20,000,000; and that the value of its assets amounted to about $35,000,000. Eight and one-half million tons of anthracite, of the thirteen millions carried by the Railroad Company in 1913, were produced by this Coal Company and by Coxe Brothers & Company, Inc., owned, as we have seen, by the Railroad Company. The combined acreage of lands owned by the Coal Company and by Coxe Brothers & Company, Inc., is admitted to be 90,719 acres, of which 61,238 acres are located along the lines of the Railroad Company. The annual reports of the Coal Company show that in 1903 56.77 per cent of the coal transported over the railroad was produced by the Coal Company and its affiliated companies; that in 1906 the percentage produced and purchased was 85.25

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per cent of that transported; and in 1907 it was 87.11 per cent. The Interstate Commerce Commission found that in 1908 the company controlled 95 per cent of the tonnage moving over its line to tidewater. Meeker v. Lehigh Valley R. Co. 21 Inters. Com. Rep. 129, 154.

The Railroad Company and the Coal Company had usually the same president, secretary, treasurer, and auditor, and the latter company admits, as it must, that the Railroad Company, "as the owner of stock, controls and long since has been controlling, the election of its directors." The Railroad Company constantly advanced large sums of money to the Coal Company for the purchase of property and for operating capital. The total of these advances to the year 1892 exceeded $15,500,000 which amount, however, was reduced by operations of the Coal Company to $11,500,000. The Coal Company never paid any dividends,

its earnings being frankly treated as those of the Railroad Company, and the financial and other relations between the two companies were so intimate and interlaced that in argument it is admitted that, "in the last analysis, the assets of the Coal Company are the assets of the Railroad Company."

There is much more in the record to like effect, but sufficient has been stated to make it clear beyond controversy that the Coal Company was organized and conducted as a mere agency or instrumentality of the Railroad Company, for the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands and in the conducting of coal mining, shipping, and selling operations by the Railroad Company, and that the policy of purchasing and leasing coal lands tributary to its lines for the purpose of controlling interstate trade and commerce in anthracite coal, and of preventing and suppressing competition therein, was deliberately entered upon by the Railroad Company, and, in combination with its agency, the Coal Company, was consistently pursued, with increasing

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energy and scope after the passage of the Anti-trust Act, until the commencement of this suit, unless these purposes and results, in point of law, were modified and cured by the organization in 1912 of the Sales Company, and by the functions which it performed,—which remain to be considered.

On January 11, 1912, the board of directors of the Railroad Company requested the directors of the Coal Company "to consider the propriety of organizing a Sales Company" and of entering into a contract with it when formed "for a limited time" for the purchase and sale by it "of the coal mined, purchased, and owned by the Coal Company." The board also requested that the privilege of subscribing for the stock of the new company be extended,

"not to the Railroad Company, but, prorata, to the common and preferred stockholders of the Railroad Company." As if anticipating compliance with its request on the part of the Coal Company, of which it owned all of the stock, the officers of the Railroad Company were authorized at the same meeting of the board to take such action and make such conveyances as might be deemed necessary or advantageous in perfecting the sales arrangement with the new company to be organized; and, in aid of the enterprise, a dividend of 10 per cent on the stock of the Railroad Company was declared, payable on February 26, which amounted in the aggregate to $6,060,800.

On the same day the board of directors of the Coal Company resolved: that the new Sales Company should be organized, as requested by the Railroad Company, with a capital stock of $10,000,000, but that only $6,060,800 of it should be issued; that when the new company was formed the Coal Company should, "if possible," contract with it for a "limited time" for the sale to it "of all coal which shall be mined, purchased, owned, or acquired" by the Coal Company during the term of the proposed contract, so that the title to such coal should vest in the Sales Company

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"before the transportation thereof shall be commenced."

The privilege of subscription to the capital stock of the new company was restricted to the stockholders of the Railroad Company.

The Sales Company was promptly organized, and the minutes of the company show that slightly less then 97 per cent of the stock was subscribed for by stockholders of the Railroad Company.

The Sales Company had seven directors. One of these, J. W. Skeele, who was also elected president, had been general sales agent of the Coal Company; another, W. R.

Evans, had been assistant to the general sales agent of the Coal Company; another, L. D. Smith, was a director of the Railroad Company, and a fourth, Paul Moore, was a son of a large stockholder in the Railroad Company. The vice president of the Company, G. N. Wilson, had been general auditor of the Railroad Company, and the treasurer, W. J. Burton, had been employed as assistant secretary of the Coal Company.

It is too plain for discussion that, with a company thus organized and officered, the making of a contract by the Coal Company for the sale of all of its coal to the Sales Company was, in substance and effect, making a contract with itself, the terms of which it could determine in its discretion.

Immediately after the organization of the Sales Company, the anticipated contract between that company and the Coal Company for the purchase of all the coal which the latter might mine or purchase was entered into and bears date March 1, 1912. This contract was to continue for ten years unless terminated in the manner which it provides for, and its terms are so nearly identical with the earlier Lackawanna contract, which is considered in United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873, that the judge who tried this case below, with entire propriety, says that the differences be-

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tween the two are "wholly unsubstantial" (225 Fed. 401). This court held that the contract in the Lackawanna Case was void because violative of the provisions of the Anti-trust Act and the commodities clause of the Act to Regulate Commerce.

The discussion of the Lackawanna contract is so full and satisfactory in 238 U. S. 516, that it would not serve any useful purpose to comment in detail upon the contract which we have here. It will suffice to say that the pro-

visions of the Lackawanna contract, which were clearly determinative of the former decision by this court, are plainly the same in substance, and almost exactly the same in form, as those in the contract we are considering, viz.: The agreement of the Coal Company (1) to sell and of the Sales Company to buy all of the coal mined by the Coal Company from lands owned or leased by it, together with all coal which it might purchase; (2) that the prices to be paid for the more important grades of coal shall be 65 per cent of the New York prices,—the two contracts are in precisely the same words in this respect; (3) that, with negligible exceptions, the Sales Company is to sell no other coal, for itself or for any other, than that "purchased" from the Coal Company; (4) that the Coal Company shall lease all of its facilities, structures, and trestles to the Sales Company; (5) that either party shall have the right to abrogate and cancel the contract upon giving to the other six months' notice of its desire so to do; (6) that the Sales Company shall not buy coal except from the Coal Company—a provision which excludes the Sales Company, potentially a strong competitor, from the market. The Coal Company purchased 2,960,000 tons of coal in 1911, in addition to that which it mined.

These are the contract provisions which led this court, in the former case, to hold that a corporation organized and circumstanced as is the Sales Company which we have

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here—subject to be stripped at the will of another of all of its business and of all its facilities for carrying on the business for which it was incorporated—was neither an "independent buyer nor a free agent."

Being entirely satisfied with the reasoning upon which the Lackawanna Case proceeds to its conclusion, we hold now, as it was there in principle held: that the purchase in form by the Sales Company did not so dissociate the Rail-

road Company from the transportation of coal in which it was interested as to meet the requirements of the law; that the contract, nominally of purchase, was so calculated to restrain interstate trade as to be obnoxious to the Anti-trust Act of Congress, and that for this reason it is unlawful and void.

It will be of service in determining the purposes of the defendant Railroad Company with its corporate subsidiaries in the activities thus discussed, to recall the history of the defendant Railroad Company, as it appears in the decisions of this and of other courts.

In 1892 the defendant Railroad Company and the Central Railroad Company of New Jersey leased their lines of railway for the term of 999 years to the Reading Railroad Company, a parallel competing carrier, extensively engaged in mining, marketing, and selling anthracite coal. This combination, had it become operative, would have gone far toward monopolizing the interstate transportation and trade in anthracite coal of our entire country; but all operations under the lease of the Central Railroad Company of New Jersey were enjoined by the New Jersey courts, for the reason that it was deemed to be in restraint of trade, against public policy, and calculated to partially destroy competition in the production and sale of anthracite coal,—a staple commodity of the state. Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964. Thereupon the lease of defendant's property was abandoned and surrendered.

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Six years later, in 1898, the defendant Railroad Company combined with the Reading and four other railway companies to contribute a large sum of money, which was successfully used to prevent the construction of a projected, competing line of railroad from the anthracite fields to tidewater. Of this enterprise this court said: "We are

in entire accord with the view of the court below in holding . . . that the transaction involved a concerted scheme to combine for the purpose of restraining commerce among the states, in plain violation of the Act of Congress of July 2, 1890. United States v. Reading Co. 226 U. S. 324, 355, 57 L. ed. 243, 253, 33 Sup. Ct. Rep. 90."

Four years later, in 1902, the defendant Railroad Company united with the Reading and four other anthracite carriers in a combination to control the entire tonnage of coal produced by independent operators along the lines of their respective railways. The device this time resorted to was a contract to purchase all the coal produced by independent mines, then opened or which might thereafter be opened by the vendors, and to pay therefor 65 per cent of the market price prevailing at tidewater points at New York, to be computed from month to month by an arbitrator to be selected by agreement. These contracts were elaborately considered and unsparingly condemned by this court in the case which is cited, and the conclusion reached was that the defendants in that case had unlawfully combined, by and through the instrumentality of the 65 per cent contract, for the purpose of controlling the sale at tidewater of the independent output of anthracite coal. The contracts were declared to be unlawful and were ordered canceled. 226 U. S. 370, 371, 373.

In 1911, in Meeker & Co. v. Lehigh Valley R. Co. 21 Inters. Com. Rep. 129, 154, 163, the Interstate Commerce Commission held that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company was one of bookkeeping; that the Railroad Company "had monopolized the coal field served

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by it," and that it had been guilty of unjust discrimination and of charging unreasonable rates, for which reparation was awarded. 23 Inters. Com. Rep. 480. This decision was

sustained by this court in Meeker & Co. v. Lehigh Valley R. Co. 236 U. S. 412, 59 L. ed. 644, P.U.R. 1915D, 1072, 35 Sup. Ct. Rep. 328. Ann. Cas. 1916B, 691.

And yet again, in 1915, the Interstate Commerce Commission, after an investigation extending over three years, in which the defendant Railroad Company and all other initial carriers of anthracite were parties, held that the rates charged by the defendant and other carriers to tidewater and to certain interior points were unreasonable; that by trackage and other arrangements they had extended advantages to their subsidiary coal companies, to the prejudice of other shippers; and that concessions as obnoxious as "direct cash rebates" had been made to such coal companies. Re Rates for Transportation of Anthracite Coal, 35 Inters. Com. Rep. 220.

This history of almost twenty-five years casts an illuminating light upon the intent and purpose with which the combination here assailed was formed and continued. Standard Oil Co. v. United States, 221 U. S. 1, 76, 55 L. ed. 619, 65[illegible] 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

Without further comment, this discussion of the record requires us to conclude that it is clearly established that, prior to the enactment of the Anti-trust Act, the Railroad Company, in combination with its Coal Company subsidiary, deliberately entered upon a policy of making extensive purchases of anthracite land tributary to the Railroad Company's lines, for the purpose of controlling the mining, transportation, and sale of coal to be obtained therefrom, and of preventing and suppressing competition, especially in the transportation and sale of such coal in interstate commerce, and that this policy was continued after the passage of the Anti-trust Act with increasing energy and tenacity of purpose, with the result that a prac-

tical monopoly was attained of the transportation and sale of anthracite coal derived from such lands.

The area of the anthracite territory is so restricted that to thus obtain control of the supply of such coal on a great system of railway (the amount transported exceeded one fifth of the entire production of the country for the year before this suit was commenced) by a combination of corporations, such as we have here, and by such methods as we have seen were employed, effected a restraint of trade or commerce among the several states, and constituted an attempt to monopolize and an actual monopolization of a part of such trade or commerce in anthracite coal, clearly within the meaning of the first and second sections of the Anti-trust Act as they have frequently been interpreted by this court. Standard Oil Co. v. United States, 221 U. S. 1, 61, 55 L. ed. 619, 645 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 392, 393, 50 L. ed. 515, 521, 532, 26 Sup. Ct. Rep. 272; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 12766, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 533, 59 L. ed. 1438, 1445, 35 Sup. Ct. Rep. 873; United States v. Reading Co. 253 U. S. 26, 64 L. ed. 760, 40 Sup. Ct. Rep. 425.

Since we have also found that the contract between the Coal Company and the Sales Company was a mere device to evade the commodities clause of the Interstate Commerce Act, and therefore void, it results that the decree of the District Court must be reversed and the case remanded, with instructions to enter a decree, in conformity with this opinion, dissolving the combination effected through the intercorporate relations subsisting between the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company, Coxe Brothers & Company, Inc., the Delaware, Sus-

quehanna, & Schuylkill Railroad Company, and the Lehigh Valley Sales Company, with such provisions for the disposition of all shares of stock, bonds, or other evidences of indebtedness, and of all property of any character, of any

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one of said companies owned or in any manner controlled by any other of them, as may be necessary to establish their entire independence of and from each other. The contract of March 1, 1912, between the Coal Company and the Sales Company, must be decreed to be void, and all contract relations between the two companies enjoined which would serve in any manner to render the Sales Company not entirely free to extend its business of buying and selling coal where and from and to whom it chooses, with entire freedom and independence, so that it may in effect, as well as in form, become an independent dealer in coal, and free to act in competition, if it desires, with the defendant Coal Company or Railroad Company.

As to the New York & Middle Coal Field Railroad & Coal Company, the G. B. Markle Company, the Girard Trust Company, and the individual defendants, the bill must be dismissed.

Reversed and remanded with instructions to enter a decree in conformity with this opinion.

The **Chief Justice** and Mr. Justice **Holmes**, while, if they exercised an independent judgment, would be for affirmance, nevertheless concur in the conclusion now announced by the court because they consider that they are so constrained to do in virtue of the controlling effect of the previous decisions in the Lackawanna and Reading Cases cited in the opinion of the court.

Mr. Justice **McReynolds** and Mr. Justice **Brandeis** did not take part in the consideration and decision of this case.

UNITED STATES v. ELGIN, JOLIET & EASTERN RY. CO.

298 U.S. 492, 56 Sup. Ct. Rep. 841, 80 L.ed. 1300 (1936)

UNITED STATES *v.* ELGIN, JOLIET & EASTERN RAILWAY CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 660. Argued April 8, 9, 1936.—Decided May 25, 1936.

1. Legislative approval of a construction placed by this Court upon an Act of Congress is evidenced by failure to amend. P. 500.

2. The mere fact that all the shares of a railroad corporation and all the shares of a manufacturing corporation are owned by a holding company does not make transportation by the one of the products of the other unlawful under the commodities clause of the Interstate Commerce Act. P. 499.

United States v. *Reading Co.*, 253 U. S. 26, distinguished. Existence of power in the holding company to control the railway company, not exercised in the present case, did not make the railway company the *alter ego* of the holding company.

11 F. Supp. 435, affirmed.

APPEAL from a decree of the District Court of three judges, which dismissed a bill brought by the United States to enjoin the Railway Company from hauling the products of certain manufacturing companies in alleged violation of the commodities clause of the Interstate Commerce Act.

[Appearances and summaries of arguments omitted.]

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellee, incorporated under the laws of Illinois and Indiana, has been an interstate common carrier by railroad since 1884. It operates the "Chicago Outer Belt Line," 195 miles long, which runs from a point on Lake Michigan, north of Chicago, around that city to South Chicago, Gary and Porter, south and east. This line connects and interchanges freight with every railroad entering Chicago and serves many industrial plants. Among them are certain large producers of steel and steel products, operated by corporations, sometimes called "Subsidiaries," all of whose shares belong to the United States Steel Corporation: Illinois Steel Company, American Bridge Company, American Sheet and Tin Plate Company, National Tube Company, American Steel and Wire Company, and Cyclone Fence Company. Transportation of products—raw, semi-finished and finished—to and from and amongst the plants of the six constitutes 60 per cent of appellee's business. It files tariffs and complies generally with the Interstate Commerce Act and Commission regulations. During the years 1926-1930, its annual operating revenue exceeded $20,000,000.

The United States Steel Corporation, a holding—non-operating—corporation organized in 1901, then acquired and has ever since held, all shares of appellee, also all those of the producing companies.

By an Original Bill filed 1930 (amended 1932), the United States instituted this proceeding against appellee, sole defendant, in the District Court, Northern District of

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Illinois. They alleged that by transporting articles manufactured, mined, produced, or owned by subsidiaries of the United States Steel Corporation, appellee violated the Commodities Clause of the Interstate Commerce Act, Act

June 29, 1906, c. 3591, 34 Stat. 584, 585; U. S. C., Title 49, § 1 (8), copied in the margin,[1] and asked for an injunction prohibiting such action.

After answer, voluminous evidence and trial, the court below made findings of fact and announced an opinion. It concluded—

Mere ownership by the United States Steel Corporation of all shares of both appellee and a producing subsidiary was not enough to show that products made or owned by the latter were articles or commodities produced by the former, or under its authority, or which it owned in whole or in part, or in which it had an interest, direct or indirect, and was forbidden to transport by the Commodities Clause.

Also, "no single piece of evidence taken alone, nor all taken together and considered as a whole warrant the inference that the defendant and the producing and manufacturing subsidiaries are under the domination, control, direction, and management of the Steel Corporation, in the sense that the defendant and the other subsidiaries are mere departments, branches, adjuncts, and instrumentalities of the Steel Corporation. The evidence fails to show that the defendant has any interest, direct or indirect,"

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legal or equitable, in the articles or commodities which it transports for the subsidiaries of the Steel Corporation."

A final decree dismissed the Bill for want of equity and the cause is here by direct appeal (U.S.C., Title 49, § 45).

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[1] From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Both conclusions are challenged and we are asked to reverse the decree and grant relief as originally prayed.

The Commodities Clause became part of the Interstate Commerce Act in 1906, U. S. C., Title 49, § 1 (8), and has remained without material change. It was first interpreted here in *United States* v. *Delaware & Hudson Co.*, (1909) 213 U. S. 366, 415, where, by Mr. Justice White, the Court said:

> "We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

This construction has been accepted and followed in the later cases. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 266; *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 526; *United States* v. *Reading Co.*, 253 U. S. 26, 62; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, 266.

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Through Mr. Justice Lamar, the court said, in *United States* v. *Delaware, L. & W. R. Co.*—

> "But mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used

as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. The amendment, however, was voted down; and, in the light of that indication of congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414. For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company."

Notwithstanding the intent imputed to Congress by this opinion, announced in 1915, no amendment has been made to the Commodities Clause. We must, therefore, conclude that the interpretation of the Act then accepted has legislative approval.

It is now insisted that, although a railroad company may own the shares of a producing company and yet transport the latter's products without violating the Commodities Clause, if a holding company acquires the shares of both carrier and producer, then such transportation becomes illegal. The theory is that the subsidiaries of holding companies are necessarily no more than parts of it. Evidently, this is entirely out of harmony with the reasoning advanced to support the construction of the Act adopted in

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United States v. *Delaware & Hudson Co., supra;* also in direct conflict with the above quoted language from *United States* v. *Delaware, L. & W. R. Co.*

Considering former rulings, it is impossible for us now to declare as matter of law that every company all of whose shares are owned by a holding company necessarily becomes an agent, instrumentality, or department of the latter. Whether such intimate relation exists is a question of fact to be determined upon evidence. . .

Counsel for appellants submit that the record compels the inference of fact that appellee and the subsidiary producing companies are but departments of the United States Steel Corporation; and that, as in *United States* v. *Reading Co., supra*, we should find the carrier is violating the Commodities Clause. It is not claimed that this inference derives from any single fact, but out of the mass. The following portion of the opinion in *United States* v. *Reading Company* is heavily relied upon—

> "But the question which we have presented by this branch of the case [alleged violation of the Commodities Clause] is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act."

And, having regard to this, they say—"The affirmative answer given in the *Reading* case is controlling here."

Obviously what was there stated cannot be taken as declaration of an abstract principle; it had application

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to the relevant circumstances. Later (pp. 61-62) in the same opinion the essential ones are revealed—

"All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same 'authority' that operated the Reading Railway lines."

If the evidence here showed the relationship between the holding company, the carrier, and the producing companies to be substantially as in the *Reading* case, that opinion well might be regarded as controlling. But there is material difference and we must look elsewhere for guidance.

Properly to appraise the situation now presented particular attention must be given to the following facts. All shares of appellee and the subsidiary producing companies have been owned by the United States Steel Corporation since 1901. The railroad has been under constant supervision by the Interstate Commerce Commission. In The Matter of Alleged Rebates to the United States Steel Corporation, 36 I. C. C. 557, (1915). It functions as a separate corporate carrier under immediate control

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of its own directors, no one of whom is on the board of the holding company; it owns all necessary equipment, makes its own contracts, manages its own finances, serves its patrons without discrimination and apparently to their satisfaction. The lawfulness of the relationship between

the holding company and subsidiaries was challenged in *United States* v. *United States Steel Corp.*, decided here in 1920, 251 U. S. 417. After long and through investigation and consideration, this court held the Anti-trust Act was not being violated. The present proceeding is one to prevent probable future unlawful conduct and not to punish acts long since completed, however reprehensible. "Our consideration should be of not what the Corporation had power to do or did, but what it has now power to do and is doing." *United States* v. *United States Steel Corp., supra,* p. 444.

The court below made definite findings of fact and upon them reached the conclusions stated above. Although criticized, and notwithstanding certain isolated acts may indicate undue control over the carrier at their dates, we think that the findings are essentially correct and support the decree. Instances of participation in the affairs of the appellee by the officers of the United States Steel Corporation, stressed by counsel, are relatively few; a material part of them occurred years ago—some of the more important in 1909. They are not adequate to support the claim that appellee must be regarded as the *alter ego* of its sole stockholder. The mere power to control, the possibility of initiating unlawful conditions, is not enough, as clearly pointed out in *United States* v. *Delaware & Hudson Co., supra.* That a stockholder should show concern about the company's affairs, ask for reports, sometimes consult with its officers, give advice and even

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object to proposed action is but the natural outcome of a relationship not inhibited by the Commodities Clause.

We find no adequate reason for disapproving the challenged decree and it must be

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed.

The language of the commodities clause, read in the light of its legislative history, can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier, which experience had shown are likely to occur when a single business interest occupies the inconsistent position of carrier and shipper. See *United States* v. *Reading Co.*, 253 U. S. 26, 60, 61. Before the enactment of the commodities clause, Congress, by sweeping prohibitions, had made unlawful every form of rebate to shippers and every form of discrimination in carrier rates, service and facilities, injurious to shippers or the public. By the Sherman Act it had forbidden combinations in restraint of interstate commerce. But it did not stop there. The commodities clause was aimed, not at the practices of railroads already penalized, but at the suppression of the power and the favorable opportunity, inseparable from actual control of both shipper and carrier by the same interest, to engage in practices already forbidden and others inimical to the performance of carrier duties to the public. See *Delaware, L. & W. R. Co.* v. *United States*, 231 U. S. 363, 370; *United States v. Reading Co., supra*

It is not denied that the "indirect" interest of the carrier in the commodity transported, at which the statute strikes, may be effected through the instrumentality of a

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holding company which owns the stock, both of the carrier and the company which manufactures and ships the commodity. This was definitely established by the decision in *United States* v. *Reading Co., supra*, where it was held that the power of control through holding

company ownership of all the capital stock both of an interstate rail carrier and a shipper producing the commodity carried, plus an active exercise of that control, are enough to make the transportation unlawful.

While it was recognized, as had been held in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, that mere ownership, by a carrier or a shipper, of the stock of the other, does not call the statute into operation, the Court was careful to point out, pp. 62, 63, that "where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent or instrumentality or department of another company, the courts will look through the forms to the reality of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require." Domination in fact by a holding company both of the rail carrier and the producing shipper of commodities, in addition to its legal power to dominate them, is enough to bring the carrier within the prohibition of the commodities clause.

The only question for our decision is whether the complete power of the United States Steel Corporation, through stock ownership, to dominate both appellee and certain shippers over its lines, has been exercised sufficiently to exemplify the evil which the commodities clause was intended to prevent, and so to bring appellee within its condemnation. It is of no consequence that complaints of rebates by appellee to United States Steel Corporation

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subsidiaries have not been sustained, 36 I. C. C. 557, or that the Steel Corporation and its subsidiaries have been held not to infringe the Sherman Anti-Trust Act. *United*

States v. *United States Steel Corp.*, 251 U.S. 417. The commodities clause does not forbid rebating or attempts to monopolize interstate commerce, which are dealt with by other statutes. It is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest, through the exercise of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult.

It is not important, as the court below thought, that in the relations between the Steel Corporation and its subsidiaries "there was a scrupulous recognition of the separate entities," or that all transactions between them were "in the form of transactions and communications between two separate and distinct corporations," or that the business and accounts of each subsidiary "were kept separate and distinct" from those of others. Nor is it of any moment, as this Court seems to imply, that the affiliates do not have the same officers and directors, and that some years ago they abandoned the practice of maintaining interlocking directorates.

Those familiar with present day methods of corporate control will not be so naive as to suppose that the complete domination in fact of its subsidiaries by a holding company owning all their stock is in any way inconsistent with scrupulous recognition of their separate corporate entities, or with the maintenance of separate accounts and distinct personnels of officers and directors. Every holding company presupposes a relationship between it and a distinct corporate entity and its power to control the

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latter. Where the issue is whether that power has been exercised, "courts will look through the forms to the realities of the relation between the companies as if the

corporate agencies did not exist." Hence we are presently concerned with what is in fact done in the Steel Corporation's exercise of its power to control, not with the particular legal forms or methods under cover of which control may in fact be effected. And since we must look to its acts of control, in addition to its power acquired by stock ownership, as the decisive test, we must scrutinize what has occurred in the past as the best indication of the manner and extent of the use which may be made of the power in the future.

In appraising the Steel Corporation's acts of control over the appellee, it is of significance that the dominant interest in the inter-company relationship, unlike that in the earlier cases brought before the Court, is that of production, and not transportation. Appellee, although a common carrier, subject to public duties and responsibilities, is, in its relation to the Steel Corporation and its subsidiaries, but an appanage to their vast steel producing business. While the commodities clause makes no distinction between the one type of domination and the other, such control of a railroad is far more menacing to the public and to rival producers than is domination of producer interests by a carrier. When the carrier interest predominates, extension of its transportation facilities beyond the demands of its producing affiliates, and even to their competitors, with resulting benefit to the public, may well ensue. But where the producing interest is dominant, and the carrier is chiefly engaged in transporting the commodities of producing affiliates, restricted or indifferent service to competing producers and to the public, tardy or inadequate extension of facilities, discrimination in furnishing service and facilities, are dangers especially to be anticipated.

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In such a relationship, control of carrier capital accumulation, expansion and expenditure, is a peculiarly con-

venient and effective means of subordinating carrier public service to the interests of production, by restriction of carrier expansion which would benefit the public and competing producers, or by allowing it only under discriminatory conditions. It is with these general considerations in mind, especially pertinent to the present case, that its facts should be examined.

Since its formation in 1901 the Steel Corporation has owned all the capital stock of the appellee railroad and of the Illinois Steel Company, a manufacturing company which appellee serves. Through lease, in 1909, of the Chicago, Lake Shore and Eastern Railway line, and the acquisition of appurtenant trackage rights over another line, appellee secured and maintains direct transportation facilities between the Illinois Steel Company and mines and quarries, all subsidiaries of the Steel Corporation. Sixty per cent. of appellee's tonnage is furnished by Steel Corporation subsidiaries.

Although the Steel Corporation is exclusively a holding and not an operating company, its by-laws defining the president's duties provide that he "shall have general charge of the business of the corporation relating to manufacturing, mining and transportation." The record shows that this authority is exercised by close and constant supervision over the business and affairs of Steel Corporation subsidiaries; not through the formal proceedings of stockholders and directors meetings, but through conferences and correspondence taking place directly between the officers of the Steel Corporation and those of its subsidiaries.

From 1901 to 1920 there were on appellee's board of directors never less than four officers or directors of the Steel Corporation, selected from its most important officers. Since 1920 the appellee's board of directors has

been selected by appellee's president and elected by him acting as proxy for the Steel Corporation. He has likewise selected the officers, who have been elected by the Board at his suggestion. The record is replete with evidence, chiefly correspondence, showing the complete subservience of appellee's president to the officers of the Steel Corporation in matters of corporate policy. The subservience of appellee's board of directors to its president, and through him in turn to the Steel Corporation, is exemplified by appellee's settled practice from 1910 until the time of suit of entering into contracts without any previous approval by its board of directors. At its annual meeting of directors the contracts which have been previously entered into, and often have already been performed, are ratified and confirmed. This procedure was followed with respect to all contracts, some 2,313 in number, executed on behalf of appellee between 1910 and 1933.

Appellee's fiscal policy has for many years been dominated and rigidly controlled by the Steel Corporation. Dividends have been habitually declared and the amount of them fixed only after securing, by correspondence, the consent and approval of the officers of the Steel Corporation. The Steel Corporation draws to itself the surplus funds of its subsidiaries, including appellee, which are deposited with it, for its own use, often upon its specific request or demand, and at a rate of interest which it fixes. These funds are withdrawn by draft of the subsidiary, payable only upon acceptance by the Steel Corporation, and customarily upon notice given in advance. From 1920 to 1933 appellee's aggregate deposits with the Steel Corporation were $79,000,000, of which $32,000,000 were made at the request or demand of the Steel Corporation.

Since its formation the Steel Corporation has maintained under its direction and control a clearance account, by which monthly settlement is made of inter-company

accounts among its various subsidiaries. All of appellee's settlements of such accounts, except freight charges and traffic claims, are cleared through this account. The account is managed by the controller of the Steel Corporation. Interest is charged or allowed on balances due in the account at a rate of interest fixed by the treasurer of the Steel Corporation. Terms of settlement are controlled by it and not by free bargaining of debtor and creditor.

By direction of the finance committee of the Steel Corporation, its subsidiaries, including appellee, are required to obtain in advance the approval of the committee of all expenditures for capital account and improvements in excess of a specified amount. From 1920 to 1932 the limit was $10,000, since which it has been $5,000. Since 1908 the officers of the Steel Corporation have issued from time to time, to all its subsidiaries, instructions outlining in detail the rules and procedure governing their application to the Steel Corporation for its approval of their expenditures for improvements. This requirement was not perfunctory. Failure to secure from the officers of the Steel Corporation, in advance, the approval of capital expenditures, brought from them by letter or telegram swift reminder of the neglect. Requests for approval of proposed expenditures have been the occasion for careful inquiry by the officers of the Steel Corporation as to their necessity and propriety. In recent years approximately 70 per cent. of appellee's total capital expenditures have been of the class requiring consent by the Steel Corporation.* Included

* Out of an annual average capital expenditure by appellate of approximately $900,000, during each of the years from 1926 to 1930 inclusive, an average of over $600,000 annually required the prior approval of the Steel Corporation. In 1930, appellee made capital expenditures of $1,910,755, of which $1,315,773 required the approval of the Steel Corporation. Appellee's total capital expenditures from 1926 to 1930 amounted to $4,597,925, of which $3,153,817 required such approval.

were items directly affecting appellee's transportation

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service, such as the cost of rolling stock, procuring an adequate water supply for its engines, improvement of its right-of-way, and additional yard facilities.

With such minute and continuous control of capital outlays of appellee by an organization primarily interested in production rather than common carrier service, it is not surprising that the only expansion of appellee during the period of control has been its lease of the line of the Chicago, Lake Shore and Eastern Railway, a subsidiary of a Steel Corporation producing affiliate, the Illinois Steel Company, which it served almost exclusively, and the acquisition through this lease of a trackage privilege over the Chicago & Eastern Illinois Railroad, restricted to the hauling of products of producing subsidiaries of the Steel Corporation—an arrangement by which appellee raised its tonnage from subsidiaries of the Steel Corporation from 25 per cent to 60 per cent.

It was the chairman of the board of the Steel Corporation, not the officers of appellee, who had the deciding voice in determining whether the lease should be taken and who assumed active control of the negotiations for its acquisition. Again, in 1920, when the trackage agreement was subject to cancellation by reason of the receivership of the Chicago & Eastern Illinois, it was the chairman of the board of the Steel Corporation who actively controlled the successful negotiation for a continuance of the agreement.

The record discloses many other forms of actual control of the business and affairs of appellee by the Steel Corporation which it is unnecessary to detail. It is enough that those mentioned, when examined in their setting, show with convincing force that the appellee railroad is in fact obedient to the dominating control of producers

of commodities which it transports. In every instance when the Steel Corporation has conceived that it had any

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interest to subserve, appellee has willingly done its bidding. In none has there been any indication of a disposition to pursue any policy not at least tacitly approved by the Steel Corporation. The active and continuous control over appellee's finances and expenditures is alone sufficient to create a continuing danger of neglect and abuse of appellee's carrier duties in favor of the dominating production and shipping interest, a temptation and an opportunity which it was the purpose of the commodities clause to forestall. In addition, the Steel Corporation has exerted that power, in the acquisition of the Lake Shore lease and its appurtenant trackage rights, to secure special advantages for its producing subsidiaries. The trackage rights extend only to hauling their own product, not that of their rivals.

This relationship passes far beyond that which is normal between a railroad and its stockholders and establishes a control over appellee's policy as complete as though it were but a department of the Steel Corporation. If the commodities clause permits control such as is exhibited here, one is at a loss to say what scope remains for the operation of the statute. Whatever views may be entertained of the soundness and wisdom of the decision in *United States* v. *Delaware & Hudson Co., supra*, it neither requires nor excuses our reduction of the commodities clause to a cipher in the calculations of those who control the railroads of the country.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO concur in this opinion.

THE END

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1947.

The United States of America, Appellant, v. South Buffalo Railway Company, Bethlehem Steel Company, and Bethlehem Steel Corporation.	Appeal from the District Court of the United States for the Western District of New York.

[April 26, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

The Government, by direct appeal from the District Court,[1] invites us to reconsider and overrule the interpretation of the commodities clause of the Interstate Commerce Act [2] promulgated in *United States* v. *Elgin, Joliet and Eastern R. Co.*, 298 U. S. 492. That holding, in substance, is that the prohibition [3] against a railroad company transporting any commodity which it owns or in which it has an interest, except for its own use, does not prevent it from transporting commodities of a corpora-

[1] 49 U. S. C. § 45; 28 U. S. C. § 345.

[2] 49 U. S. C. § 1 (8).

[3] The complete text of the commodities clause provides: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

tion whose stock is wholly owned by a holding company which also owns all of the stock of the railway, unless the control of the railway is so exercised as to make it the *alter ego* of the holding company.

The present challenge to that doctrine is predicated on the following facts: Bethlehem Steel Corporation (the holding company) owns substantially all of the stocks of South Buffalo Railway Company (South Buffalo) and of Bethlehem Steel Corporation (the Steel Company). At its Lackawanna plant, near Buffalo, N. Y., the Steel Company produces steel and from it fabricates various products. These commodities are transported by the South Buffalo from the plant to the rails of trunk-line carriers. In fact, South Buffalo provides the sole terminal connection between this industry and the trunk-line railroads. It operates about 6 miles of main-line track and 81 miles of spur track, 58 miles of its trackage being on leased right-of-way within the steel plant where it connects with other trackage owned by the Steel Company itself.

While about 70% of South Buffalo revenues have been derived from the Steel Company traffic, it also renders terminal switching for 27 unrelated industries, some of considerable size. It enables all of them to ship, by direct connection, over five trunk-line systems and through interchange over seven more.

South Buffalo performs no transportation service and owns no facilities outside of the State of New York, where it operates only within the Buffalo switching district. It is classified by the Interstate Commerce Commission as an "S–1" carrier, which is defined as one engaged in "performing switching services only." It files tariffs covering switching service, both with the Interstate Commerce Commission and with the New York Public Service Commission. It does not appear to participate

with any line-haul railroad in a through interstate route or to receive a division of any joint or through rate.

In 1936 this Court decided *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492, and held that the production and transportation set-up of the United States Steel Corporation, one of Bethlehem's competitors, did not violate the commodities clause. Thereupon, Bethlehem made a study of the relations between itself, South Buffalo and the Steel Company in the light of this decision. It revised its intercorporate relationship in the next few years to comply, as it was advised, with the conditions under which this Court had found the statute inapplicable to United States Steel. It does not seem necessary to recite the complex details of intercorporate dealings before the reorganization about 1940 as this action for injunction was not begun until 1943 and the crucial question is whether there was a contemporaneous violation or a threat of violation against which the writ of the Court should be directed. Voluntarily abandoned courses of conduct are not grounds for injunction, though they may sometimes be relevant evidence of intent or similar issues.

At all times crucial to the Government's case, Bethlehem controlled the stock of both the shipper and the carrier corporations. It unquestionably had power to favor its shipping subsidiary at the expense of its carrying subsidiary, or vice versa. The first question is whether we will now hold that mere possession of the power, regardless of whether it is exercised or remains dormant, makes out a violation of the statute. This Court said in the *Elgin Case* that it does not.

It is the Government's contention that the *Elgin* decision misconstrued the Act, misunderstood its legislative history and misapplied the Court's own prior decisions. It is not necessary in the view we take of the case to

decide to what extent, if any, these contentions are correct. It is enough to say that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved. But we do not write on a clean slate. What the Court has written before is but one of a series of events, which convinces us that its overruling or modification should be left to Congress. As the Court held on our last decision day, when the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made. *Massachusetts* v. *United States*, 333 U. S. —, decided April 19, 1948. Moreover, in this case unlike the cited one, Congress has considered the alleged mistake and decided not to change it.

The Interstate Commerce Commission, after repeatedly calling the attention of Congress to the *Elgin Case* during its pendency, in 1936 reported its defeat in the litigation. Referring to commodities clause cases it said, "We recommend that Congress, in the light of facts already made available in our reports and in reports of investigations conducted by congressional committees, shall determine the appropriate limit of our jurisdiction in such cases and whether further legislation to extend that jurisdiction is necessary."[4] Congress took no action.

But its inaction has not been from inadvertence or failure to appreciate the effect of the Court's interpretation. A Bill was introduced in the Senate containing language relating to affiliates and subsidiaries calculated in effect to set aside the *Elgin* decision.[5] Section 12 of the Act as introduced read as follows:

"It shall be unlawful for any carrier by railroad *and, on and after January 1, 1941, it shall be unlawful*

[4] 50 Annual Report I. C. C. 30 (1936).

[5] S. 2009, 76th Cong., 1st Sess., March 30 (legislative day March 28) 1939.

for any carrier, other than a carrier by air, to transport, in commerce subject to this Act, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by or under the authority of such carrier *or any subsidiary, affiliate, or controlling person of such carrier,* or any such article or commodity in which such carrier, *subsidiary, affiliate, or controlling person* has any interest, direct or indirect, *legal or equitable,* except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier."

The italicized portions indicate the proposed additions which would have extended the clause to cover (1) carriers other than railroads, and (2) subsidiaries, affiliates and controlling persons.

At the beginning of hearings thereon by the Senate Committee on Interstate Commerce its chairman said that, with respect to the commodities clause, the purpose of the Bill was "To make effective the intent of Congress in prohibiting railroads, or other carriers after January 1, 1941, from transporting products not utilized in the conduct of their transportation business but in which they have an interest, direct or indirect." [6] A week later, in the course of the hearings when evidence began to be offered showing the effect the proposed clause might have on various industries, the chairman made this statement:

"Let me say this to you with reference to the commodities clause, so that there will not be a lot of time wasted on it. I am speaking for myself and not for the committee. I think the commodities clause will have to be changed; and if we are going to make such drastic changes in the commodity clause

[6] Hearings before Senate Committee on Interstate Commerce on S. 2009, 76th Cong., 1st Sess., 3 (April 3, 1939).

> as this bill would suggest, I think it ought not to be incorporated in this particular piece of legislation, but should come up as a separate piece of legislation so that we can devote considerable time and thought to that particular subject. This would so change the economic structure of a lot of industries that I think it is something that would have to have particular consideration in a separate piece of legislation."[7]

In a further discussion the Chairman added: "I might say, also, that if the commodities clause should stay in as it is at the present time it would disrupt a great many industries, and I would seriously question whether or not I wanted to attempt anything of that kind at this time, particularly in this specific piece of legislation."[8]

When the bill was reported to the Senate, the proposed change had been eliminated and the original language of the Act retained. The Committee, in reporting the bill, said, "The rewritten commodities clause was considered far too drastic and the subcommittee early decided against any change therein."[9]

The Government argues that the characterization of the rejected revised commodities clause as "too drastic" was based on the proposed extension of its terms to all common carriers and not on the proposal to include a "subsidiary, affiliate, or controlling person" of a carrier. We believe, however, that a fair reading of the legislative history leads to the conclusion that the "drastic readjustment" feared by the Committee was that expected from the application sought here by the Government, at least as much as that feared from extension of the clause to cover carriers other than railroads. If the Committee ob-

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[7] *Id.*, at 427 (April 10, 1939).

[8] *Ibid.*

[9] Senate Report No. 433, 76th Cong., 1st Sess., 15 (May 16, legislative day May 8, 1939).

jected only to extending the clause to other carriers, it would have been a simple matter to delete the short series of words which would have accomplished that change, and still leave undisturbed the more complicated provision concerning subsidiaries and affiliates, since the text of each provision is wholly disconnected from the other.

In view of the foregoing, it seems clear that when, in discussing whether or not this revised clause would have "prevented the steel company, or somebody in that position, from operating their own railroad," the Committee Chairman said "I did not intend such a result," he expressed the view which prevailed in the Committee and in the Congress.

The Government now asks us to apply the unchanged language as if Congress had adopted the proposal which it rejected as "far too drastic." The considerations which led to the suggestion that the problem presented by the Government's position would require separate legislation and particular consideration seems to us to require that the problem be left to legislation rather than to the judicial process. And the pertinent portions of the legislative history which are set out at length in the margin [10] indicate clearly, we think, that this Senate Committee responsible for S. 2009, which became the Transportation Act of 1940, deliberately refused to recommend and the Con-

[10] The extent of the consideration which the Senate Interstate Commerce Committee gave to the proposed revision of the commodities clause, is indicated by the following excerpts from Hearings on S. 2009, held from April 3 to April 14, 1939:

In opening the hearing, Senator Wheeler, Chairman, stated that, with respect to the commodities clause, the purpose of the bill was "to make effective the intent of Congress in prohibiting railroads, or other carriers after January 1, 1941, from transporting products not utilized in the conduct of their transportation business but in which they have an interest, direct or indirect."

During the testimony of the General Counsel, Association of American Railroads, the following colloquies took place:

"Senator Reed. Judge, in section 12 there is some new lan-

gress refused to legislate into the law the change we are now asked to make by judicial decision.

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guage. I have marked it 'O. K.' here. That is to cover the decisions of the Supreme Court in the *E., J. & E.* case?

Mr. Fletcher. I will get to that in just a moment. There is new language in there. . . .

Mr. Fletcher. I come now to section 12, the commodities clause, about which I would like to say a word.

It was the thought of those who drew the bill, H. R. 4862, to undertake to put into statutory form the recommendation of the Committee of Six that they ought to extend the commodities clause, which now applies only to railroads, to water carriers and motor carriers as well.

Now I think the water carrier people will object to that. . . .

. . . I think some of the steel companies have water operations of that kind. I mention that as a change in the law suggested by the draftsmen who prepared the bill, reflecting the views of the Committee of Six.

The Chairman. Judge, somebody called me on the phone the other day . . . and asked me as to whether or not in my opinion this prevented the steel company, or somebody in that position, from operating their own railroad, where they have a small railroad they are operating. *I did not intend such a result.*" (Emphasis supplied.)

Mr. Fletcher. This bill has no relation to that. One of my associates suggests, Senator, that possibly this language which I was just about to mention and which was called to my attention a few minutes ago by Senator Reed, might possibly have that effect.

Senator Reed. *I would disagree with the chairman*, if I may be so bold. *I think the commodities clause would have that effect in the bill that we are currently discussing.*" (Emphasis supplied.)

Mr. Fletcher. When I said so promptly and perhaps rashly that I did not think it did, I did not have in mind this particular amendment, which I will now mention.

Senator Reed. *I am perfectly willing that it should have that effect.*

The Chairman. *Well, I doubt that it should.* For instance, a lumber company may own some railroad.

Senator Reed. You exempt that?

Mr. Fletcher. You exempt the lumber company?

The Chairman. Yes.

Mr. Fletcher. It might not be altogether lumber.

The Chairman. *I was speaking, for instance, of some steel com-*

We could, of course, refuse to follow the *Elgin* precedent, and apply a different and more drastic rule to

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pany or some other industrial company which might own a short railroad. (Emphasis supplied.)

Senator Reed. The United States Steel Co. owns the Union Railroad Co.

The Chairman. I do not know what the Union Railroad Co. is.

Senator Reed. It is a short road.

Mr. Fletcher. I think the E. J. & E. started all this shouting.

Senator Reed. In section 12, on page 44, beginning at line 22, it reads: "or produced by or under the authority of such carrier or any subsidiary, affiliate" . . . and this is the language . . . "or controlling person of such carrier."

Mr. Fletcher. That is new, you see.

Senator Reed. That is new. I am in accord with the chairman on that language.

Mr. Fletcher. I do not know, Mr. Chairman, but I do think it is a trifle unfortunate to try to accomplish so drastic a thing in a bill of this kind, the thought of which was to reproduce existing law.

The Chairman. *I am very doubtful about it. I am afraid that it will cause such a drastic readjustment.* (Emphasis supplied.)

Mr. Fletcher. The *E. J. & E. Co.* [case] . . .

The Chairman (interposing). I am not familiar with the *E. J. & E.* case.

Mr. Fletcher (continuing) . . . brought about this suggestion here. There the United States Steel Corporation does not own the E. J. & E. directly, but through the medium of the Illinois Steel Corporation, a subsidiary of the United States Steel Co. . . . and I may get that a little confused . . .

Senator Reed (interposing). You have.

Mr. Fletcher. My recollection is that the United States Steel Corporation owns a company—you might call it a holding company—which holding company owns both the E. J. & E. and the steel corporation.

It was contended by the Government that when the E. J. & E. transported freight for the Illinois Steel Corporation they were violating the commodities clause, because either directly or indirectly the railroad owned this traffic that was being transported but the Supreme Court of the United States held not, but where you had one company or person who owned both the railroad and the com-

Bethlehem than applies to its competitor. Congress, however, in making a rule for the future, can make one of impartial application to all like situations. Limitations that are traditional upon our powers do seem not to permit us to do so.

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mercial enterprises that produced the tonnage, the transportation by the railroad of that tonnage was not equivalent to the transportation by the railroad of tonnage which it owned.

Senator Reed. Judge, you remember that Justice Stone, Justice Brandeis, and Justice Cardozo dissented from that majority opinion of the Supreme Court in the *E. J. & E.* case.

Mr. Fletcher. That is right.

Senator Reed. And Justice Stone wrote the dissenting opinion.

Mr. Fletcher. Yes.

Senator Reed. I am inclined to think that the Supreme (sic) as presently constituted, would hold with what was the minority view.

Mr. Fletcher. I would not express any opinion on that.

Senator Reed. I speak frankly, being no lawyer myself.

Mr. Fletcher. Whether that is wise or unwise, I doubt if it ought to be done in this legislation and in this bill.

Senator Reed. I thought Justice Stone wrote a more logical opinion that Justice Butler did. I think it was Justice Butler who wrote the majority opinion in that *E. J. & E.* case.

Mr. Fletcher. I think it was." [Justice McReynolds wrote the opinion of the Court.]

* * *

Later, during the testimony of Counsel for Mississippi River System Carriers' Association, the following statements concerning the commodities clause were made:

Senator Reed. ". . . . and I think we might give further consideration to that commodities clause."

Mr. Bayles. It is too drastic, also.

Senator Reed. It was probably tightened up when, which I say as a layman and therefore not in fear of being criticized, the Supreme Court of the United States made a strange decision in the *E. J. & E.* case. This was tightened to meet that E. J. & E. decision, because I think that was a strange construction of the law on the part of the Supreme Court of the United States.

Testimony by counsel for coal operators led to the following:

Whatever may be said of the *Elgin* decision, when the Committee of Congress faced the readjustments its overruling would force, and with special reference to the steel

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Senator White. What changes have been made in the commodities clause.

Mr. Norman. Very substantial ones.

The Chairman. Very substantial.

Mr. Norman. That is on page 44.

The Chairman. What we tried to do, to be frank with you, was to try to adapt it to meet the decision of the Supreme Court in the *E. J. & E.* case.

Senator Reed. I think, of course, what Mr. Norman has in mind is that it goes further than that, in that for the first time we are applying the commodities clause to water carriers.

Senator White. I understood that, but in what other respects?

Senator Reed. I think that is the only respect.

Mr. Norman. Well, no; as the Senator says, it probably would get around the Supreme Court decision in the *E. J. & E.* case, because it puts in there the words "subsidiary, affiliate, or controlling person of such carrier."

The Chairman. That is right."

* * *

A discussion of the effect on coal-industry contract carriers followed. Then:

"Mr. Norman. So that commodities clause, again, is a big one, and certainly ought to be studied before there are any changes made in it. It is loaded with dynamite so far as business is concerned.

Senator Reed. You may have one kind in mind, but there are many of them.

The Chairman. There are difficulties on that question, in my mind. Suppose we reenacted the law as it is. The question is whether the courts might say, in view of the Supreme Court's decision, "In reenacting the law, you approved the decision of the Supreme Court."

On April 10, 1939, the Chairman, in addition to the statements quoted in the body of this opinion also said:

". . . I want to say that I think it is foolish for a lot of people to come in here and waste our time and their own time in talking about that [the commodities clause] and for that reason I wanted to make it clear by that statement . . .

"As I said before, this is such a broad subject and it would un-

industry,[11] it concluded the decision should be allowed, at least for the present, to stand. We cannot ignore the considerations they found to be so persuasive, and which are equally involved in the request that we do what Congress considered and abandoned.

The relief asked of us as a court of equity is so drastic in nature as to afford an example of an "upset" in an industry owning a short line of railroad of the type referred to by the Chairman of the Interstate Commerce Committee of the Senate, who said "it is questionable whether we would want to make such a radical departure from the present system." The demand is for an injunction perpetually to enjoin and restrain South Buffalo from transporting commodities in which the Steel Company or the holding company owns an interest. There is no other rail route by which inbound raw materials or outbound products of this huge industry can reach trunk-line railroads. And the traffic that we are asked thus to prohibit yields 70% of the railroad's revenues, and if taken away would doubtless substantially increase the cost of service to the unaffiliated industries that would remain to be served. Of course, what is literally asked is probably not

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doubtedly cause a tremendous upset in many lines of business, that it is questionable whether we would want to make such a radical departure from the present system."

As pointed out in the text, when the Bill was reported to the Senate, the proposed changes in the commodities clause had been abandoned. The Committee report stated:

". . . The commodities clause, forbidding a carrier by railroad to transport any article or commodity in which it has an interest direct or indirect, with certain exceptions not very material [timber and timber products] has been retained . . ."

". . . Section 12. Commodities Clause. This provision retains the 'commodities clause' (sec. 1 (8) of the Interstate Commerce Act), now applicable only to railroads, in its present form. The rewritten commodities clause was considered far too drastic and the subcommittee early decided against any change therein."

[11] See note 10.

what is ultimately desired. To forbid the physical operation as now conducted would be needlessly damaging to both shipper and carrier. What is aimed at, we suppose, is to force such a change of financial structure as will divorce shipper interest from all transportation interest. It seems clear, however, in the light of the legislative history, that this is the kind of operation that Congress did not want to prohibit because the prohibition was thought too drastic. If an independent ownership could be found for South Buffalo, it might be desirable. But independent ownership of a dependent facility wedged in between shippers, one of whom controls 70% of its revenues, and the trunk-line railroads, is not shown to be likely. Under the Government's theory, no other shipper or group of shippers any more than Bethlehem could own the road. Nor is it clear that any evils exist or are threatened which would be eliminated if this operation were transferred to control of one of the trunk-line railroads or to a pool of them. This road, despite its shipper ownership, is bound by both federal and state law to serve all shippers without discriminations or unreasonable charges. The Commission has power to exact compliance with these duties. The argument, however, is that a situation exists which presents opportunity and temptation for abuse and for concealed evasions of duty. But to forestall possible abuses we are asked to apply a remedy which there is indication failed of congressional approval because its application to many situations would be too drastic and would do greater injury to shipper and transportation interests than could result from its withholding. In the light of the history of this clause since the *Elgin* decision and the equitable considerations involved in this case, we decline to overrule the interpretation Congress has not seen fit to set aside.

The argument is made that even accepting the *Elgin* decision the evidence here establishes that Bethlehem has

so exercised its power over South Buffalo as to reduce the railroad to a mere department of Bethlehem. The trial court found against the Government and considered that on this subject this case contains much less proof to sustain an injunction than did the *Elgin Case*. Without reciting the voluminous evidence in detail, we agree. Bethlehem, as a stockholder, of course controlled South Buffalo. It did not, however, disregard in either the legal or economic sense, the separate entity of its subsidiary or treat it as its own *alter ego*. On the contrary, it rather ostentatiously maintained the formalities of separate existence, choosing as directors several Buffalo citizens who were not interested in Bethlehem. We are not naive enough to believe that Bethlehem chose men for the posts whose interests or records left any fair probability that they would act adversely to Bethlehem in representing its interest as chief stockholder of the railroad. Nor has any instance been cited in which the best interests of the railroad would require them to do so. So long as Congress considers it inadvisable to extend the prohibition of the commodities clause to subsidiaries and affiliates, we see nothing that Bethlehem has done to incur liability for its violation. Of course, it could not expect the Commission or the courts to respect a corporate entity which Bethlehem itself disregarded; but that it has not done. The subsidiary would not have to establish its separate identity by a course of hostility to its sole stockholder or its chief customer. Its identity has been preserved in form and in substance—the substance of separate corporate existence being itself largely a matter of form. Under the *Elgin Case* and until Congress shall otherwise decide, this is sufficient.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1947.

The United States of America, Appellant, v. South Buffalo Railway Company, Bethlehem Steel Company, and Bethlehem Steel Corporation.	Appeal From the District Court of the United States for the Western District of New York.

[April 26, 1948.]

Mr. Justice Rutledge, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy join, dissenting.

This is another case where the Court saddles Congress with the load of correcting its own emasculation of a statute, by drawing from Congress' failure explicitly to overrule it the unjustified inference that Congress approves the mistake. I think that *United States* v. *Elgin, Joliet and Eastern R. Co.*, 298 U. S. 492, was decided in the teeth of the commodities clause, 49 U. S. C. § 1 (8), that it should now be overruled, and that this conclusion is dictated by the legislative history which the Court misreads, in my opinion, as giving basis for the opposite one.

The commodities clause forbids "any railroad company to transport . . : any article or commodity . . . in which it may have any interest, direct or indirect . . . ." The *Elgin* decision made the clause "in which it may have any interest, direct or indirect" to read, in effect, "in which it may have any interest, direct or indirect, unless the interest is indirectly held through 100 per cent stock ownership of another corporation and hence 100 per cent interest in that company's profits, or through some other corporate arrangement having like effects."

The simple question for decision under the statute is whether the South Buffalo Railway has an interest, "direct or indirect," in the commodities which it hauls for the affiliated Bethlehem Steel Company. Any attempt to answer by a factual inquiry into the degree of control which the Holding Company or the Steel Company has actually exercised over the railroad can only complicate a simple problem.[1] Only by the most sophisticated, or unsophisticated, process of reasoning can it be concluded that any one of the many subsidiary members of this integrated steel producing empire[2] has no interest in the operations of every other member. Particularly, the railroad has an interest in the production of the Steel Company, "for all of the profits realized from the operations of the two must find their way ultimately into [the Holding Company] treasury,—any discriminating practice which would harm the general shipper[3] would profit the Holding Company." *United States* v. *Reading Co.*, 253 U. S. 26, 61. Here a railroad and one of its customers are both wholly owned subsidiaries of the same holding

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[1] See Comment, The Commodities Clause and the Regulation of Industrial Railroads, 46 Yale L. J. 299; 36 Col. L. Rev. 1175.

[2] The Holding Company owns substantially all the stock in approximately 57 subsidiaries, including the Steel Company and the South Buffalo Railway Company. Some of these produce ore in Chile, Venezuela, Cuba and in the Upper Great Lakes regions; others control coal mines in West Virginia and Pennsylvania. Two subsidiaries operate ocean-going steamship lines, hauling raw materials to steel plants controlled by other subsidiaries. A Great Lakes shipping company owned by the Holding Company carries ore from a mining subsidiary to a producing subsidiary. Seven short-line railroads including South Buffalo, each wholly owned by the Holding Company and having common officers and directors, transport products for the various Bethlehem steel plants.

[3] The opinion of the Court seems to assume that the purpose of the commodities clause was to prevent the holding company from favoring "its shipping subsidiary at the expense of its carrying subsidiary, or vice versa."

company. It is clear to me, and the Court does not deny, that the railroad in fact is occupying the inconsistent positions of carrier and shipper which the commodities clause was designed to prevent. *United States v. Reading Co., supra.*[4]

The Court does not dispute that it would so hold if the clause had not been construed differently in the *Elgin* case. But even on the assumption that the statute was then misconstrued, the Court is unwilling to correct its own error because it concludes that Congress has subsequently indicated approval of the *Elgin* decision. This conclusion is based on a distorted view of the legislative history of the Transportation Act of 1940, particularly of § 12 of S. 2009, which would have amended the commodities clause if adopted. Since the proposed § 12 would have overruled the *Elgin* case, and since it was rejected in committee as "far too drastic,"[5] it is inferred that Congress has expressed approval of that case.

The conclusion does not follow because the premise is wrong. The argument overlooks the crucial inquiry, namely, the reason for which Congress considered the proposed § 12 "far too drastic." If this reason had been an objection to applying the commodities clause to the wholly owned subsidiary relationships present in this and the *Elgin* cases, the argument might have some pertinence. But that was not the reason. On the contrary, the two Senators who were most active in sponsoring the bill and

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[4] Moreover, the conclusion is factually justified by the history of complete domination prior to 1940 plus the fact that former employees of the Steel Company continue to be the principal officers of South Buffalo as well as the other Bethlehem short-line railroads. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control." *North American Co. v. S. E. C.*, 327 U. S. 686, 693.

[5] Sen. Rep. No. 443, 76th Cong., 1st Sess. 15; Hearings before Senate Committee on Interstate Commerce on S. 2009, 76th Cong., 1st Sess. 427, 590, 772.

in the conduct of the hearings on it felt that no legislation would be necessary if no more were intended than a reversal of the *Elgin* case.[6] That was only one of several

[6] Senator Reed expressly so stated: "Judge, you remember that Justice Stone, Justice Brandeis, and Justice Cardozo dissented from that majority opinion of the Supreme Court in the *E. J. & E. case* . . . I am inclined to think that the Supreme [sic], as presently constituted, would hold with what was the minority view." Hearings before Senate Committee on S. 2009, 76th Cong., 1st Sess. 68. He later said that he thought the *Elgin* decision "was a strange construction of the law on the part of the Supreme Court of the United States." *Id.* at 309.

The views of Senator Wheeler seem clearly to the same effect. When it was first suggested that the proposed commodities clause would overrule the *Elgin* case, he stated (apparently because he was interested primarily in extending the clause to apply to other types of carriers): "I did not intend such a result." When the effect of the clause was pointed out to him, he expressed doubt whether that case should be overruled, not because he approved it, but as he explained because "I am not familiar with the E. J. & E. case." *Id.* 367–68.

Three days later, when the point was again under discussion, Senator Wheeler, at this time apparently refreshed in recollection of the *Elgin* case, frankly stated that one of the purposes of the revised clause was to meet the Supreme Court decision in it. The witness then expressed the view that the revised clause went considerably beyond the decision because it applied to other types of carriers, and to situations where the shipper owned only ten per cent of the carrier's stock. The witness suggested that, if the intent was merely to reverse the *Elgin* case, it would be better to leave the clause in its present form, because "I do not believe the decision in the *E. J. & E. case* is going to be one of the laws of the Medes and the Persians." *Id.* 385.

After more discussion of the effect of the amended version on water carriers and pipe lines, Senator Wheeler remarked: "There are difficulties on that question, in my mind. Suppose we reenacted the law as it is. The question is whether the courts might say, in view of the Supreme Court's decision, 'In reenacting the law, you approved the decision of the Supreme Court.'". *Id.* 386.

The Senator thus was faced with a dilemma. At this point he was apparently persuaded that the extension of the commodities clause to all carriers was a more drastic change than he had originally

broad purposes of the bill, others being much more sweeping. The new commodities clause, instead of applying only to railroads, would have applied to all types of carriers except air carriers. It is perfectly clear from a reading of the hearings that this proposed application to carriers of all types was what was considered "far too drastic" a change to be included in the Transportation Act of 1940.

The crucial importance of this extension is abundantly shown from the vigorous objections on behalf of parties that would have been affected by extending the commodities clause to water carriers,[7] to pipe lines,[8] and to motor carriers.[9] It was argued repeatedly that it was proper for shippers to control interests in these carriers for reasons not applicable to carriers by rail. These arguments cannot be read without concluding that the change, whether desirable or not, would have been drastic indeed and would have gone far beyond the intended coverage of the Transportation Act of 1940.[10] Rather

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realized, but hesitated to reenact the old version lest the reenactment be construed as legislative approval of the *Elgin* case. His fear has now been justified by today's decision. It was not until the following week that he reached the conclusion that the drastic nature of the proposed change outweighed the risk that reenactment would be construed as approval of that case. *Id.* 427; and see statements quoted in note 12 *infra*. Such a choice hardly can be construed into "approval" of the decision.

[7] *Id.* 236, 284–286, 308–310, 385–387, 427–432, 492, 623, 632–633, 692, 753–754, 926–928.

[8] *Id.* 386, 589–597, 606–610, 611–612, 654–660, 736–742.

[9] *Id.* 127, 432–433.

[10] For example, the petroleum industry strenuously opposed the provision because it would have effected the divorcement of pipe line companies from producers. See note 8 *supra*; cf. *id.* at 935. Opposition by farm lobbies was directed particularly at the new commodities clause: "Section 12 appears to endanger the activities of more than 100,000 farmers of our area who have cooperatively associated themselves together and who, because of exorbitant rail rates, are transporting increasing tonnage of grain, livestock, and

than jeopardize the entire legislative program comprehended by the Act,[11] the committee naturally decided that sound strategy required separate consideration of this narrower, but still broad and highly controversial problem.

Statements of the committee chairman show that this was the real basis for the conclusion that the amendment would have been "far too drastic." [12] Indeed they show, together with other statements before the committee, that the *Elgin* decision was regarded as unfortunate and likely to be overruled when another case should arise.[13] Even the opposition by the short-line railroads was based not

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petroleum products both through cooperative trucking associations and by trucks owned by local or regional cooperatives." *Id.* 432–433. See also *id.* 311. The most vigorous opposition, however, came from parties who would be adversely affected by the applicability of the clause to water carriers. See note 7 *supra.* They pointed out, as an instance of the far-reaching effect of the amendment, that 65 per cent of the privately owned American merchant marine would be affected by the change.

[11] See Hearings 772; cf. note 10 *supra.*

[12] Senator Wheeler explained the basis for the decision to abandon the proposed amendment more than once. To shorten testimony by witnesses interested in the effect of the clause on pipe lines and water carriers he stated: "You might as well quit wasting your time, because I made an announcement yesterday with reference to that, and I hope you people will not come here with the idea of taking up a lot of time on that. I have said that pipe lines are a subject that ought to be given independent consideration, and we cannot take it up and give it the necessary time and study in this bill. That may be modified or eliminated, so far as pipe lines and water carriers are concerned." *Id.* 590. Later he said: "I have felt, frankly, that in this particular legislation, which does divorce, ships from industry, that it was such a broad subject, and one which required so much independent study, that it ought to be handled by separate legislation. No one in the Government service seems to have made a study of the question. I felt that it ought to be eliminated from the provisions of this bill at this time, and be introduced as separate, independent legislation, as has been done in the past." *Id.* 772.

[13] See note 6.

on the argument that an overruling of the *Elgin* case would have been too drastic, but rather on the fact that the amended § 12, in conjunction with other proposed legislation, would have prohibited the transportation of commodities for anyone who owned, even as an investment, as much as ten per cent of the stock of the railroad.[14] And other groups argued that the amendment was too drastic because it was not limited to common carriers.[15] In sum, the proposed amendment was indeed drastic, but not because it would have accomplished what the committee members assumed this Court would and should do without legislative aid.[16] It is therefore most unreasonable to conclude that the considerations which prompted the Senate Committee to reject a proposed extension of the commodities clause to all types of carrier compel this Court to deny a request to overrule an interpretation of the impact of the clause on railroads which the most active sponsors regarded as erroneous.

The host of reasons which may have induced the various members of the committee to forego the extremely controversial and drastic extensions forbids any inference that the committee action was the equivalent of approval of the *Elgin* case by the entire Congress. In fact, the difficulty of interpreting the views of even one legislator without taking account of all he has had to say, as exemplified by the discussion in note 6, should serve as a warning that the will of Congress seldom is to be determined from its wholly negative actions subsequent to the enactment of the statute construed. In this case the rejection of the proposed amendment is not more, indeed I think it is less, indicative of congressional acquiescence than complete inactivity would have been. Even if there may be cases where the "silence of Congress" may

[14] Hearings 541; and see *id.* 285, 385–386.

[15] *Id.* 421, 435, 841.

[16] See note 6.

have some weight, that ambiguous doctrine does not require or support the result which the Court reaches today. *Girouard* v. *United States*, 328 U. S. 61; cf. *Cleveland* v. *United States*, 329 U. S. 14, concurring opinion at 21.

Nor is that result justified by the "equitable" considerations which the Court's opinion somewhat obliquely advances. It is suggested that a refusal to follow the *Elgin* precedent would be to apply a different and more drastic rule to Bethlehem than applies to its competitor, the United States Steel Corporation. But, aside from the specious character of an argument that permits X to violate the law on the ground that Y also violates it, there is no explanation offered for the assumption that the overruling of the *Elgin* case would have no effect on United States Steel. The policy of *res judicata* would not apply, cf. *Commissioner* v. *Sunnen*, 333 U. S. —, and United States Steel, instead of being prejudiced by the course of decision, actually has been benefited by more than a decade of ownership of the Elgin road, contrary to the statute's plain terms and policy.

The Court also feels that the relief requested is too drastic because Bethlehem would be compelled to sell its short-line railroads, the Government has not shown that independent ownership of these railroads is likely, nor has it shown that evils exist which would be remedied by this relief. These are considerations which undoubtedly influenced the majority in the *Elgin* case, somewhat differently it would seem from the majority in this one, but which the dissenting justices felt had been foreclosed by the legislative determination of policy. Reliance on such arguments today seems inconsistent with the statement "that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved." Moreover, it does not follow that this Court in the exercise of its equity jurisdiction could not adapt the relief afforded so as to give time and opportunity for making

the adjustments necessary to secure conformity with the statute in an orderly and inoppressive manner. Indeed it would be the Court's duty to do this.

The arguments on this level are most effectively answered by the dissenting opinion of Mr. Justice Stone, who was joined by Mr. Justice Brandeis and Mr. Justice Cardozo, in the *Elgin* case: "The language of the commodities clause, read in the light of its legislative history, can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier, which experience had shown are likely to occur when a single business interest occupies the inconsistent position of carrier and shipper. See *United States* v. *Reading Co.*, 253 U. S. 26, 60, 61. Before the enactment of the commodities clause, Congress, by sweeping prohibitions, had made unlawful every form of rebate to shippers and every form of discrimination in carrier rates, service and facilities, injurious to shippers or the public. By the Sherman Act it had forbidden combinations in restraint of interstate commerce. But it did not stop there. The commodities clause was aimed, not at the practices of railroads already penalized, but at the suppression of the power and the favorable opportunity, inseparable from actual control of both shipper and carrier by the same interest, to engage in practices already forbidden and others inimical to the performance of carrier duties to the public. See *Delaware, L. & W. R. Co.* v. *United States*, 231 U. S. 363, 370; *United States* v. *Reading Co.*, *supra*." 298 U. S. at 504.[17]

In my opinion this expresses the intent of the letter and the policy of the commodities clause, and we should now return to it on our own responsibility. Congress should not again be required to reenact what it has once provided for, only to have its mandate nullified in part by this Court's misconstruction.

[17] See also note 4.